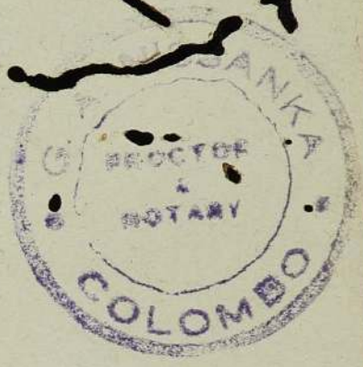
# The Ceylon Law Weekly

containing Cases decided by the Court of Criminal Appeal, the Supreme Court of Ceylon, and His Majesty the King in the Privy Council on appeal from the Supreme Court of Ceylon, and Foreign Judgments of local interest.




## DIGEST

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## VOLUME XXX

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# INDEX OF NAMES

# CORRIGENDUM

For the headnote in *Rex vs. de Alwis* on p. 103, substitute the following :—

Four accused were indicted for attempted murder. By a verdict of five to two the jury found the 1st accused guilty of an attempt to commit culpable homicide not amounting to murder. The other accused were acquitted by a unanimous verdict. In his charge the learned trial Judge made it sufficiently clear that an acquittal of all the accused would be justified. The first accused appealed on a certificate of the trial Judge.

The evidence showed (*a*) that the injured man had received a number of blows and that there were two or more assailants ;

(*b*) that according to the prosecution one blow was given by the accused which was admitted by the accused.

Therefore the position was that the Crown had proved that only one blow was given by the accused. The trial Judge was of opinion that if the accused had struck more than one blow it would be an excessive use of the right of private defence. He then said to the jury : " Has the 1st accused by a preponderance of probability satisfied you that he struck only one blow ? "

**Held** : (i.) That as the prosecution had established that only one blow was given by the accused, the jury could not have held that he acted in excess of the right of private defence.

(ii.) That it was for the prosecution to prove the actual number of blows inflicted by the accused.

(iii.) That the trial Judge erred in saying that the burden was on the accused to prove that he did not deal more than one blow.

(iv.) That the fact that the trial Judge disapproved of the verdict of the jury or issued a certificate under section 4 (*b*) of the Court of Criminal Appeal Ordinance is not of itself a sufficient ground for upsetting the verdict of the jury.

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On the trial date viz., 24-8-43, the plaintiff who was a Muslim, challenged the defendant, a Sinhalese Buddhist to take an oath at the Warakamure Mosque that he (the defendant) did not make a payment of Rs. 10 on 31st July, 1938, or a payment of Rs. 5 on 17th January, 1943, on account of a promissory note sued upon. Defendant accepted the challenge and it was agreed by the parties that if the defendant took the oath, plaintiff's action should be dismissed with costs, and if the defendant failed to take the oath, judgment should be entered for plaintiff as prayed for with costs. Both parties signed the record.

Subsequently, plaintiff moved to withdraw from the agreement on the ground that he agreed to the terms on a misunderstanding and that the defendant is a Sinhalese Buddhist. The Court allowed this motion. The defendant appealed.

**Held :** (i.) That the plaintiff should not have been allowed to resile from the agreement as it was a lawful compromise within the meaning of section 408 of the Civil Procedure Code.

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" His Lordship suggested to witnesses for the prosecution answers which enabled them to shape the evidence in a manner which made the case for the prosecution more convincing than on the evidence as it otherwise stood."

The petition was drafted by an advocate of the Supreme Court.

**Held :** That the statement was calculated to bring the judge into contempt or to lower his authority and that the advocate was guilty of a contempt of Court.

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**Held :** That the words used by the appellant respecting the Bar, and which must be taken to have been intended by him to refer to the opposing Counsel in particular, did not amount to a contempt of Court.

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An order fixing maximum prices for thread under the Control of Prices Ordinance required every trader who " sells " thread to exhibit a notice setting out the prices so fixed. The accused was convicted with having failed to exhibit the notice. There was no proof that he sold thread to any person on the premises.

**Held** : That an actual sale of thread must be proved and that proof of mere exposure for sale is not sufficient to justify a conviction.

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Two orders were made under the Control of Prices Ordinance, No. 39 of 1939, fixing the maximum prices of Koduwa fish per pound and of Sunlight soap per tablet.

**Held** : That the orders applied to the sale of a quarter pound of Koduwa fish and a twin tablet of Sunlight soap.

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Admittedly, the land in dispute, a paddy field, originally belonged to one Henchappu who had four sons and three daughters. The plaintiffs and the 5th defendant, who are successors in title of the four sons claimed the entire land on the ground that they and their predecessors in title, had by exclusive continued and uninterrupted possession from 1904 to 1941, acquired a prescriptive title as against the 1-4 defendants who claimed through one of the daughters of Henchappu. The plaintiffs further proved that a number of deeds had been executed during this period on the basis of this exclusive ownership. There was no evidence to shew that the three daughters or those claiming from them knew of the execution of the said deeds or that they acquiesced in the acquisition of such prescriptive title.

**Held** : (i.) That in the circumstances the Court was not entitled to presume ouster.

(ii.) The question as to whether from long, continued, undisturbed and uninterrupted possession ouster may be presumed depends on all the circumstances of the case.

Per HOWARD, C.J. : " Moreover it would appear that the plaintiff Tillekeratne had bought the share of the co-owner, had worked a plumbago pit himself on another land in the neighbourhood, and had never claimed or taken a share in the plumbago which to his knowledge was being dug from the disputed land by the defendants and their lessees. It seems to me that the distinction drawn between the excavation and removal of minerals, an act definitely depreciating the value of the holding, and the taking of natural produce such as fruit of trees or the development of lands for the cultivation of paddy by expenditure incurred by the occupier is both logical and sound."

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**Held** : That in a case based entirely on circumstantial evidence, the fact that the deceased was last seen alive in the company of the accused would not, of itself, justify a conviction, where the exact time of death is not established ; nor would the fact that the accused subsequently attempted to dispose of a weapon which might have caused the injuries on the deceased.

(*a*) The fact that a not unreasonable explanation was given by the accused fairly promptly after his arrest ;

(*b*) Absence of any motive for the accused to murder the deceased ;

(*c*) The behaviour of the accused during the relevant period ;

(*d*) The fact that there were other men in the background who may have had a motive for the murder and may have used the accused as an innocent tool ;

(*e*) The fact that the accused was not continuously in the company of the deceased during the time when the murder may have taken place ; and

(*f*) Absence of evidence proving that the accused absconded immediately after the murder,

are all points which should be taken into account in deciding whether the evidence excludes the possibility of a hypothesis consistent with the innocence of the accused.

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*Court of Criminal Appeal—Two accused charged with murder of one man—Fatal injury caused by first accused—No evidence that injury caused by second accused either accelerated or contributed to death of deceased—Common intention—Grave and sudden provocation—Misdirection.*

Two accused were charged with the murder of the deceased. The only fatal injury was that inflicted by the first accused, while the injury inflicted by the second accused neither accelerated nor contributed to the death of the deceased. The trial Judge directed the Jury that if they thought there was no common intention and that the second accused acted independently, under grave and sudden provocation, his offence would be one of culpable homicide not amounting to murder. The Jury found the first accused guilty of murder and the second accused guilty of culpable homicide not amounting to murder.

**Held** : That this was a misdirection in the absence of any evidence that the injury caused by the second accused either accelerated or contributed to the death of the deceased, and that the proper verdict against the second accused would be one of attempting to commit culpable homicide not amounting to murder where hurt has been caused.

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*Court of Criminal Appeal—Rejection by jury of evidence of prosecution witnesses against some accused—Conviction of another on same evidence although learned trial judge made it clear to jury that acquittal of all accused justified—Appeal on certificate of trial judge—Jury's verdict not supported by evidence—Misdirection—Trial judge disapproving of jury's verdict—Is it sufficient ground for setting aside verdict.*

Four accused were indicted for attempted murder. By a verdict of five to two the jury found the first accused guilty of an attempt to commit culpable homicide not amounting to murder. The other accused were acquitted by a unanimous verdict. In his charge the learned trial judge made it sufficiently clear that an acquittal of all the accused would be justified—The 1st accused appeal upon a certificate of the trial judge.

Upon an examination of the evidence their Lordships came to the conclusion—

(*a*) that in convicting the appellant the jury took the view that he exceeded the right of self-defence.

(*b*) that the prosecution had failed to prove that the appellant exceeded such right.

Their Lordships also found a passage towards the end of the learned trial judge's charge which was likely to have created in the minds of the jury the impression that the burden rested with the appellant to disprove that he did not exceed the right of self-defence.

**Held** : (i.) That in the circumstances the verdict of the jury against the appellant is unreasonable and not supported by the evidence.

(ii.) That the fact that the trial judge disapproved of the verdict of the jury or issued a certificate under section 4 (*b*) of the Court of Criminal Appeal Ordinance is not of itself a sufficient ground for upsetting the verdict of the jury.

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*Court of Criminal Appeal—Evidence of witness called by the Crown and then dealt with as adverse—Must it be excluded from the case—Meaning of the words "without premeditation" in Penal Code section 294, exception 4—Misdirection.*

**Held** : (i.) That the fact that a witness is dealt with as adverse and cross-examined to credit, in no way warrants a direction to the jury that they are bound in law to place no reliance on his evidence.

(ii.) That an explanation of the word "premeditation" in exception 4 to section 294 of the Penal Code as if it was synonymous with "intention" is a misdirection.

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## Criminal Procedure Code

*Revision—Penalty prescribed by law—Inadequacy of sentence passed—Right of appeal—Application for revision by Attorney-General—Delay—Criminal Procedure Code sections 338 and 357.*

**Held** : (i.) That where a Magistrate imposed a sentence less than the minimum prescribed by law, it is an error in law, and is appealable under section 338 of the Criminal Procedure Code.

(ii.) That where an application to revise such a sentence was made nearly four months after it was passed, the Supreme Court ought not to exercise its powers under section 357 (1) of the Criminal Procedure Code in view of the delay that had occurred.

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*Criminal Procedure Code section 440 (1)—Witness referring to diary and giving oral evidence different from entry in diary—Summary punishment for perjury.*

Where a witness read an entry made by him in his diary and told the Court deliberately something different from what was recorded by him.

**Held** : That it was an appropriate case for summary punishment under section 440 (1) of the Criminal Procedure Code.

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*Magistrate dismissing case without calling on the defence*—Prima facie *case made out by complainant—Criminal Procedure Code, section 191.*

**Held** : That when a *prima facie* case has been made out by a complainant, the power vested in a Magistrate by section 191 of the Criminal Procedure Code should not be exercised until after the defence has been called upon.

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*Criminal Procedure Code, sections 181 and 182—Applicability of—Nature of the doubt referred to—Indictment—Alternative counts for murder and abetment of murder—Can accused be tried at one trial on same indictment.*

**Held** : (i.) That alternative counts for murder and abetment of murder are properly laid in one and the same indictment when on the evidence in the possession of the prosecution at the time when the indictment is framed, it is impracticable of which of such offences the accused may be said to be guilty.

(ii.) That the doubt referred to in section 181 of the Criminal Procedure Code must arise from the equivocal nature of the acts of the accused, as alleged by the prosecution and disclosed during the non-summary proceedings, and cannot be affected by questions such as whether the prosecution will be able to produce this evidence at the trial, or whether the jury will believe it.

Per SOERTSZ, J. : " Section 181 does not apply when the doubt arises from the nature of the evidence, but it applies only in cases in which a doubt arises from the nature of the acts. Where the acts are unambiguous and indicate a definite offence, but in consequence of a failure to appreciate the legal value of the facts, a different offence is charged and that charge fails, it would not be possible to invoke the aid of section 182 of the Criminal Procedure Code in order to substitute a conviction of the accused on the charge that should have been but was not preferred."



*Criminal Procedure Code, sections* 165 B *and* 224 (1)

The accused had elected to be tried by a Tamil-speaking Jury. Application was made by the Crown for an order under section 224 (1) of the Criminal Procedure Code directing that the accused be tried by an English-speaking Jury. It was urged that the accused were Sinhalese and that all the witnesses were Sinhalese and that there was no special reason why the accused should be tried by a Tamil-speaking Jury. It was also urged that a great deal of time would unnecessarily be taken up in trying the prisoners if a Tamil-speaking Jury were empanelled.

The Court made order directing that the accused should be tried by an English-speaking Jury.



*Criminal Procedure Code—Sections* 222 *and* 224—*Election of Jury—Subsequent application for altering election.*

The accused in this case had elected under section 165B of the Criminal Procedure Code to be tried by an English-speaking Jury. After the transfer of the case by fiat of the Attorney-General under section 43 of the Courts Ordinance from the Northern Circuit to the Western Circuit the accused moved the Supreme Court for leave to alter their election and asked that they be tried by a Tamil-speaking Jury.

The application was refused.



*Right of accused or his advocate to cross-examine witness for the prosecution recalled by the Magistrate —Criminal Procedure Code section* 189 (2).

The complainant in a case was recalled by the Magistrate and gave further evidence on which no cross-examination by Counsel for the defence was permitted. The Magistrate convicted the accused and referred in his judgment to matters elicited when the complainant was recalled.

**Held** : That the conviction cannot be upheld.



*Confiscation—Power of—Criminal Procedure Code section* 413—*Defence* (*Miscellaneous*) *Regulations para* 52.

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Section 347 (B).



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Damages awarded in a divorce action are compensatory and not punitive.



## Decree

Judgment-creditor applying for execution of decree, pending appeal by judgment-debtor, must make judgment-debtor respondent to application.



## Defence (Miscellaneous) Regulations

*Order requisitioning paddy—Failure to deliver quantity requisitioned—Conviction—Validity of—Defence* (*Miscellaneous*) *Regulation* 37.

By an order made by the Governor on 15th September, 1942, under Defence (Miscellaneous) Regulation 3, all Government Agents, Assistant Government Agents and Assistant Government Agents (Emergency), were appointed to be competent authorities for the purpose of requisitioning under D. R. 37 any article of food or drink. The accused was required by order of one of the competent authorities to deliver a certain quantity of paddy which had been requisitioned. He was charged and convicted with having failed to deliver this quantity. The evidence disclosed that, on a certain calculation, the accused ought to have had the quantity of paddy requisitioned. There was also no satisfactory evidence to show that a requisition order had been served on the accused.

**Held** : That in these circumstances the conviction cannot stand.



*Defence Miscellaneous Regulation* 17 B—*Possession of service petroleum—Certificate of Government Analyst—Burden of proof as to service, on accused, of the certificate—Evidence Ordinance, section* 114.

The accused was charged under Defence Miscellaneous Regulation 17 B with having been in possession of service petroleum, which was defined to be petroleum containing certain specified compounds. The regulation enacted that a certificate by the Government Analyst to the effect that any petroleum contained the specific compounds shall be sufficient evidence of the facts stated therein and that before such a certificate is tendered as evidence, a copy thereof shall be served on the accused. At the trial the accused did not object to the reading of the certificate. The Magistrate acquitted the accused on the ground that there was no evidence to show that a copy of the certificate had been served on the accused.

**Held** : (i.) That as the regulation enacted that a copy of the certificate " shall be served " on the accused—and not " shall be shewn to have been served "—the presumption of regularity arises in the absence of any objection by the accused ;

(ii.) That it is not incumbent on the prosecution, as a condition precedent to the production of the certificate, to prove that a copy thereof has been served on the accused.



## Defence (Purchase of Foodstuffs) Regulations

*The Defence* (*Purchase of Foodstuffs*) *Regulations*, 1942—*Charge under Regulation* 4—*Facts to be proved.*

**Held** : That in a charge made under regulation 4 of the Defence (Purchase of Foodstuffs) Regulations 1942, for transporting country paddy without a permit, the prosecution must establish that the paddy transported was country paddy.

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## Defence (Control of Textiles) Regulations

*The Defence (Control of Textiles) (No. 1) Regulations* 1943—*Judicial notice of date on which regulation* 25 *came into force.*

Where a charge was laid under regulation 25 of the Defence (Control of Textiles) (No. 1) Regulations which was brought into operation by a notification of the Governor published in the "Gazette," but no reference to this notification was made in the charge.

**Held** : That the Court will take judicial notice of this date on which the regulation was brought into operation.

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## Domicile

Action for nullity of marriage brought by husband on ground of wife's pregnancy at time of marriage. Husband domiciled in Ceylon, and wife of Indian domicile, prior to marriage.

**Held** : That wife must be regarded as having husband's domicile up to date of decree of nullity.

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An agreement having been reached between the Commissioner and an assessee as to the amount of tax due, the assessee paid part of the tax by cheque. The Commissioner then sent him a notice specifying the balance tax due. The assessee stopped payment of the cheque, and the Commissioner thereupon issued his certificate for the summary recovery of the full amount of the tax. The assessee maintained that the entire tax could not be said to be in default until a fresh notice had been issued by the Commissioner.

**Held** : That the notice issued by the Commissioner was not one contemplated by the Ordinance and that the entire tax was in default when he issued his certificate.

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*Excess Profits Duty—Section* 3 (1) *of the Excess Profits Duty Ordinance No.* 38 *of* 1941—*Question whether assessee carrying on a "business" or whether he is an "employee" is a question of fact—Case stated under section* 74 *of the Income Tax Ordinance.*

**Held** : (i.) That the question whether a person is carrying on business or whether he is an "employee" is a question of fact.

(ii.) That the Supreme Court will not, on a case stated under section 74 of the Income Tax Ordinance which is also applicable to the Excess Profits Duty Ordinance, interfere with a finding of fact of the Board of Review if there is evidence to support the finding.

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**Held** : That where a *fidei commissum* property is partitioned and a defined lot is allotted under the decree either to a *fiduciarius* or a person deriving title from a *fiduciarius* by way of a gift, sale, etc., the *fidei commissarii*, could in a subsequent action set up their claim against—

(*a*) such *fiduciarius* or such person to whom the lot was decreed, or

(*b*) any one deriving title from either of them after the decree, if, neither he nor his predecessors in title, if any, is a purchaser for value without notice of the *fidei commissum.*

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## Husband and Wife

*Husband and wife—Action by wife for separation—Claim by husband for divorce on ground of wife's adultery—Child born during wedlock—Legitimacy of child—Burden of proof—Damages—Costs—Evidence Ordinance section* 112—*Civil Procedure Code section* 612.

The plaintiff brought this action against her husband for a separation *a mensa et thoro* on the ground of malicious desertion and claimed the custody of the two children of the marriage. The husband denied that he deserted his wife and asked for a dissolution of the marriage on the ground of his wife's adultery with the second defendant. He also denied that he was the father of the younger child, who was born on March 26th, 1942, on the sole ground that he had no access to the wife at any time when the child could have been begotten.

The case for the wife was presented on the footing that the husband had sexual intercourse with her on April 17th, 1941, and August 9th, 1941, and that the younger child was born as a result of the act of coition on August 9th, 1941. The child having been born during the subsistence of a valid marriage, the burden, under section 112 of the Evidence Ordinance, was on the husband to prove that

not the father of the child. The husband led evidence as regards the wife's adultery. The medical evidence which was given by five witnesses, was considered on the footing that the last menstrual period of the wife was about 11th to 14th, 1941, and dealt with the questions whether a coitus on August 9th, 1941, could have resulted in conception and whether the child could have been begotten as a result of a coitus on that date. The evidence was at times conflicting, hesitating and doubtful. Apart from this the opinions of text-book writers threw a great deal of doubt on the husband's case. It could not therefore be said with certainty that the medical evidence proved that the younger child could not have been begotten on August 9th, 1941.

**Held** : (i.) That the evidence led by the husband had established the charge of adultery.

(ii.) That the husband had failed to discharge the burden of disproving that the younger child born during wedlock was not his child.

(iii.) That as the damages awarded in a divorce action are compensatory and not punitive, the amount awarded by the trial Judge should be reduced.

Per WIJEYEWARDENE, J. : " A child born to a woman during the subsistence of a valid marriage, cannot, I think, be made a bastard on such evidence as is given by the experts in this case. The fact that during the material period of time the plaintiff was on terms of intimacy with the second defendant does not of course entitle the first defendant to ask a Court to hold that he is not the father of the child, if he had access to the mother at a time when the child could have been begotten.

" There remains for consideration the question of damages. The damages awarded in a divorce action are compensatory and not punitive. The two main considerations governing the award of such damages are (*a*) the actual value of the wife to the husband, and (*b*) the proper compensation to the husband for the injury to his feelings, the blow to his marital honour and the loss to his matrimonial and family life.

" Taking into consideration all these circumstances and also the damages usually awarded in our Courts, I think the second defendant has been ordered to pay excessive damages. As my brother thinks, however, that substantial damages should be given in view of the fact that certain suggestions were made against the first defendant in the District Court, I agree to his assessment of the damages at Rs. 10,000."

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*Marriage—Action for nullity of—Husband having Ceylon domicile—Wife having Indian domicile before marriage—Jurisdiction—Application of Prescription Ordinance—Prescription Ordinance sections* 10 *and* 15—*Civil Procedure Code sections* 597, 602, 604, 607 *and* 756.

The parties to this action were married on 12th March, 1936. About three months after the marriage the wife gave birth to a child. The husband who had a Ceylon domicile brought this action for a declaration of nullity of marriage against the wife, who until her marriage had an Indian domicile, on the ground that he was unaware that she was pregnant and that before the marriage he had access to the wife. The action was not instituted until more than seven years after the birth of the child. The trial Judge entered a decree absolute for the husband and the wife appealed and moved that security for costs be dispensed with.

A preliminary objection to the appeal was taken on the ground that the appellant (wife) had not given notice in accordance with section 756 of the Civil Procedure Code that she would tender security. This was overruled.

It was argued in appeal—

(i.) that the Ceylon Courts had no jurisdiction as, the action being one for a declaration of nullity of marriage, the wife cannot be regarded as having acquired the domicile of the husband.

(ii.) that the action was prescribed under section 10 of the Prescription Ordinance.

(iii.) that as the husband had been guilty of unreasonable delay in presenting his plaint, judgment should not have been pronounced in his favour—Civil Procedure Code section 602.

**Held** : (i.) That the claim in the present action for a decree of nullity was akin to a claim for nullity on the ground of impotence and not to a claim for nullity on the ground of bigamy, that the marriage must be regarded as good until the decree for nullity was entered, that the wife must be regarded as having the domicile of the husband up to the date of the decree and that, therefore, the Ceylon courts had jurisdiction in the action.

(ii.) That the term " divorce " in section 15 of the Prescription Ordinance applied to cases where a decree for nullity of marriage was prayed for and that the action was not prescribed.

(iii.) That in all the circumstances of the case the husband's delay in filing his plaint could not be said to be unreasonable.

(iv.) That section 604 of the Civil Procedure Code applied to the present action and that a decree *nisi* should have been entered in the first instance.

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## Joinder of Charges

*See Criminal Procedure Code* ... ... 67

## Judge

Trial Judge's disapproval of Jury's verdict is not of itself a sufficient ground for upsetting verdict.

*See Court of Criminal Appeal* ... ... 103

## Jurisdiction

In action brought by Ceylon domiciled husband for declaration of nullity of marriage, where wife was domiciled in India prior to marriage.

*See Husband and Wife* ... ... 90

Jurisdiction to appoint a representative under section 7 of the Mortgage Ordinance, dependent on tendering of evidence that value of mortgaged property does not exceed Rs. 2,500.

*See Mortgage Ordinance* ... ... 106

*See Rent Restriction Ordinance* ... ... 15

In action for pre-emption.

*See Thesawalamai* ... ... ... 8

## Jury

Application to be tried by Tamil-speaking Jury.

*See Criminal Procedure Code* ... ... 38

## Landlord and Tenant



## Legitimacy

Child born during wedlock—Burden of proving illegitimacy.



## Minor (Kandyan)



## Minute of Consent

Entered in erroneous terms.



## Money Lending Ordinance

*Money Lending Ordinance—"Harsh, unconscionable or substantially unfair" transaction—Finding of trial Judge.*

**Held :** That the question whether a money lending transaction is "harsh, unconscionable or substantially unfair" is one of fact and a finding by a trial court of such a fact will not be disturbed unless it is clearly wrong.



## Mortgage Bond

*Mortgage Bond—Hypothecation of shares in a company—Delivery of share certificates to mortgagee—Absence of provision for registration—Subsequent sale in execution and purchase of shares by party with knowledge of existence of mortgage—Rights of such purchaser—Law governing such hypothecation—English or Roman-Dutch law.*

The plaintiff sued the 1st and 2nd defendants as executors of the last will and testament of H. Bastian Fernando, deceased, for the recovery of a sum of Rs. 144,541.25 and interest due on a mortgage bond dated 28th September, 1922, whereby 900 shares in the Chilaw Coconut Co., Ltd. (now H. Bastian Fernando Estates, Ltd.) has been hypothecated to the plaintiff. The 3rd defendant was added as a party on the footing that she, with knowledge of the aforesaid mortgage had caused to be seized and sold and herself purchased the said shares.

The 1st and 2nd defendants consented to judgment and the action against the 3rd defendant was contested.

It was established :

(*a*) That the share certificates mortgaged to the plaintiff were deposited with him along with the bond and had always been in his possession.

(*b*) That the plaintiff notified his claim as mortgagee to the company.

(*c*) That two conditions were necessary for the transfer of the shares in question, viz. :

(i.) Approval of the transfer by the Board of Directors.

(ii.) A transfer duly executed and registered in the books of the company, and that neither of them had been satisfied in the case of the plaintiff.

(*d*) That the 3rd defendant prior to her purchase at the Fiscal's sale actually had notice of the existence of the mortgage in favour of the plaintiff and that she got the shares she purchased registered in the company's books in her name.

It was clear that under our law there is no provision which requires that such a mortgage or pledge should be registered.

The learned District Judge dismissed the plaintiff's action as against the 3rd defendant and the plaintiff appealed.

**Held :** (i.) That the mortgage or pledge of shares in a company is not a matter with respect to Joint Stock Companies and the law applicable is the Roman-Dutch law and not the English law.

(ii.) That physical delivery of share certificates (which are only the documentary evidence of title) cannot be said to constitute delivery of the right mortgaged.

(iii.) That as regards delivery of possession the mortgagee of an incorporeal right stands on the same footing as that of a corporeal right.

(iv.) That the 3rd defendant inasmuch as she had actual notice of the existence of the mortgage did not stand in any other better position in respect of the shares in question than the mortgagor himself and that in consequence the plaintiff is entitled to resort to the shares in the hands of the 3rd defendant and is not merely restricted to claim in the amount realized at the execution sale.



## Mortgage Ordinance

*Mortgage Ordinance (Chapter 74) section 7—Deceased mortgagor—Representation to estate not granted—Appointment by court of person to represent estate of deceased for purposes of hypothecary action—No evidence before court that value of mortgaged property did not exceed Rs. 2,500—Jurisdiction of court to make appointment—Validity of subsequent orders of court.*

After the death of a mortgagor and before representation to his estate was granted, the mortgagee put the bond in suit and moved, under section 7 of the Mortgage Ordinance, for the appointment of a person to represent the estate of the deceased for the purpose of the action. No evidence was led as to the value of the mortgaged property. The court appointed a representative under section 7 and subsequently ordered a sale of the mortgaged property which was then bought by the mortgagee In an action of the administrator of the estate of the deceased mortgagor against the purchaser-mortgagee for a declaration of title to the mortgaged property.

**Held :** (i.) That it was a condition precedent to the appointement of a representative under section 7 of the Mortgage Ordinance that evidence should be tendered that the value of the mortgaged property did not exceed Rs. 2,500.

(ii.) That in the absence of such evidence, the court had no jurisdiction to make the appointment and that the subsequent sale of the mortgaged property and other proceedings were a nullity as against the estate of the deceased mortgagor.



## Motor Car Ordinance

*Motor Car Ordinance No. 45 of 1938—Lorry licensed for the carriage of goods—Is it an offence under section 42 (1) to carry pigs.*

**Held :** That where a lorry had been duly licensed to carry goods it was no offence under section 42 (1) of the Motor Car Ordinance No. 45 of 1938 to carry pigs as the word "goods" include pigs.

*Motor Car Ordinance No. 45 of 1938 sections 111 (2), 112, 151, 158, and 42—Overloading of omnibus—Conviction of conductor—Omnibus driven by driver with knowledge that it was overloaded—Liability of driver for aiding and abetting the conductor.*

Held : (i.) That the driver of an omnibus can be charged with abetting an offence by the conductor under section 111 (2) of the Motor Car Ordinance No. 45 of 1938.

(ii.) That by the mere act of driving the omnibus the driver cannot be said to facilitate the commission of the offence of overloading the omnibus.

(iii.) That mere knowledge on the part of the driver that the omnibus is overcrowded cannot make him liable for the offence of abetting the overloading of such omnibus.

DE ALWIS *vs.* AGOSINGHO ... ... 1

## Municipal Council

Member not in office *de facto*
*See Writ of Quo Warranto* ... ... 20

## Oaths and Affirmations Ordinance

An agreement by a Buddhist defendant, on challenge by a Muslim plaintiff, to take an oath at a Mosque, is binding and does not fall within section 7 of the Oaths and Affirmations Ordinance.
*See Civil Procedure Code* ... ... 108

## Order to Produce

Application for order on P. M. G. to produce telegram.
*See Supreme Court* ... ... 37

## Partition Ordinance

Section 9.
*See Fidei Commissum* ... ... ... 100

## Penal Code

*Dishonest retention of stolen property—Onus of proof—Penal Code section 394.*

Held : That a person, charged with dishonestly retaining stolen property, is entitled to be acquitted if, having regard to all the circumstances of the case, the explanation given by him might reasonably be true, even though the Court is not convinced of its truth.

FERNANDO AND ANOTHER *vs.* HEILER ... 105

*Price-controlled goods—Dealer bound to sell on tender of controlled price—Attempt to obtain price-controlled goods by means of a forged document—Meaning of "fraudulently" and "dishonestly"—Control of Prices Ordinance, No. 39 of 1939—Penal Code sections 22, 23, 403, 459, and 490.*

The price of Sanatogen was controlled under the Control of Prices Ordinance, No. 39 of 1939. A dealer is bound by law to sell a price-controlled article on tender of the price. As Messrs. Cargills, Ltd., sold Sanatogen only on production of a doctor's prescription, the accused attempted to obtain a bottle from them on production of a forged prescription. He was charged and convicted under sections 403, 459 and 490 of the Penal Code. It was argued in appeal that the conviction was bad as, if the attempt had succeeded there would have been no wrongful gain or wrongful loss to either party.

Held : (i.) That the accused acted both dishonestly and fraudulently and was therefore rightly

(ii.) That "fraudulently" is wider than "dishonestly" and is not confined to the acquisition of wrongful gain or to the infliction of wrongful loss measurable in money's worth.

KING VS. FERNANDO ... ... ... 79

Section 294, exception 4—"premeditation" is not synonymous with intention.
*See Court of Criminal Appeal* ... ... 39

## Perjury

Summary punishment for.
*See Criminal Procedure Code* ... ... 16

## Prescription

When does long, continued and undisturbed possession constitute ouster among co-owners.
*See Co-owners* ... ... ... 50

Action filed within the period of limitation—Summons served after the period—
*See Tender* ... ... ... ... 17

## Previous Conviction

When to be taken into account in imposing sentence.
*See Criminal Law* ... .. ... 56

## Privy Council

When should Crown be ordered to pay costs in Privy Council.
*See Contempt of Court* ... ... ... 97

## Proctor

*Proctor—Conviction for misappropriation of money entrusted by clients—Removal from Roll.*

The respondent, a Proctor, was convicted for misappropriating a sum of Rs. 330.33 entrusted to to him by his clients for the purpose of redeeming a mortgage bond. An application was made by the Solicitor-General for an order removing the respondent from the Roll of Proctors.

The application was granted.

IN RE WIJESINGHE ... ... ... 54

## Rent Restriction Ordinance

*Rent Restriction Ordinance No. 60 of 1942—Application of section 8 proviso (c).*

Held : That the word "his" in proviso (*c*) to section 8 of the Rent Restriction Ordinance refers to the landlord only and not to both the landlord and a member of the family.

ABEYWARDENE VS. AMARADASA ... ... 55

*Rent Restriction Ordinance No. 60 of 1942—Action for ejectment instituted without consent of Assessment Board—No plea bringing action within any of the provisos to section 8—Jurisdiction of Court.*

A decree for ejectment was entered by the Court in the absence of the defendant who later appeared and consented to the decree. She then challenged the jurisdiction of the Court to entertain the action as the plaintiff had neither obtained the consent of the Assessment Board nor brought himself within any of the provisos to section 8 of the Ordinance.

Held : That as the Court had jurisdiction over the subject-matter of the action, the defect of not complying with the procedure prescribed as essential for the exercise of the jurisdiction was one which could be waived.

BAVA *vs.* THOMAS ... ... ... 15

*Landlord and Tenant—Action for ejectment—Premises reasonably required for the use of the landlord—Extent to which landlord's rights should be interfered with—Rent Restriction Ordinance, No. 60 of 1943, section 8.*

Plaintiff sued his tenant, the defendant, for ejectment from a room in premises No. 215, Hultsdorf Street, on the ground that the room in question was reasonably required for his occupation. Plaintiff stated in his evidence that his chief business was supplying meals to the Fiscal's Office and others at Hultsdorf and the premises No. 179/181, situated close by, and in which he was carrying on the said business were about to be demolished for a fire gap on the orders of the Civil Defence Commissioner. He further added that when he vacated No. 179/181 he had to prepare the meals he supplied in the back portion of the premises No. 215 and that there was no other suitable place for dishing out the meals except the room occupied by the defendant.

The evidence also indicated (*a*) that premises No. 215 consisted of 7 rooms, kitchen, 3 garages, and some broad verandahs and that the plaintiff was already using one room and the kitchen, that two other rooms were occupied by his own people and the remaining rooms by some Proctors ; (*b*) that plaintiff had other premises in the vicinity where his brother and brother-in-law carried on similar business ; (*c*) that plaintiff had already converted one of the garages into a room ; (*d*) that another room in the same street was available to the defendant.

The defendant's evidence was to the effect (*a*) that he was a Licensed Surveyor who had been practising at Hultsdorf for several years having fairly extensive Court work ; (*b*) that the room available in Hultsdorf Street was not suitable for his work ; (*c*) that in addition to himself an Auctioneer and Broker occupied the room ; (*d*) that the plaintiff could enclose a verandah or use a garage for the purpose.

**Held** : (i.) That in the circumstances, the landlord reasonably required the premises for his occupation.

(ii.) That a tenant is not entitled to stay on because some sort of makeshift arrangement can be resorted to by the landlord.



## Repealed Statute

*Repeal of statute—Effect of upon conviction under repealed statute—When can such conviction stand.*

The accused was charged and convicted with having sold on 8th December, 1944, Nettali (dried fish) over and above the controlled price fixed by the order published in "Gazette," No. 9,166 of 3rd September, 1943. This order was revoked by section 1 (*a*) of order No. C 31 of 1944, published in "Gazette" No. 9,274 of 26th May, 1944, which contained a new order in place of the repealed one.

**Held** : (i.) That the conviction could not stand inasmuch as the offence was not committed while the regulation, under which the accused was convicted, was in force.

(ii.) That the conviction could not be altered to one under the new regulation under section 347 (*b*) of the Criminal Procedure Code.



## Restitutio In Integrum

Restitutio in integrum—*Minute of consent entered in erroneous terms.*

The terms of settlement arrived at between the parties to a case were minuted in erroneous terms in the journal. One of the parties, on discovering the error moved the Supreme Court for *restitutio in integrum*. The Court having been satisfied on the affidavits, that there was a *prima facie* case, the application was allowed.



*Restitutio in integrum and rei vindicatio (action for) See Transfer of Land ... ... ... 84*

## Revision

The Supreme Court will not exercise its powers under section 357 (1) of the Criminal Procedure Code on an application made, to revise an appealable sentence, nearly four months after sentence was passed.

*See Criminal Procedure Code ... ... 87*

## Right of Footpath

*See Servitude ... ... 3 & 41*

## Roman Dutch Law

*See Mortgage Bond ... ... ... 57*

## Sentence

When should previous conviction be taken into account in imposing sentence.

*See Criminal Law ... ... ... 56*

Where Magistrate imposes a sentence less than the minimum prescribed by law, it is an error in law and appealable.

*See Criminal Procedure Code ... ... 87*

## Servitude

*Servitude of footway—Can right to free use of footway be obstructed—Right to use bicycle or wheelbarrow on footway.*

The plaintiff claimed a right of footway, three feet wide, over the defendant's land. The defendant had, by placing obstructions at certain points of the footway to prevent cattle trespass, restricted the free use of the footway by the plaintiff.

**Held** : That the plaintiff was entitled to the use of the footway, free from any obstruction.

Per DE KRETSER, J. : "The rights to use a bicycle and a wheelbarrow are not free from difficulty. .....I am inclined to think that a right to use a bicycle or to use a wheelbarrow should be conceded to a person entitled to a footpath."



*Servitude—Right of footpath claimed through another's land—Existence of other means of access to a public road—Nature of evidence necessary to establish such right.*

**Held** : (i.) That the fact that a person who claims a right of way has direct access to a road is a matter that cannot be ignored in considering the evidence of user.

(ii.) That a right to a footpath must be established by cogent evidence, as it affects the right of the owner of a land to the free and unfettered use of his land.

## Supreme Court

*Application for an order on the Postmaster-General to produce a telegram—Inherent powers of the Supreme Court—Principle governing their exercise.*

**Held :** That, in the absence of any applicable statutory provision, empowering the Supreme Court to order the production of a telegram in the custody of the telegraph authorities, the Court will not order such production in the exercise of its inherent powers.

Per WIJEYEWARDENE, J. : " It is a sound legal principle that a decision given in the exercise of such powers should not be inconsistent with the express intention of the legislature."

NANAYAKKARA vs. THE G. A., WESTERN PROVINCE ... ... ... 37

## Tender

*Tender—Deposit of money in Court without previous offer by party to an agreement to purchase—Is this sufficient to prove tender.*

*Prescription—Action filed within the period of limitation—Summons served after the period—Is the claim barred.*

The appellant, by a deed dated 2-11-35 agreed to transfer to one Ukku Banda all that portion of land that would be allotted to him by final decree in a partition case that was pending then. Ukku Banda's rights were sold in execution and were purchased by one Yusoof who in turn sold those interests to plaintiff. The appellant was allotted a defined lot in the final decree dated 8-10-37.

The plaintiff instituted this action on 6-9-43 together with a Kachcheri receipt showing a deposit of Rs. 150 to the credit of the case. This sum the plaintiff alleged was the amount on payment of which he was entitled to a transfer.

The learned Commissioner held that this deposit constituted a sufficient tender and entered judgment for plaintiff.

In appeal it was contended for the appellant—

(*a*) that the plaintiff's action should have been dismissed as the plaintiff had not proved that he had tendered the amount to the appellant before the plaintiff came into Court.

(*b*) that although the plaint was filed and the money deposited on 6-9-43, *i.e.*, within six years of the final decree (entered on 8-10-37) the plaintiff's claim for a transfer is barred because summons was not served till 14-12-43.

**Held :** (i.) That subject to an appropriate order in regard to interest, costs, etc., in a particular case, a deposit made in Court within the stipulated time without previous offer is sufficient tender.

(ii.) That the claim was not barred as the filing of the plaint constituted the institution of the action and the deposit then made placed the money *in custodia legis* and any delay that occurred thereafter cannot be imputed to plaintiff in the course of the routine of the business of Court.

(iii.) Plaintiff not given costs of the trial Court because he did not prove tender prior to action. If he had so tendered litigation might have been avoided.

RATNAYAKE vs. GUNATILEKE ... ... 17

## Thesawalamai

*Thesawalamai—Action for pre-emption—Juris- —How should subject-matter of action be valued.*

**Held :** That an action for pre-emption, being merely an action to assert the right to be substituted in the place of the vendee, should be valued on the basis of the sum of money the plaintiff should offer for that substitution, and not on the value of the land at the time of the institution of the action.

KARTHIGESU AND ANOTHER vs. PARUPATHY ... 8

## Transfer of Interest

Application by transferee of defendant's interest pending action to be added as defendant.

*See Civil Procedure Code* ... ... 111

## Transfer of Land

*Action* rei vindicatio *and for* restitutio in integrum *—Transfer of land by a married Kandyan woman—Woman under 21 years of age at date of transfer—Circumstances in which transfer will be set aside—Burden of proof.*

This was an action *rei vindicatio* and for *restitutio in integrum* by a married Kandyan woman who was under 21 years of age at the date on which she transferred the land in question to the defendant. The questions for decision were—

(1) whether the burden of proof was on the minor to show that she suffered damage or detriment or on the defendant to show that the minor derived benefit from the transfer ; and

(2) whether the minor should restore the defendant to his original position as a condition precedent to the grant of the relief claimed.

The defendant did not show that the minor derived any substantial benefit from the transfer.

**Held :** (i.) That the minor must prove that she has suffered loss, damage or prejudice.

(ii.) That in the absence of any proof by the defendant that the minor has been benefited, the minor must be taken to have suffered the kind of loss or damage sufficient to enable her to obtain relief.

(iii.) That the minor must indemnify the defendant and put him back where he stood before he entered into the contract.

SIMAN NAIDE vs. JANE NONA ... ... 84

*Transfer of land by notarial deed—Contemporaneous non-notarial agreement by vendee to re-transfer land to vendor—Trust—Enforceability of non-notarial document.*

A vendor transferred certain lands by deed. At the time of the execution of the deed, the vendee signed a non-notarial document agreeing to retransfer the lands to the vendor within four years on payment of a certain sum of money. No mention was made, in the deed, of the agreement to retransfer. On payment of the agreed sum within four years, the vendee refused to retransfer the lands. No condition was established to show that the whole beneficial interest of the vendor had not been transferred by the deed. No circumstances were proved which could bring the case within the provisions of the Trusts Ordinance relating to constructive trusts.

**Held :** That the non-notarial document was of no force or avail at law.

SAIYA NONA vs. KARTHELIS APPUHAMY ... 72

## Trusts Ordinance

Non-notarial agreement by vendee to re-transfer land to venor—

*See Transfer of Land* ... ... ... 7

*Breach of trust—Sale of trust property by trustee—* Bona fide *purchaser for value having no notice of equitable title—Legal title of purchaser—Prescription —Trusts Ordinance* (*Chapter* 72) *section* 111.

The 1st to 4th defendants purchased a schooner in 1925. The vessel was registered and the documents were executed in the name of the 5th defendant who, in breach of trust, sold the schooner by bill of sale (P 5) on 11th August, 1928, to the 6th defendant. By further bills of sale 6th defendant sold the schooner to 7th defendant, who sold it to 8th defendant, who sold it by P 2 on 25th August, 1937, to the plaintiff. The plaintiff claimed the schooner as a *bona fide* purchaser for value. It was established that he had been in possession of the vessel since the date of purchase.

The 1st and 2nd defendants prayed that the bills of sale be set aside. They denied that the plaintiff was the owner of the vessel and maintained—

(*a*) that P 2 was effected secretly, fraudulently and collusively with intent to defraud them of certain moneys due to them in respect of the vessel under another action instituted by them against the 3rd and 4th defendants; and

(*b*) that the 5th defendant was holding the vessel in trust for the 3rd and 4th defendants and that the latter fraudulently and collusively obtained the execution of the various bills of sale and by reason of these bills rendered themselves insolvent.

The transfer to the plaintiff was not secret, being registered. It was not proved that the 3rd and 4th defendants were left without any property when the vessel was transferred by P 5.

**Held**: (i.) That the plaintiff was not bound by the trust in breach of which the schooner was sold by the 5th defendant, as the plaintiff—

(*a*) had obtained the legal title;

(*b*) was a *bona fide* purchaser for valuable consideration; and

(*c*) had received no notice that the transaction was a breach of trust before the transfer was completed.

(ii.) That the 1st and 2nd defendants had failed to establish fraud against the plaintiff.

(iii.) That, even if fraud had been established, the claim of the 1st and 2nd defendants was prescribed as 1st defendant had notice of P 5 on 28th October, 1929 and that the case did not come within the ambit of section 111 (1) of the Trusts Ordinance.

COOMARASAMY vs. CHELLAM AND OTHERS ... 61

## Urban Councils Ordinance

Sections 11 and 19.
*See Writ of Mandamus* ... ... ... 19

## Village Communities Ordinance

*Election of disqualified person to Village Committee —No objection raised on nomination day—Application for writ of* quo warranto *to set aside election—When will writ be granted—Village Communities Ordinance sections* 13 (*e*), 15 (3) *and* (4).

**Held**: (i.) That a writ of *quo warranto* lies to set aside an election to a Village Committee on the ground that the person elected was not qualified for election as a member.

(ii.) That the fact that no objection was raised to the nomination of the respondent does not operate as a bar to the grant of the writ.

(iii.) That the writ will not be granted where there has been unreasonable delay in presenting the petition or where the petitioner is actuated by malice.

MENDIAS APPU vs. HENDRIK SINGHO ... 7

## Waste Lands Ordinance

*Waste Lands Ordinance No.* 1 *of* 1897—*Section* 4—*Effect of order under—Claim for compensation by* bona fide *improver—Is it wiped out by an order under section* 4—*Can fruits of the improvements be set off against compensation—Is* bona fide *improver liable to account for fruits he has taken.*

**Held**: (i.) That the effect of an order under section 4 of Ordinance No. 1 of 1897 is that the title to lands is finally decided and that the lands became vested in the persons mentioned in the order.

(ii.) That a claim for compensation by a *bona fide* improver is not wiped out by the section.

(iii.) That the fruits of improvement received by a possessor cannot be set off against a claim for compensation in respect of the improvements which produced them.

(iv.) The possessor is bound to restore to the owner all fruits actually gathered by him after the *litis contestatio*, as after this date he can no longer be regarded as a *bona fide* possessor and is liable to account for the profits he has taken since.

WICKRAMASINGHE vs. DIAS ... ... 74

## Will

*Will—Onus of proving—What should be proved—Suspicious circumstances attaching to execution—Duty of court.*

**Held**: (i.) That it is the duty of the propounders of a will or codicil to prove—

(*a*) the fact of execution;

(*b*) the mental competency of the testator; and

(*c*) his knowledge and approval of the contents of the will.

(ii.) That where there are suspicious circumstances attaching to the execution of a will or codicil the onus of removing such suspicion is on the propounders.

Per KEUNEMAN, J.: "Now, in *Berry vs. Butlin* there are also laid down certain qualifications which, perhaps, I may quote: 'All that can be truly said is that if a person, whether attorney or not, prepares a will with a legacy to himself it is at most a suspicious circumstance of more or less weight according to the facts of each particular case, in some of no weight at all.....But in no case amounting to more than a circumstance of suspicion demanding the vigilant care and circumspection of the court in investigating the case and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased'."

KANAGARATNAM vs. ANANTHATHURAI ... 48

## Words and Phrases

"Goods."
*See Motor Car Ordinance* ... ... 54

"Fraudulently" and "dishonestly"
*See Penal Code* ... ... ... 79

"Premises."
*See Rent Restriction Ordinance* ...

## Workmen's Compensation Ordinance

*Workmen's Compensation Ordinance* (*Chapter* 117) *Schedule II., section* 1—*Person employed in loading and unloading goods from lorry—Is he a person employed in connection with the " operation " of the lorry.*

**Held :** That the word " operation " in Schedule II., section 1 of the Workmen's Compensation Ordinance includes such activities as the loading and unloading of good in the case of lorries " used for the carriage of.....goods for hire, or for industrial or commercial purposes," and that a person so employed is a " workman " within the meaning of the Ordinance.



## Writ of Mandamus

Mandamus—*Courts Ordinance section* 42—*Urban Councils Ordinance No.* 61 *of* 1939, *sections* 11 and 19.

The Assistant Government Agent having rejected the nomination paper of a candidate and a *Mandamus* having been granted, the Supreme Court issued order on the Assistant Government Agent to accept the nomination paper without giving any further directions to the Assistant Government Agent. The Assistant Government Agent carried out the order of the Court by accepting the nomination paper but referred to postpone the election the date of which had been duly fixed.

**Held :** (i.) That the Assistant GovernmentAgent had no power to postpone the election.

(ii.) That where in an application for a Writ of *Mandamus* praying that an election be declared void, any party that may be affected by the order is not made party respondent, a *Mandamus* will not be granted.



## Writ of Quo Warranto

Lies to set aside election to Village Committee, on ground that person elected was not qualified for election.



*Writ of* Quo Warranto—*Election as member of Municipal Council—Does writ lie when member not in office* de facto.

**Held :** That an application for a writ of *quo warranto* to set aside an election to a Municipal Council will not be granted when, at the time the rule *nisi* was issued, the person elected had not attended any meeting of the Council or done any other act showing that he had acted in or accepted the office of Municipal Councillor.

*Present:* KEUNEMAN, J., WIJEYEWARDENE, J. & ROSE, J. VOL. XXX

DE ALWIS (P. C. 858) vs AGOSINGHO

*S. C. No.* 1290—*M. C. Ratnapura No.* 41604.
Argued on 12th & 13th March, 1945.
Decided on 20th March, 1945.



*Motor Car Ordinance No.* 45 *of* 1938 *sections* 111 (2), 112, 151, 158, *and* 42—*Overloading of omnibus—Conviction of conductor—Omnibus driven by driver with knowledge that it was overloaded—Liability of driver for aiding and abetting the conductor.*

**Held :** (i) That the driver of an omnibus can be charged with abetting an offence by the conductor under section 111 (2) of the Motor Car Ordinance No. 45 of 1938.

(ii) That by the mere act of driving the omnibus the driver cannot be said to facilitate the commission of the offence of overloading the omnibus.

(iii) That mere knowledge on the part of the driver that the omnibus is overcrowded cannot make him liable for the offence of abetting the overloading of such omnibus.

**Cases referred to :** *Gough vs Rees* (142 L.T. 424)
*Attorney-General vs James Singho* (41 N.L.R. 199)
*Thangiah vs Batchi Appu* (5 C.L.J. 214)
*De Silva vs Fort Police* (45 N.L.R. 551)*

*H. V. Perera, K.C.*, with *G. P. J. Kurukulasuriya* and *Ananda Pereira*, for the accused-appellant.

*T. S. Fernando, Crown Counsel*, for the Crown.

KEUNEMAN, J.

This case was referred to a bench of three judges under section 48 of the Courts Ordinance.

The accused was charged in that, being the driver of omnibus No. Z 3717, he did aid and abet the conductor of the omnibus in the commission of the offence of " bus overloading " punishable under section 111 (2) of the Motor Car Ordinance No. 45 of 1938 in breach of section 151 of the said Ordinance, and thereby committed an offence punishable under section 158 thereof.

The evidence of Assistant Superintendent of Police, Dep, was that he halted the omnibus in question at Lellopitiya. It was carrying 42 passengers when it was licensed to carry 22. The accused was the driver. The omnibus was over-crowded, and some passengers were hanging on the sides. The conductor was charged and dealt with.

The magistrate held that the omnibus carried an excess of passengers, and that the driver was fully aware of the fact that the omnibus was overloaded. He further held that the driver had aided and abetted the conductor in the offence of " overloading " and found the driver guilty. The appeal is from that conviction.

The first point argued was that the offence set out in section 111 (2) could not be abetted. This was not pressed in view of the decisions in *Gough vs Rees* (142 L.T. 424) and *Attorney-General vs James Singho* (41 N.L.R. 199). We agree that the driver of an omnibus can be charged with abetting an offence by the conductor under section 111 (2) of the Motor Car Ordinance.

It was further argued that the offence of abetment was not made out in this case. Under section 151 of the Motor Car Ordinance " any person who attempts to commit, or abets the commission of, an offence shall be guilty of that offence." Under the Interpretation Ordinance section 2, the word " abet " has the same meaning as in the Penal Code section 100. In this case there is no evidence of instigation or conspiracy, and the only part of section 100 which applies relates to intentional aid, by an act or unlawful omission. Explanation 3 has a bearing : "Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof is said to aid the doing of that act."

Crown Counsel's argument was as follows : Section 111 (2) runs thus : " Where the number of passengers found at any time in an omnibus on a highway exceeds the maximum number specified in the licence for that omnibus, or where goods other than the personal luggage of a passenger are found in an omnibus on a highway, the conductor of the omnibus shall be guilty of an offence."

Crown Counsel emphasized the definition of the word " passenger " contained in section 176 as " a person carried in a hiring car." I may add



* 29 C.L.W. p. 10

that the term "hiring car" includes an omnibus. Crown Counsel argued that the word "carried" meant moved or transported, and that in section 111 (2) one essential of the offence was that the excess of passengers must be found in an omnibus in motion, and that persons who mount into a standing omnibus or who are seated in an omnibus which is halted are not to be regarded as passengers. He therefore argued that the driver, by driving the omnibus which had an excess of passengers to his knowledge, was facilitating the commission of the offence under section 111 (2).

It is true that the word "carried" may mean "transported," but I do not think it is the only or the necessary meaning for the purpose of the Motor Car Ordinance. The Ordinance uses the word "passengers" as applicable to persons who are not necessarily being transported. For example, "plying for hire" means standing or waiting to be hired by passengers. But more to the point is the word "stopping-places" which means a place set apart as a place at which omnibuses may be halted for the purpose of taking up or setting down passengers. In my opinion the word "carried" may include the meaning "taken up," and I think that a person is a passenger from the time he is taken up into the halted omnibus, throughout the journey including all stops, and until he is set down from the omnibus. Any other meaning would be artificial and unreal.

In this view movement or transportation is not a necessary ingredient of the offence set out in section 111 (2), and the driver of an omnibus is not by his act of driving the omnibus completing that offence, and so the driver cannot be said to facilitate the commission of the offence by his act of driving the omnibus.

At the same time, it must, I think, be conceded that in its essence the offence under section 111 (2) is a continuing offence, and if an excess of "passengers" is found at any point in the journey the conductor is guilty of an offence under that section. Even so the mere knowledge on the part of the driver that the omnibus is overcrowded cannot, in my opinion, make him liable for abetting the offence, for he has in no way facilitated the commission of the offence.

Crown Counsel also referred to section 112 which grants both to the driver and to the conductor of a hiring car (including therein an omnibus) the power to request any person not to enter, when the hiring car is already carrying the full number of passengers. No person shall enter the hiring car in disobedience of the request, and if anyone does enter he is guilty of an offence under section 150 (1). Crown Counsel argued that the failure to exercise that power may be regarded as an abetment.

The first difficulty in this case is to find the evidence that the driver failed to exercise the power, but even if it is established that he did not exercise the power it has to be remembered that while the power is given to the driver no duty is imposed upon him to exercise that power, and in many cases it would be unreasonable to impose such a duty upon the driver. Further no power is given either to the driver or the conductor to request persons, who have entered either in disobedience of the request not to enter or when the full complement of passengers has already been taken in, to leave the omnibus, nor is any duty imposed on them to that effect. I do not agree with the argument of Crown Counsel.

As distinct from abetment, it has been suggested that section 150 (2) (*b*) and proviso 1 may be resorted to. But in this case it cannot be said that it has been proved that "the contravention was due to any act, omission, default or neglect" on the part of the driver. It was necessary for the prosecution to show a causal connection between the act, omission, default or neglect and the contravention, and this has not been established in the present case.

At one stage Crown Counsel argued that the driver was guilty of an offence under section 42 in that he used the omnibus in contravention of the conditions contained in the licence. I do not think it is open to us to consider that section in connection with the present case. Here the driver was charged with an offence in which his responsibility for an offence committed by the conductor was in question. The offence under section 42 is an independent offence which has no connection with the offence of the conductor, and it may raise many defences which have not been considered in the present case.

We have been referred to the cases of *Thangiah vs Batchi Appu* (5 C.L.J. 214) and *De Silva vs Fort Police* (45 N.L.R. 551) where views similar to those I have adopted were expressed.

The appeal is allowed; the conviction is set aside and the accused is acquitted.

WIJEYEWARDENE, J.

I agree.

ROSE, J.

I agree. *Appeal allowed.*

*Present:* WIJEYEWARDENE, J.

## SUMANGALA ISTHAVIRA vs APPUHAMY

*S. C. No. 290—C. R. Gampola No. 6317.*
Argued on 7th March, 1945.
Decided on 7th March, 1945.

*Servitude—Right of footpath claimed through another's land—Existence of other means of access to a public road—Nature of evidence necessary to establish such right.*

**Held :** (i) That the fact that a person who claims a right of way has direct access to a road is a matter that cannot be ignored in considering the evidence of user.

(ii) That a right to a footpath must be established by cogent evidence, as it affects the right of the owner of a land to the free and unfettered use of his land.

*L. A. Rajapakse, K.C.*, with *S. R. Wijayatilake*, and *T. B. Dissanayake*, for the plaintiff-appellant.

*S. W. Jayasuriya*, for the defendant-respondent.

WIJEYEWARDENE, J.

The plaintiff brings this action as the controlling *viharadhipathi* of the Pothgul Vihare, Elpitiya, to have it declared that a land of the Vihare, lot 2 in plan D2, is free from the servitude of a footpath claimed by the defendant as the owner of lots 5 and 6.

The Vihare stands on the land called Viharawatta, lot 1 in plan D2, and the Vihare owns lots 2, 3 and 4.

Lot 1 is separated from lot 2 by the Gansabawa road. The lots 2, 3 and 4 are contiguous lots. In going from lot 1 to lot 3 the plaintiff crosses the Gansabawa road at the point A, shown in plan D2, and goes along the foot-path, shown in detail in plan P1, — the footpath being Y F Z. The tea plantation in lot 2 appears to be fenced with barbed wire except along the common boundary between the lots 2 and 3.

The defendant states that he went along the footpath G F in plan P1 and then proceeded along the footpath F Y used by the priest, and thus got on to the Gansabawa road. He says he used this path for the last 32 years as he had no other access to the Gansabawa road.

It is no doubt true, as pointed out by the learned Commissioner, that the defendant claims this right of way by prescription, but the fact that the defendant has direct access to the Gansabawa road as admitted by the retired Korale — one of the defence witnesses — is a matter which cannot be ignored in weighing the evidence of user.

The defendant's case is that he has been using the footpath in question for nearly 32 years but he is unable to explain satisfactorily why the plaintiff should have suddenly objected to his using the footpath about 1942. He makes a somewhat vague statement that there were "some differences" between him and the plaintiff about 1942 and that he then ceased to help the Siamese Sect to which the plaintiff belongs. He says that the plaintiff obstructed the use of the footpath only after he withdrew his support from the Siamese Sect. The defendant's evidence with regard to the nature of the "differences" between him and the plaintiff that resulted in plaintiff obstructing the footpath is very unsatisfactory and unconvincing. The plaintiff appears to me to give a more reasonable account of the origin of the differences between him and the defendant. He says that the defendant who was a *dayakaya* of the temple wanted to use the footpath in 1940 and he told the defendant that he could not allow footpaths over Vihare lands. The defendant then got displeased with the plaintiff and ceased to support the plaintiff's temple.

The plaintiff fenced lot 2 nearly 20 years ago as there was a tea plantation on it. As he had to go from lot 1 to lot 3 over lot 2 he lowered the barbed wire at the point A near the Gansabawa road so as to give him access to lot 2 without, at the same time, leaving a gap through which trespassing cattle could enter lot 2. If the defendant was allowed by the plaintiff until two years ago to use that footpath there would have been a similar arrangement of the strands of wire at the point G. But the position now is that the wire had been cut at G. Defendant says that he did not make the gap at G. He says that the gap at G is today what it was for the last 20 years. It is difficult to believe that the plaintiff who took so much trouble to prevent cattle trespassing at A would have left the opening at point B through which cattle could have entered lot 2 and damaged his plantation. This supports the version of the plaintiff that

there was a continuous fence between lot 2 and lot 5 and the defendant created the gap about 1942 by cutting the strands.

The evidence of the surveyor, de la Motte, is not of much assistance to the defendant. He went to the lands some months after the dispute arose and saw what he thought was a path near the point C. It would not be difficult for the defendant to have taken steps to see that there were signs of such a path during the months that elapsed between the commencement of his dispute with the plaintiff and the visit of de la Motte.

Kiri Banda, the Retired Korale, made a general statement that he knew the defendant using the road for the last 25 years, but under cross-examination he admitted that he had been to the defendant's land about 15 years ago for an inquiry and in connection with vaccination duties. He also added that he had been to these lands 2 or 3 years ago along the footpath "as a short cut" and that nobody objected to his doing so. The fact that the Korale of the village going on official duty was not prevented from going over the plaintiff's land, cannot be relied upon as evidence of user of the footpath by the defendant as owner of a dominant tenement. Moreover, the evidence of this witness that the Gansabawa road "touches the defendant's land" contradicts the defendant's evidence that this "land has no Gansabawa Road on the southern end." I have no doubt that the defendant denied that he had direct access to the Gansabawa road in order to lend colour to his story that he crossed the plaintiff's land to go to the Gansabawa road. The remaining witness, Samarakoon, could only speak of the use of the footpath by the defendant after 1940.

As against this evidence, there is the evidence of the plaintiff who is a Nayaka Thero. I see no reason for rejecting the evidence of this witness. He is corroborated by the evidence of Mr. Kalenberg, a licensed surveyor, who says that the path from F to G appeared to him to be of much more recent date than the rest of the path. On a careful examination of the evidence in the case I am definitely of opinion that the defendant has failed to prove the servitude claimed by him. Servitudes such as these must be established by cogent evidence, as they affect the right of the owner of a land to the free and unfettered use of his land.

I set aside the judgment of the learned Commissioner and direct decree to be entered in terms of clause 1 in the prayer of the plaint and for damages at Rs. 6/– a year from date of action. The plaintiff would be entitled to costs here and in the court below.

*Judgment set aside.*

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*Present:* WIJEYEWARDENE, J.

## THE COMMISSIONER OF INCOME TAX vs VAZ

*S. C. No. 790 with Application No. 575—M. C. Colombo No. 34559.*
Argued on 9th & 14th March, 1945.
Decided on 21st March, 1945.

*Excess Profits Duty Ordinance No. 38 of 1941—Agreement between Commissioner and assessee as to amount of tax due—Part payment of tax by cheque—Notice given to assessee of balance tax due and date of payment—Payment of cheque stopped by assessee—Can whole tax be held to be in default in the absence of a fresh notice.*

An agreement having been reached between the Commissioner and an assessee as to the amount of tax due, the assessee paid part of the tax by cheque. The Commissioner then sent him a notice specifying the balance tax due. The assessee stopped payment of the cheque, and the Commissioner thereupon issued his certificate for the summary recovery of the full amount of the tax. The assessee maintained that the entire tax could not be said to be in default until a fresh notice had been issued by the Commissioner.

**Held :** That the notice issued by the Commissioner was not one contemplated by the Ordinance and that the entire tax was in default when he issued his certificate.

**Cases referred to :** *The Commissioner of Income Tax vs de Vos* (1933 – 35 N.L.R. 349)

*H. V. Perera, K.C.*, with *S. Nadesan*, and *N. Nadarasa*, for the assessee-appellant.
*T. S. Fernando, Crown Counsel*, for the Commissioner of Income Tax.

WIJEYEWARDENE, J.

Acting under section 14 of the Excess Profits Duty Ordinance No. 38 of 1941 read with section 80 of the Income Tax Ordinance, the Commissioner of Income Tax issued on March 1st 1944, a certificate certifying that the assessee had made default in the payment of Rs. 16,500 being the balance Excess Profits Duty due from him.

The Magistrate of Colombo summoned the assessee to appear in court on March 8th, 1944, and shew cause why further proceedings should not be taken against him for the recovery of the amount.

After inquiry the magistrate delivered his order on June 1st, 1944, imposing on the assessee a fine of Rs. 16,500 and, in default, sentencing him to undergo six months' simple imprisonment.

In view of the decision in *The Commissioner of Income Tax vs de Vos* (1933–35 N.L.R. 349), counsel for the assessee did not claim a right to be heard in appeal but asked for relief by way of revision.

The assessee was assessed for Income Tax under the Income Tax Ordinance and for Excess Profits Duty under the Excess Profits Duty Ordinance. The assessee was dissatisfied with both the assessments and appealed to the Commissioner to review and revise the assessments.

The Excess Profits Duty was originally assessed at Rs. 50,000 and the notice of assessment C4 required the assessee to pay that amount on or before November 2nd, 1943.

The Commissioner referred the Excess Profits Duty appeal to the assessor under section 69 (2) of the Income Tax Ordinance (made applicable by section 13 of the Excess Profits Duty Ordinance) and so informed the assessee by R4 of November 11th, 1943. In view of the appeal the Commissioner, acting under section 76 (2) of the Income Tax Ordinance (made applicable by section 14 of the Excess Profits Duty Ordinance) issued R5 on November 22nd, 1943, informing the assessee of the order made by him that out of the Excess Profits Duty "Rs. 47,500 shall be held over and that Rs. 2,500 shall be paid on or before 30th November, 1943." The assessee did not pay Rs. 2,500 on the due date. In the meantime, the Commissioner received information that the assessee had transferred his properties including his stock-in-trade. Acting under section 76 (3) of the Income Tax Ordinance (made applicable by section 14 of the Excess Profits Duty Ordinance) the Commissioner cancelled R5 and made a fresh order which was communicated to the assessee by notice C1 of December 28th, 1943. By that notice he requested the assessee to pay Rs. 50,000 and a penalty of Rs. 50 on or before December 30th, 1943, and informed him that he would have to pay a further sum not exceeding 10% of the duty if the sum of Rs. 50,000 was not paid on that date. On January 5th, 1944, the Commissioner took action under section 79 (3) of the Income Tax Ordinance (made applicable by section 14 of the Excess Profits Duty Ordinance) and issued a certificate C2 to the District Judge of Colombo for the recovery of Rs. 59,000 and issued a notice C3 at the same time to the assessee (*vide* section 79 (4) of the Income Tax Ordinance). A sum of Rs. 1,800 was realized by the seizure and sale of the assessee's property as a result of the proceedings in the District Court.

In the meantime the assessee's appeal against the Income Tax assessment came up before the Commissioner on January 25th, 1944, in the presence of the assessee's authorized representative, and the Commissioner reduced the statutory income from trade to Rs. 38,000. No objection was taken under section 71 (1) of the Income Tax Ordinance to the Income Tax so determined by the Commissioner. On that day the appeal to the Commissioner against Excess Profits Duty assessment was not decided. In fact, at that time the assessment appealed against had been referred back by the Commissioner to the assessor. But an understanding was reached that, in view of the Commissioner's decision in the Income Tax appeal, the Excess Profits Duty would have to be assessed on the basis that the statutory income from trade was Rs. 38,000. The Commissioner informed the assessee's authorized representative on that occasion that Rs. 15,000 should be paid on account of Excess Profits Duty before February 29th, 1944. On February 26th, 1944, Mr. K. Candavanam who is referred to as an "Income Tax Adviser" and has interested himself in the assessee's matters paid Rs. 15,000 by cheque C5 and obtained from the Commissioner receipt R2, which stated that the Commissioner had "received from Mr. K. Candavanam on behalf of J. P. Vaz (assessee) the sum of Rs. 15,000." After the receipt of that cheque the Commissioner issued R3 to the assessee giving particulars of the Excess Profits Duty and the payments received and credited to his account and showing a balance of Rs. 50 still due. According to R3 the assessee was given time till March 6th, 1944, to pay the balance Rs. 50.

Mr. Candavanam stopped payment of the cheque C5 on February 28th, 1944 and the

Commissioner thereupon issued the certificate on which the present proceedings commenced in the Magistrate's Court.

It is necessary at this stage to consider the effect of a certificate issued by the Commissioner in terms of section 80 of the Income Tax Ordinance and the extent of the magistrate's jurisdiction in the relative proceedings. The Commissioner's certificate is conclusive against any plea that the tax is "excessive, incorrect or under appeal" subject to the right of the assessee to the limited relief which the magistrate may grant under the latter part of section 80 (2). On the other hand, the Commissioner's certificate is only "sufficient evidence" that the tax is in default and it is open to the assessee to prove that the tax is not in default. The magistrate has reached the decision in this case that the tax was in default and it is this decision which the assessee seeks to canvass by his petition for revision.

The argument put forward on behalf of the assessee may be summarized as follows: The Commissioner decided the Excess Profits Duty Appeal. He then sent notice R3 in terms of section 76 (4) of the Income Tax Ordinance. According to that notice a balance sum of Rs. 50 was due on March 6th, 1944. Even if a larger sum became due owing to Mr. Candavanam stopping payment of the cheque C5 for which the assessee had been given credit, still, in the absence of any further notice, the tax cannot be held to be in default before March 6th, 1944.

I am unable to sustain this argument. The proceedings shew clearly that the Excess Profits Duty Appeal had not been heard by the Commissioner. What happened on January 25th, 1944, was that the Commissioner and the assessee's authorized representative reached an agreement within the meaning of section 69 (2) of the Income Tax Ordinance. A notice need not be issued by the Commissioner under section 76 (4) of the Income Tax Ordinance in respect of such an agreement. That section required a notice to issue only in the following cases:

(*a*) Where there has been a final determination of an appeal under Chapter XI of the Income Tax Ordinance;

(*b*) Where a tax held over by the Commissioner under section 76 (2) becomes payable by a subsequent order of the Commissioner;

(*c*) Where the Commissioner makes an order increasing the tax charged by the original assessment.

R3 was not, in my opinion, a notice contemplated by the Ordinance. The tax was therefore in default when the Commissioner issued his certificate.

I do not think that in any event the circumstances of this case call for the exercise of the revisionary powers of this court. Mr. Candavanam knew that a payment of Rs. 15,000 had to be made on or before February 29th, 1944. He knew that if that payment was made the balance left could be paid on March 6th, 1944. He issued the cheque for Rs. 15,000 on February 25th, 1944, on behalf of the assessee as shewn by the receipt R4. R3 was issued clearly after Mr. Candavanam forwarded the cheque as R3 shews that the assessee was given credit for that cheque. It is as a result of the receipt of that cheque that R3 was issued giving the assessee time to pay the balance on or before March 6th, 1944. Mr. Candavanam chose to stop payment of that cheque and the assessee still claims that the tax was not due till March 6th, 1944, in view of R3. The assessee was summoned to appear in the Magistrate's Court on March 8th, two days after the date when according to the assessee the tax fell due. No payment whatever was made during the pendency of the Magistrate's Court proceedings though the assessee's counsel stated at the very commencement of the inquiry that he did not challenge the correctness of the amount. The assessee filed his papers in revision nearly six months after the magistrate made his order.

I may add that the Crown Counsel who appeared for the Commissioner informed me at the argument that the assessee would be given credit for the sum of Rs. 1,800 realized by the sale of his property in the District Court proceedings.

I dismiss the appeal and refuse the application for revision.

*Appeal dismissed.*
*Application in revision refused.*

*Present:* WIJEYEWARDENE, J.

## MENDIASAPPU vs HENDRICK SINGHO

*In the matter of an Application for a Writ of* Quo Warranto *against Dioguhennedige Hendrick Singho.* (*No.* 463).
Argued on 2nd March, 1945.
Decided on 6th March, 1945.

*Election of disqualified person to Village Committee—No objection raised on nomination day—Application for writ of* quo warranto *to set aside election—When will writ be granted—Village Communities Ordinance sections* 13 (*e*), 15 (3) *and* (4).

**Held :** (i) That a writ of *quo warranto* lies to set aside an election to a Village Committee on the ground that the person elected was not qualified for election as a member.
(ii) That the fact that no objection was raised to the nomination of the respondent does not operate as a bar to the grant of the writ.
(iii) That the writ will not be granted where there has been unreasonable delay in presenting the petition or where the petitioner is actuated by malice.

**Cases referred to :** *G. R. Karunaratne vs Government Agent, Western Province* (1930 – 32 N.L.R. 169.)
*Rex vs Smith* (1790 – 100 E. R. 740)

*S. C. E. Rodrigo*, for the petitioner.
*C. S. Barr-Kumarakulasingham*, with *Vernon Wijetunga*, for the respondent.

WIJEYEWARDENE, J.

This is an application for a writ of *quo warranto* declaring that the election of the respondent as member for Lucasgoda Ward in the Village Committee of Tissamaharama is null and void.

Acting under the provisions of section 14 of the Village Communities Ordinance the Government Agent fixed May 31, 1944, as the day for the delivery of nomination papers. On that day the respondent alone was nominated for the Lucasgoda Ward and the Government Agent declared him to be the duly elected member for that ward. The petitioner filed papers in this court on September 22, 1944, impugning the election on the ground that the respondent was not qualified for election as a member as he had been convicted in 1921 for an offence under section 315 of the Penal Code and served a sentence of six months' rigorous imprisonment (*vide* section 13 (*e*) of the Village Communities Ordinance ). The respondent does not dispute the fact that he was so disqualified at the date of the election but seeks to obtain relief on the following grounds :

(*a*) That the remedy by way of *quo warranto* does not lie in this case.
(*b*) That there has been unreasonable delay on the part of the petitioner.
(*c*) That the petitioner has presented this application because the respondent has criticized the present Chairman of the Village Committee.

The argument in support of ground (*a*) was briefly as follows :

The petitioner did not avail himself of the opportunity given by section 15 (3) to raise an objection to the nomination of the respondent on May 31, 1944, when the respondent's nomination paper was delivered to the Government Agent. In the absence of any such objection the Government Agent declared him duly elected under section 15 (4) and in doing so the Government Agent exercised a judicial function. Section 15 (3) moreover makes the decision of the Government Agent with regard to any objection to a nomination final and conclusive.

I am unable to uphold this contention. It is not suggested that the petitioner was present when the nomination papers were delivered. Moreover, even if he was present, the circumstances in which nominations are made should be considered before a decision is reached on the question whether he concurred in the election. The Village Communities Ordinance makes no provision for the preparation of lists of voters and eligible candidates. A voter cannot be expected reasonably to acquaint himself with the early history of all the villagers and much less to provide himself with the necessary evidence to prove what he knows against them so as to be ready to object successfully to the nomination of anyone of the villagers whose name may be put forward. I am in respectful agreement with the views expressed by Maartensz, A.J. in *G. R. Karunaratne vs Government Agent, Western Province* (1930 – 32 N.L.R. 169).

No doubt, section 15 (3) makes the decision of the Government Agent final and conclusive.

The decision therein referred to is the decision given by the Government Agent after inquiry into an objection raised at the time the nomination papers are delivered to him. But where no objection is raised all that the Government Agent is required to do is to "scrutinize" the nomination paper which is in the Form B in the schedule to the Rules Relating to the Conduct of Elections (Subsidiary Legislation 1941 Supplement Vol. 3 p. 336). That form gives the names and addresses of the proposer, the seconder and the candidate. It also contains a declaration by the proposer and the seconder that they are entitled to vote but strangely enough omits any declaration as to the eligibility of the proposed candidate. The Government Agent "scrutinizing" the nomination papers is not, therefore, even acting on a declaration made by anyone that the candidate has the necessary qualification to be a member of the Village Committee.

Moreover, on the question of concurrence a distinction has to be drawn between cases where the defect arises in connection with the form of conducting the election and cases where the defect lies in the non-compliance with a positive requirement of the law regarding the qualification of the person elected. In *Rex vs Smith* (1790 – 100 Eng. Rep. 740) an objection was taken to the election of a Mayor on the ground of his not having taken the sacrament according to the rites of the Church of England, within one year next before his election, as required by the 13 Car. 2, stat. 2, c.I. The court set aside the election and held that the relators were not disqualified by reason of their having concurred in the election.

The petitioner's counsel, however, was unable to give any explanation for the delay in presenting the petition. The petitioner has not stated in the affidavit when he first became aware of the conviction of the respondent.

The respondent stated in his affidavit that the petitioner, a servant of the Chairman of the Village Committee, was "actuated by malice" as he had occasion to criticize the Chairman. This statement was not contradicted by any counter-affidavit. In fact, it appeared to be conceded in the course of the argument.

I refuse the application on the grounds (*b*) and (*c*). The respondent is entitled to costs.

*Application refused.*

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*Present:* WIJEYEWARDENE, J.

## KARTHIGESU & ANOTHER vs PARUPATHY & TWO OTHERS

*S. C. No.* 265—*C. R. Point Pedro No. L* 123.
Argued on 7th March, 1945.
Decided on 13th March, 1945.

Thesawalamai—*Action for pre-emption—Jurisdiction—How should subject-matter of action be valued.*

**Held :** That an action for pre-emption, being merely an action to assert the right to be substituted in the place of the vendee, should be valued on the basis of the sum of money the plaintiff should offer for that substitution, and not on the value of the land at the time of the institution of the action.

**Cases referred to :** *Mailvaganam vs Kandiah* (1930 – 32 N.L.R. 211)
*Jagat Singh vs Baldeo Prasad* (A. I.R. 1921 – All. 290)
*Gobind Dayal vs Inayatullah* (1885 – 7 All. 775)
*Tejpal vs Girdhari Lal* (1908 – I.L.R. 30, All. 130)

*H. W. Thambiah*, with *J. N. David* and *K. A. Sivasubramaniam*, for the plaintiffs-appellants.

No appearance for the 1st and 2nd defendants-respondents.

*A. S. Ponnambalam*, for the 3rd defendant-respondent.

WIJEYEWARDENE, J.

The second plaintiff, wife of the first plaintiff, is entitled to an undivided one-sixth share of a land called Sempadu. The defendants who were entitled to an undivided one-fourth share of the same land sold their share to the 3rd defendant by P2 of June 24, 1940, for Rs. 300. The plaintiffs filed this action on June 10, 1943, to have it declared that the 2nd plaintiff was entitled to pre-empt the share conveyed to the 3rd defendant.

The claim of the 2nd plaintiff was contested on two grounds, *viz* :

(*a*) That the 2nd plaintiff had been given notice of the sale and was otherwise aware of it.

(*b*) That the Court of Requests had no jurisdiction to entertain the action as the value of the 1/4th share in June 1943 was over Rs. 300.

The Commissioner of Requests held on the first ground in favour of the plaintiffs but dismissed the action as he assessed the value of the one-fourth share at the time of the institution of the action at Rs. 380 and held that the Court of Requests had no jurisdiction.

There does not appear to have been any earlier case in which the courts have been asked to consider how the subject-matter of an action for pre-emption should be valued.

The question that has often been discussed in pre-emption cases both here and in India is whether the sum which the pre-emptor should offer to pay the original vendee is the price mentioned in the deed of transfer or the market value of the share of the land in question. It may be taken as settled by those decisions that the pre-emptor should pay the price stated in the deed except where the court has reason to believe that the price so given is fictitious in which case the pre-emptor will have to pay the market value which will be invariably the sum that the court determines to have been actually paid by the original vendee ( *vide Mailvaganam vs Kandiah* (1930 – 32 N.L.R. 211) and *Jagat Singh vs Baldeo Prasad* ( A. I. R. 1921 – All. 290). The principle underlying these decisions appears to me to be found in the following passage in the judgment of Mahmood, J. in *Gobind Dayal vs Inayatullah* (1885 – 7 All. 775 p. 809) :

> "The right of pre-emption is not a right of *re-purchase* either from the vendor or from the vendee, involving any new contract of sale ; but it is simply a right of *substitution*, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It is, in effect, as if in a sale-deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place."

The principle was adopted in *Tejpal vs Girdhari Lal* (1908 – I.L.R. 30 All.130).

It may be observed at this stage that pre-emption as it prevails in British India owes its origin entirely to Mohammedan law and the provision in the *Thesawalamai* (Legislative Enactments, Vol. 2 Cap. 51, Pt. 7) may be due to the early occupation of North Ceylon for a time by Mohammedans or the later occupation by the Malabars who had themselves come under Mohammedan influence in India. The decisions of the Indian Courts on questions of pre-emption may, therefore, be taken as guides so far as such decisions are not affected by Statutes or the personal law governing persons of Islamic faith.

I would base my decision in this case on the principle mentioned above. An action for pre-emption being merely an action to assert the right to be substituted in the place of the vendee, should be valued on the basis of the sum of money the plaintiffs should offer for that substitution. That amount in this case would be Rs. 300. The Court of Requests would have jurisdiction therefore, even though the share would be worth more than Rs. 300 at the time of the institution of the action.

The plaintiffs failed to frame a clear issue in the lower court with regard to the question now decided by me and I would take that into consideration in the order I propose to make as to costs.

For the reasons given by me I set aside the judgment of the Commissioner and direct that in the event of the plaintiffs depositing in court a sum of Rs. 300 before April 11, 1945, a decree be entered—

(*a*) Declaring the 2nd plaintiff entitled to pre-empt the share referred to in deed P2 ;

(*b*) Setting aside and cancelling P2 and declaring it null and void ;

(*c*) Ordering the 1st and 2nd defendants to execute a conveyance in favour of the plaintiffs ;

(*d*) Granting the plaintiffs costs of the appeal.

If the sum of Rs. 300 is not deposited as aforesaid I direct decree to be entered dismissing the plaintiffs' action with costs of appeal and in the Court of Requests.

*Judgment set aside.*

## *IN THE COURT OF CRIMINAL APPEAL*

*Present:* KEUNEMAN, J. (President), WIJEYEWARDENE, J. & ROSE, J.

## THE KING vs APPUHAMY

*M. C. Ratnapura No.* 38273.
*S. C. No.* 59—*Application No.* 14 *of* 1945.
Argued on 12th March, 1945.
Decided on 15th March, 1945.

*Court of Criminal Appeal—Circumstantial evidence—Matters which a court should consider in deciding whether the evidence excludes the possibility of a hypothesis consistent with the innocence of the accused.*

**Held:** That in a case based entirely on circumstantial evidence, the fact that the deceased was last seen alive in the company of the accused would not, of itself, justify a conviction, where the exact time of death is not established; nor would the fact that the accused subsequently attempted to dispose of a weapon which might have caused the injuries on the deceased.

(*a*) The fact that a not unreasonable explanation was given by the accused fairly promptly after his arrest;
(*b*) Absence of any motive for the accused to murder the deceased;
(*c*) The behaviour of the accused during the relevant period;
(*d*) The fact that there were other men in the background who may have had a motive for the murder and may have used the accused as an innocent tool;
(*e*) The fact that the accused was not continuously in the company of the deceased during the time when the murder may have taken place; and
(*f*) Absence of evidence proving that the accused absconded immediately after the murder,
are all points which should be taken into account in deciding whether the evidence excludes the possibility of a hypothesis consistent with the innocence of the accused.

*A. Rajasingham*, for the 1st accused-appellant.
*E. H. T. Gunasekera, Crown Counsel*, for the Crown.

KEUNEMAN, J. (President)

In this case this accused was found guilty of murder on purely circumstantial evidence. The material evidence in the case was given by Dingiri Appu, a trader in a boutique at Lellopitiya, and by his nephew, Jainhamy, to this effect: Dingiri Appu, the deceased his brother, and Jainhamy were seated in Dingiri Appu's boutique on the night of the 3rd December, 1943, when the 1st accused came to the window and said that two people had brought a couple of fine gems and that the people were on the estate road. Dingiri Appu was not willing to go out, but the deceased left the boutique with the 1st accused. They carried a lighted candle in a coconut shell.

In about half or quarter of an hour the 1st accused returned to the boutique of Dingiri Appu and said: "Your brother has looked at the gems, and you are required to come and assess them." The 1st accused tried his best to induce Dingiri Appu to go with him but Dingiri Appu was unwilling and the 1st accused went away. He returned a third time and told Dingiri Appu that his brother was coming along the estate road with the other men, and wanted him to go out and meet them. Dingiri Appu became suspicious and refused to go out, and in fact loaded his gun and kept it beside him. According to Dingiri Appu, the 1st accused came about 11 p.m., while according to Jainhamy the deceased left the boutique about 8.30 or 9 p.m.

Dingiri Appu took no action to search for the deceased for about an hour, and then he sent Jainhamy to the deceased's boutique. In consequence the two sons of the deceased went in search of him towards the rubber estate, actually passing not far from where the deceased's body was found later, but they saw nobody. They carried a lantern which did not throw its light very far, and it was possible that if the body was there it may have been hidden behind some rocks at the spot. The two sons of the deceased returned to their boutique.

Early next morning Sirisena went out and discovered the body of the deceased near the top of a hill, beside a rock.

The medical evidence showed that the deceased had three incised wounds in the region of the neck, the longest 6 inches long, which could have been caused by a heavy sharp cutting instrument. The post-mortem examination was

held at 2.30 p.m. on the 4th December 1943, and the doctor found that signs of *rigor mortis* were well marked. He, however, gave no details with regard to the onset of *rigor mortis*. He was not able to say "with mathematical accuracy" how many hours after death he held the post-mortem. He added: "*Rigor mortis* usually sets in about 4 or 5 hours after death. It is well marked in many cases after about 18 hours. *Rigor mortis* disappears about 36 hours after death. It commences to vanish in about 24 hours after death, and completely vanishes in about 36 hours." The doctor said it was "possible" for the man to have died about 9 p.m. the previous day. The trial judge correctly summed-up this evidence as being "not inconsistent with" the deceased having died about this time, but the evidence is not sufficient to establish the exact hour of death.

The doctor also found in the deceased's stomach a small quantity of rice and curry undergoing digestion, and said that the deceased must have had the meal three or four hours before death, and that traces of rice and curry could be found three or four hours after death. Here again there is an absence of detail as to the extent to which digestion had progressed, but the point is not without significance in this case. The evidence of the deceased's son Upasena was that the deceased had not partaken of rice and curry since "the midday meal" but the exact hour of that meal has not been spoken to. At any rate it was not unreasonable for the defence to make the suggestion that the deceased had actually partaken of a meal of rice and curry that night, and on the evidence he must have done so after he went out with the 1st accused, and have been killed some hours after he had this meal.

As regards motive on the part of the 1st accused, the trial judge rightly said that there was "no real evidence with regard to motive" and that the suggestion that robbery was the motive hardly fitted in with the death of the deceased.

Two other matters have been suggested against the 1st accused. The first is that on the 6th December, 1943 he brought the sword (P9) to the witness Suwaris and suggested that Suwaris should give him even Rs. 2 and keep the sword in pawn. Suwaris refused to lend the money, and the 1st accused then left the sword with Suwaris saying that he was going on an urgent journey and would return for the sword on the 10th. The 1st accused did not in fact return to claim the sword which was later given to the Police. The doctor said that the injuries could have been caused by a weapon like P9 but in fact there was not a vestige of evidence to connect this sword with the injuries found on the deceased. Those injuries could have been caused by a heavy sword or by a heavy long *manna* knife. The sword does not appear to have been sent to the Government Analyst for examination for traces of human blood, and the evidence of Suwaris was that it was not rusty but shining when he received it.

The other point alleged against the 1st accused was that "he disappeared entirely from the neighbourhood where the killing took place." It is true that some search was made for the 1st accused in Lellopitiya where the body was found; but this is perhaps of little significance, for, admittedly, the 1st accused was living in Kuruwita, about 15 miles away and only came to Lellopitiya on casual visits. There is no evidence that he had disappeared from Kuruwita, and it is not unreasonable that the 1st accused should have returned to his village, Kuruwita, where he had employment. Certainly the witness Suwaris saw the accused close to Kuruwita on the 6th and 7th December, and it was not until that day the accused set out on his journey. There is really no evidence of a flight immediately after the night of the 3rd December. I may add that it was only on the 6th that the accused tried to pledge the sword P9, and there is no evidence that the 1st accused had any weapon at all when he was seen on the night of the 3rd.

The trial judge summed-up the evidence of the prosecution as follows:

> "To sum-up the whole case against the accused as it is put forward by the Crown, first of all you have got it established that he had come to the house of Dingiri Appu that night and Dingiri Appu's brother the deceased went away with him; that he came back twice after that in an attempt to get Dingiri Appu himself to go out, and therefore he was the last person with whom the deceased was seen alive."
>
> "The doctor's evidence is not inconsistent with the deceased having met his death some time about the time he was last seen in the company of the accused; that he disappeared from the neighbourhood where the killing took place; that he attempted to dispose of this weapon which the doctor said could have caused the death of the deceased."

The accused was arrested on the 12th December, and on the 15th he made a voluntary statement to the magistrate which has been proved by the prosecution. In this the accused stated that he came to Lellopitiya on the 3rd December on the invitation of Amisa. At Amisa's house he met Mendis and an unknown man. Amisa told him that he had a gem which was a stolen gem, and wanted him to find a buyer. Amisa asked him to arrange with the Mudali

of the boutique, so the accused went to the Mudalali and spoke to him about the gem but the Mudalali refused to go to the jungle to see the gem. The accused returned to the men who had sent him, who were now on a footpath. These men refused to go to the boutique but said they would go to the estate. Accused returned to the Mudalali, who refused to go out but sent his elder brother. Accused and the elder brother of the Mudalali went out with a lighted candle to the place where the other three men were. Amisa however wanted the Mudalali himself to come, so the Mudalali's brother was asked by Amisa to stay there and the accused was again sent to fetch the Mudalali, whose brother sent a message to the Mudalali not to be afraid. The Mudalali and Jainhamy got out of the boutique with a lantern but did not go further than the smoke room. Then the Mudalali complained that he was bitten by leeches and went back to his boutique. The Mudalali asked accused to fetch his brother. When the accused went back to where the men had been there was no light there and the men were not there. Accused called out and there was no reply; he thought the men had gone somewhere else, so he himself went away.

As the trial judge said, this story "agrees almost word for word with the story told by Dingiri Appu himself and Jainhamy." The only difference was that Dingiri Appu and Jainhamy had said that the deceased left with the accused on the first occasion, while the accused said that it was on the second occasion. This, the trial judge added, was "no real difference," and suggested that probably some duty rested on the accused "as he induced the deceased to go with him, to go and tell Dingiri Appu that he found no signs of his brother." Strictly speaking no inducement was offered to the deceased, who went voluntarily, but the comment does not lack justification.

The learned trial judge had on more than one occasion adequately instructed the jury with regard to circumstantial evidence, *viz.* that they must be satisfied "that the circumstances are incompatible with the accused's innocence, and that they were only consistent with his guilt. If the circumstances are consistent with his innocence then it is your duty to acquit him."

It is perhaps a little unfortunate that towards the end of his charge the trial judge said: "It is for you to say whether that statement explains his conduct, and whether the circumstances are consistent with his guilt."

We have anxiously considered the whole of the evidence, and we think that while the circumstances were perhaps consistent with the guilt of the accused, it was not possible to exclude a hypothesis pointing to the fact that the accused was not guilty of the offence with which he was charged.

The following points in favour of the accused may be emphasized:

(1) The absence of any motive whatever for the accused to murder the deceased.

(2) The really suspicious element in the evidence was the persistent return of the accused to the boutique of Dingiri Appu, but the point in favour of the accused is that he went there quite openly and did not attempt to conceal his identity.

(3) The evidence does point strongly to the fact that there were other men in the background who may have had a motive for the murder, and who may have used the accused as an innocent tool to lure the deceased and Dingiri Appu from the boutique.

(4) The accused was not in contact with the deceased on two occasions, and the murder could have been committed in his absence, *i.e.* on his two subsequent visits to Dingiri Appu's boutique. More particularly there is a strong possibility that the murder may have been committed during the accused's last visit to the boutique.

(5) The prosecution failed to fix the exact time of the death of the deceased, and the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance. The presence of rice and curry in the stomach of the deceased also indicates a strong possibility that the death took place some hours after the deceased set out with the accused.

(6) The absence of evidence that on the night in question the accused was seen to carry a weapon neutralizes to a large extent the evidence that the accused had the weapon P9 and attempted to pawn it near Kuruwita. Further no connection between P9 and the injuries caused to the deceased has been shown.

(7) There is no evidence that the accused was absconding immediately after the 3rd December.

(8) The explanation of the accused was given fairly promptly after his arrest and is not unreasonable.

In all the circumstances we are of opinion that it was not open to the jury to say that every reasonable hypothesis consistent with the inno-

cence of the accused of the charge of murder had been eliminated. The case is undoubtedly a case of some suspicion but we do not think it amounts to more than that.

In the circumstances the application of the accused is allowed and he is acquitted.

*Application allowed.*

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*Present:* DIAS (Commissioner of Assize)

THE KING vs RAJARATNAM *alias* CHETTIAR & OTHERS

*In the matter of an Application under section 222 of the Criminal Procedure Code for selection of a jury.*

*S. C. No.* 100—*M. C. Jaffna No.* 6291.

Argued on 11th May, 1945.

Decided on 15th May, 1945.

*Criminal Procedure Code—Sections 222 and 224—Election of jury—Subsequent application for altering election.*

The accused in this case had elected under section 165B of the Criminal Procedure Code to be tried by an English-speaking jury. After the transfer of the case by fiat of the Attorney-General under section 43 of the Courts Ordinance from the Northern Circuit to the Western Circuit the accused moved the Supreme Court for leave to alter their election and asked that they be tried by a Tamil-speaking jury.

The application was refused.

*R. L. Pereira, K.C.*, with *H. W. Thambiah*, for the applicant.

*H. H. Basnayake, Acting Solicitor-General* with *P. S. W. Abeywardene, Crown Counsel*, for the Crown.

DIAS (Commissioner of Assize)

The prisoners when they were committed to stand their trial elected to be tried by an English-speaking jury. Ordinarily the trial would have taken place in the Northern Circuit at Jaffna. The Attorney-General by his fiat, however, transferred the case from the Northern Circuit to the present Sessions at Colombo.

The prisoners now move that they may be tried by a Tamil-speaking jury. Their application is opposed by the Crown.

I agree with the Solicitor-General that the application has been made under the wrong section. Section 222 of the Criminal Procedure Code deals with an application for trial before a special jury. The prisoners make no such application.

I am, however, prepared to deal with this matter as one made under section 224 (1).

The questions for decision are whether the prisoners can make this application at all having once elected to be tried by an English-speaking jury, and if so, whether it should be allowed ?

Section 165B of the Criminal Procedure Code provides :

> " On committing the accused for trial before any higher court, the magistrate shall ask the accused to elect from which of the respective panels of jurors the jury shall be taken for the trial in the event of the trial being held before the Supreme Court, and the magistrate shall record such election, if made. The accused so electing shall, if the trial is held before the Supreme Court, *be bound by* and *may be* tried according to his election, subject, however, in all cases to the provisions of section 224."

Section 224 (1) provides :

> " That the jury shall be taken from the panel elected by the accused, *unless the court otherwise directs.*"

The language of section 165B shows that it does not necessarily follow that the prisoner will always be tried by the jury which he elected before the magistrate. The words used are " shall be bound and may be tried " and not " shall be bound and shall be tried." The position then is that while the accused is bound by his election it does not follow that the trial must necessarily take place before a jury of the panel selected by the accused.

Section 224 (1) makes it clear that as a rule the jury shall be taken from the panel selected by the prisoners "unless the court otherwise directs." A common example of the practical working of these sections is to be found where a prisoner who, before the magistrate, elects to be tried by a Sinhalese-speaking jury, but on the opening day of the Sessions expresses his desire to be tried by an English-speaking jury. The presiding judge in such a case has power in his discretion to give effect to the prisoner's desire.

In my view, a prisoner who once makes his election under section 165B is bound by it: but there is nothing to prevent him subsequently from moving the trial judge under section 224 (1) for trial before another panel. A judicial discretion is thus vested in the trial judge which he will exercise one way or the other after hearing both sides, and having considered the matter in all its aspects.

It is probable that at the time the election was made, it was believed that the trial would be held before an English-speaking jury at Jaffna, and it was hoped that the majority of, if not all, the jurors would be Tamil-speaking gentlemen, well versed in local conditions, *et cetera*. The action of the Crown by transferring the case to Colombo may have frustrated that intention.

The question I have to address myself to is whether the case of these prisoners would be prejudiced by their being now tried according to their original election by a Colombo English-speaking jury?

The language of our courts is English. If a Tamil-speaking jury is empanelled a great deal of public time will be lost by the Tamil and English interpretation which will be required without any corresponding gain to the accused who are defended by eminent counsel, who will no doubt be adequately instructed in advance.

All jurors, whether English-speaking or Tamil-speaking, must be deemed to be honest men, so that no hardship would be caused to an accused by his not being able to understand the language in which the trial is being conducted. In the majority of cases tried by juries, the accused do not understand the language of the court, although the interpretation enables them to follow the questions put to and the answers given by the witnesses.

The reasons stated in paragraphs 4 to 8 of the affidavits are unsound. I cannot agree that it "is absolutely necessary that this case should be tried by a Tamil-speaking jury for the better appreciation of the evidence that would be given by the witnesses in this case." I am also unable to agree that because the majority of the witnesses in this case are Jaffna Tamils, who will be speaking the Tamil language, it is therefore expedient that a Tamil-speaking jury shall try the case.

The interpreters of the Supreme Court are efficient officers and can do justice to the evidence of any Tamil-speaking witness. Even if local customs, manners or the "local setting in which the alleged incident took place" are material, I do not see how a Tamil-speaking jury would be in a better position to understand them than an English-speaking jury. I do not understand how the charge against the accused can be prejudiced by the trial taking place before an English-speaking jury.

The argument that a trial before a Tamil-speaking jury will enable the accused to follow more readily the questions put by the jury is an unsound argument, as all questions put by the jury to witnesses will be translated into Tamil and the accused will then hear them.

The only matter which merits consideration is the one raised in paragraph 9 of the affidavits, namely, that an English-speaking Jaffna jury is necessarily a Tamil-speaking jury, and that the action of the Crown in transferring the case to Colombo has prejudiced them. As there seemed to be some substance in these contentions I reserved my order.

Having carefully weighed all the pros and cons, I see no reason to direct that the trial should take place before a panel other than that which the accused elected. Convenience certainly indicates a trial before an English-speaking jury. I do not see how the prisoners will in any way be prejudiced by being so tried.

The application is, therefore, refused.

*Application refused.*

*Present:* ROSE, J.

## BAVA vs THOMAS

*Application for Revision in C. R. Kandy No.* 34721. (583)
Argued & Decided on 14th February, 1945.

*Rent Restriction Ordinance No.* 60 *of* 1942—*Action for ejectment instituted without consent of Assessment Board—No plea bringing action within any of the provisos to section* 8 *—Jurisdiction of court.*

A decree for ejectment was entered by the court in the absence of the defendant who later appeared and consented to the decree. She then challenged the jurisdiction of the court to entertain the action as the plaintiff had neither obtained the consent of the Assessment Board nor brought himself within any of the provisos to section 8 of the Ordinance.

**Held :** That as the court had jurisdiction over the subject-matter of the action, the defect of not complying with the procedure prescribed as essential for the exercise of the jurisdiction was one which could be waived.

**Cases referred to :** *Gurdeo Singh vs Chandrikah Singh* (36 Cal. p. 193)
*Pisani vs Attorney-General of Gibraltar* (L.R. 5 P.C. p. 515).

*Ivor Misso*, for the defendant-petitioner.
*E. B. Wickramanayake*, for the plaintiff-respondent.

ROSE, J.

In this matter it appears that the respondent instituted proceedings for ejectment against the petitioner from certain premises. The petitioner did not appear and decree was entered in her absence, but subsequently, as a result presumably of negotiations between the parties, both parties represented by counsel appeared before the court on the 27th July, 1944, and entered into what in effect was a consent judgment and the note of the judge reads as follows: "Mr. Gunawardene with Mr. Lee for plaintiff. Mr. Van Reyk for defendant. Settled. Of consent" — I suppose that means by consent — "decree to stand. Writ of ejectment not to issue till 1-12-44." The *decree* of course means the decree entered into on an earlier date.

The petitioner now alleges that notwithstanding her consent to this judgment the court in fact had no jurisdiction to entertain the matter at all having regard to section 8 of the Rent Restriction Ordinance, no consent having been obtained from the Assessment Board and no specific plea having been made by the respondent to bring the matter within one of the four provisos to the section, and the petitioner relies upon the proposition of law which is of course unimpeachable that where a court has no jurisdiction to entertain a matter then no acquiescence by the parties can confer jurisdiction upon that court. It seems to me, however, that this particular matter is covered by an Indian case which has been cited to me by the respondent, that of *Gurdeo Singh vs Chandrikah Singh* (36 Cal. p.193), in which the judgment refers to a Privy Council case the report of which is unfortunately not available but which I presume to be correctly cited — the case of *Pisani vs Attorney-General of Gibraltar* (L.R. 5 P.C. p. 515) — where, their Lordships of the Privy Council held that where there is jurisdiction over the subject-matter, but non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect can be waived.

In this case it seems to me to be clear, as the respondent has pointed out, that the court has jurisdiction over the subject-matter (which in fact was an action for ejectment) and had the case been properly pleaded so as to bring it within one of the four provisos there could have been no question but that the court could have proceeded to hear and adjudicate upon the matter. It is perhaps even doubtful whether there is not a sufficient plea to bring the matter within the first proviso, (*a*), but even assuming, for the sake of the respondent, that there is no specific plea to bring it within (*a*) and no plea to bring it within (*c*), I am of opinion that that is not a matter which takes it outside the jurisdiction of the trial court, because had there been a consent and had the matter been raised it would have been open to the court to grant leave to amend the plea.

For these reasons it seems to me that the petition fails and must be dismissed with costs.

*Application refused.*

*Present:* WIJEYEWARDENE, J.

## BANDA (S. I. Police) vs SEEMAN

*S. C. No. 761—M. C. Kalutara No. 23906 with Application for Revision.*
Argued on 1st March, 1945.
Decided on 5th March, 1945.

*Criminal Procedure Code section 440 (1)—Witness referring to diary and giving oral evidence different from entry in diary—Summary punishment for perjury.*

Where a witness read an entry made by him in his diary and told the court deliberately something different from what was recorded by him,

**Held :** That it was an appropriate case for summary punishment under section 440 (1) of the Criminal Procedure Code.

**Cases referred to :** *The King vs Sedris* (1914 – 4 Bal. Notes of Cases 31)

*H. V. Perera, K.C.*, with *U. A. Jayasundera*, and *S. E. J. Fernando*, for the petitioner.

WIJEYEWARDENE, J.

This is an appeal against the summary conviction of the petitioner under section 440 (1) of the Criminal Procedure Code. He has also filed papers in revision.

The case in which the petitioner, a village headman, gave evidence was one filed by the Police against two persons, Dimitius and Pabilis, for the theft of a bicycle. A warrant had to be issued for the arrest of Dimitius who surrendered to court about six months after the filing of the plaint. The trial had to be postponed once as Dimitius was absent and the petitioner stated to court that he knew Dimitius was ill. When the trial was taken up ultimately, the petitioner said in the course of his examination-in-chief that the two eye-witnesses of the theft, Sirisena and Velin, stated to him that "a man *like* Dimitius removed the cycle." The magistrate, thereupon, questioned him regarding his diary and repeated the question as to the statement made to him by Sirisena and Velin. Then the petitioner referred to his diary and said, "Sirisena and Velin told me that a man *like* Katuwellagoda Dimitius rode away on the cycle." The diary, however, when examined showed the entry, "Sirisena and Velin said Katuwellagoda Dimitius rode away on the cycle....."

The magistrate acquitted the accused in the case and called upon the petitioner to shew cause why he should not be punished under section 440 (1). The petitioner's explanation was, "I gave evidence according to the record in my diary — my memory was not fresh."

The magistrate convicted the petitioner, as he was of opinion that the petitioner gave false evidence deliberately in order to make it unsafe to act on evidence of identification of Dimitius by the other witnesses. I would in this connection refer to the observations made by Wood Renton, C.J. in *The King vs Sedris* (1914–4 Bal. Notes of Cases 31 p. 32) :

> "Too little attention is paid, I think, sometimes in cases of this kind to the language of section 440 of the Criminal Procedure Code. It fixes the penalty which it provides, to evidence which is false 'in the opinion of the court.' Great weight should be attached, in considering a case of this kind on appeal, to the importance attached by the legislature itself to the opinion of the trial judge as to the character of any evidence whose veracity is impugned."

It is, no doubt, true that judges should act very cautiously in exercising the summary powers given by section 440 (1) but that does not mean there should be any reluctance on the part of the judges to exercise these powers in an appropriate case. In the present case the petitioner did not purport to rely on his memory in giving this particular evidence, as is shown by the record of the magistrate and the explanation given by the petitioner himself. He read the entry made by him in his diary and told the court deliberately something different from what was recorded by him. Independently of the opinion expressed by the learned magistrate I have reached the decision that the petitioner made a deliberate attempt to mislead the court and gave false evidence within the meaning of section 188 of the Penal Code.

I dismiss the appeal and refuse the application in revision.

*Appeal dismissed.*

*Present:* SOERTSZ, J.

RATNAYAKE vs GUNATILEKE *alias* JAMES SINGHO

*S. C. No.* 297—*C. R. Kandy No.* 33673.
Argued on 3rd May, 1945.
Decided on 17th May, 1945.

*Tender—Deposit of money in court without previous offer by party to an agreement to purchase—Is this sufficient to prove tender.*

*Prescription—Action filed within the period of limitation—Summons served after the period—Is the claim barred.*

The appellant, by a deed dated 2/11/35 agreed to transfer to one Ukku Banda all that portion of land that would be allotted to him by final decree in a partition case that was pending then. Ukku Banda's rights were sold in execution and were purchased by one Yusoof who in turn sold those interests to plaintiff. The appellant was allotted a defined lot in the final decree dated 8/10/37.

The plaintiff instituted this action on 6/9/43 together with a Kachcheri receipt showing a deposit of Rs. 150/– to the credit of the case. This sum the plaintiff alleged was the amount on payment of which he was entitled to a transfer.

The learned Commissioner held that this deposit constituted a sufficient tender and entered judgment for plaintiff.

In appeal it was contended for the appellant—

(*a*) that the plaintiff's action should have been dismissed as the plaintiff had not proved that he had tendered the amount to the appellant before the plaintiff came into court.

(*b*) that although the plaint was filed and the money deposited on 6/9/43, *i.e.*, within six years of the final decree (entered on 8/10/37) the plaintiff's claim for a transfer is barred because summons was not served till 14/12/43.

**Held :** (i) That subject to an appropriate order in regard to interest, costs, etc. in a particular case, a deposit made in court within the stipulated time without previous offer is sufficient tender.

(ii) That the claim was not barred as the filing of the plaint constituted the institution of the action and the deposit then made placed the money *in custodia legis* and any delay that occurred thereafter cannot be imputed to plaintiff in the course of the routine of the business of court.

(iii) Plaintiff not given costs of the trial court because he did not prove tender prior to action. If he had so tendered litigation might have been avoided.

**Cases referred to :** *Odendaal vs Du Plessis* (S.A.L.R. App. Div. 1918 – p. 475).

*N. Nadarajah, K.C.*, with *H. W. Thambiah*, for the defendant-appellant.
*C. E. S. Perera*, with *M. H. M. Naina Marikar*, for the plaintiff-respondent.

SOERTSZ, J.

The material facts upon which this appeal rests are these: The defendant-appellant by a deed of agreement, dated 2nd November, 1935, contracted with one R. M. Ukku Banda to transfer to him, after final decree had been entered, all that share or portion of land that the appellant would be allotted by the final decree in partition case No. 46783 D. C. Kandy which was pending at the date the deed was entered into. The rights of Ukku Banda under this deed were sold in execution to one Yusoof who, in turn, sold those interests to the plaintiff-respondent. By final decree dated 8th October, 1937, the defendant-appellant got lot 3 in plan X1 dated 20th August, 1937. The plaintiff instituted this action on the 6th of September, 1943 and asked for a deposit note to enable him to deposit a sum of Rs. 150 which he alleged was the amount, on payment of which he would be entitled to a transfer. A deposit note No. 40736 was accordingly issued and a Kachcheri receipt referred to in the journal shows that, on the 6th of October, 1943, a sum of Rs. 150 was deposited in the Kachcheri to the credit of this case.

The learned Commissioner held that this constituted a sufficient tender to entitle the plaintiff to a transfer and he gave judgment accordingly.

On appeal, Mr. Thambiah contended that the plaintiff's action failed and should have been dismissed because the plaintiff had not proved that he had tendered the amount due to the appellant, before the plaintiff came into court. In other words, Mr. Thambiah's contention is that it is not open to a party in the position of the appellant here, to bring the money into court in the first instance within the stipulated time and to ask for a conveyance. He submits that a previous offer of the amount and a refusal by the other party to accept it is a necessary condition precedent to the institution of the action and the deposit of the money. It seems to me that if this proposition is sound, it would put a premium on evasiveness, for a party, by making himself inaccessible during the relevant period, could

contrive to deprive the other party of a cause of action and so defeat him. Mr. Thambiah sought to support his argument with a passage from the judgment of Innes, C.J. in the case of *Odendaal vs Du Plessis* (S.A.L.R. App. Div. 1918 p. 475) in which it is laid down:

> "Protection even more effective than that given by the doctrine of tender in England, was afforded in Holland by the process of judicial deposit (*Consignatie*) derived from the Civil Law. A debtor who considered that the claim of his creditor was either excessive as to *amount*, or unwarranted as to terms, was entitled *after due offer* (*oblatie*) to make a judicial deposit of the sum or the thing for which he admitted liability. The deposit was placed in charge of some person approved by the court, generally one of its officers. *There could be no deposit without a previous offer, for as remarked by Huber.....consignatie could have no place unless there had been an unwarranted refusal of a prior oblatie.*"

Mr. Thambiah relies particularly on the words I have underlined, but I do not see that they support his argument. Innes, C.J. was examining the case of a defendant who on being sued for damages in £ 5,000 on account of assault and defamation, admitted the assault but denied the slander and brought £ 100 into court in settlement of any damages sustained. The trial court found that both assault and defamation had been established and awarded £ 100 damages in respect of both injuries and gave the plaintiff costs up to the date of tender, but ordered him to pay the defendant all costs recovered thereafter. The question on appeal was whether the plaintiff was entitled to all costs on the ground that the tender relied on by the defendant was not an adequate tender in that it was in respect of the assault only and was conditional inasmuch as it was offered in full settlement. The answer given by Innes, C.J. and Solomon, J.A. to that question was that in regard to the first objection that the defamation was denied, the plea showed that although the defamation was denied, the tender of the £ 100 was intended to cover both heads of the claim, and in regard to the second objection they held that "the object of the process (*i.e. consignatie*) was to enable a debtor to protect himself against interest, costs and other consequences of default by discharging his obligation. The purpose was to extinguish the claim and the offer and deposit would always, therefore, be in full settlement. That condition was inherent in their nature." From this it is clear that a previous offer is not necessary to give the plaintiff a cause of action but such an offer if shown to have been made before action and if held to be sufficient as to its amount and its terms would entitle the plaintiff to costs, interest, etc. by putting the defendant *in mora*. If, on the other hand, the defendant proves that no offer had been made, and that if it had been made he would have accepted it, and that it was not due to his default that such an offer was not made, he would get the costs incurred in the unnecessary litigation. Mr. Thambiah's proposition that an extra-judicial offer is necessary before an action with *consignatie* could be instituted is refuted by another part of the same judgment in which it is stated that "under certain circumstances an actual tender (*realis oblatie*) made *in judicio* would be enough to prevent interest from commencing to run. Huber goes further; an offer *in judicio* (*rechtelijk in een praees gesihiedt*), he thinks, has the same result as an extra-judicial *oblatie* followed by *consignatie*. Zutphen is of the same opinion, for he says, that an offer made judicially on which issue is joined has the force of an extra-judicial offer supplemented by *consignatie*." I would, therefore, hold that, subject to an appropriate order in regard to interest, costs, etc. in a particular case, a deposit made in court within the stipulated time is sufficient without a previous offer.

The next question is whether in view of the fact that although the plaint was filed and the money deposited on the 6th of September, 1943, that is to say, within six years of the final decree which was entered on 8th October, 1937, the plaintiff's claim is barred because sunmons was not served on the defendant-appellant till the 14th of December, 1943, that is to say, after the six-year period of limitation. In my opinion, the answer to the question should be in the negative. The filing of the plaint constituted the institution of the action and the deposit then made placed the money *in custodia legis*. Any delay that occurred thereafter, in the course of the routine of the business of the court cannot, fairly, be imputed to the plaintiff. *Actus curiae neminem gravabit.*

It only remains to say that as the plaintiff has failed to lead any evidence to show that he had previously tendered the money due and that the defendant refused to accept it and as the defendant denies that such an offer was made, I would direct that each party bear his costs in the court below. Subject to that variation, the appeal is dismissed with costs.

*Appeal dismissed.*

*Present:* WIJEYEWARDENE, J.

## CARRON vs THE G.A., WESTERN PROVINCE

*S. C. Application No.* 416/1944.

*In the matter of an Application under section* 42 *of the Courts Ordinance* (*Chapter* 6 *of the Legislative Enactments of Ceylon*) *praying for a Writ of Mandamus on the Government Agent, Western Province, to hold a fresh election for Division No.* 1, *Kalubowila East, of the Dehiwala-Mount Lavinia Urban Council.*

Argued on 21st May, 1945.

Decided on 30th May, 1945.

*Mandamus—Courts Ordinance section* 42—*Urban Councils Ordinance No.* 61 *of* 1939 *sections* 11 *and* 19.

The Assistant Government Agent having rejected the nomination paper of a candidate and a Mandamus having been granted, the Supreme Court issued order on the Assistant Government Agent to accept the nomination paper without giving any further directions to the Assistant Government Agent. The Assistant Government Agent carried out the order of the court by accepting the nomination paper but referred to postpone the election the date of which had been duly fixed.

**Held :** (i) That the Assistant Government Agent had no power to postpone the election.

(ii) That where in an application for a Writ of Mandamus praying that an election be declared void, any party that may be affected by the order is not made party respondent, a Mandamus will not be granted.

**Cases referred to :** *Application for a Writ of Mandamus on the Chairman of the Colombo Municipal Council* (1913 – 18 N.L.R. 97)

*In the matter of an Application of John Neill Keith for a Writ of Mandamus on the Government Agent, Western Province* (1880 – 3 S.C.C. 12).

*E. B. Wickramanayake*, with *H. Wanigatunga*, for the petitioner.

*H. H. Basnayake, Acting Solicitor-General*, with *H. A. Wijemanne, Crown Counsel*, for the respondent.

WIJEYEWARDENE, J.

This is an application for a Writ of Mandamus in connection with the by-election held on July 22, 1944, in respect of Kalubowila East Ward No. 1 of the Dehiwala-Mount Lavinia Urban Council.

The respondent published on May 29, a notice under section 10 of the Urban Councils Ordinance requiring the delivery of the nomination papers on July 3, and intimating that a poll would be taken on July 22, if more than one candidate was nominated.

On July 3, nomination papers were delivered on behalf of three candidates — Mr. T. V. K. Carron (petitioner), Mr. N. W. de Costa and Mr. S. de S. Jayasinghe. The Additional Assistant Government Agent, Colombo, who received the nomination papers upheld an objection against the nomination of Mr. de Costa. He declared the other two candidates duly nominated and issued on July 4, the requisite notice under rule 1 of the Rules in the First Schedule to the Ordinance with regard to the poll on July 22.

On a petition of Mr. de Costa this court made order on July 17, directing the Assistant Government Agent, Colombo, " to accept the petitioner's (Mr. de Costa's) nomination paper and declare him to be a candidate for election " (*vide* judgment reported at page 476 of volume 45 of the New Law Reports). On receipt of that order the Assistant Government Agent gave notice immediately to all the three candidates stating that he would accept the nomination paper of Mr. de Costa on July 18, at the Urban Council office.

On July 18, the Assistant Government Agent accepted the nomination paper of Mr. de Costa in the presence of the three candidates. Mr. de Costa, thereupon, asked for a postponement of the poll and the Assistant Government Agent replied he had no authority to do so. Then Mr. de Costa gave a writing withdrawing from the candidature and stating that the Assistant Government Agent's refusal to give the postponement asked for was the reason for his withdrawal. The Assistant Government Agent issued immediately under section 11 (4) of the Ordinance a written notice announcing the withdrawal of Mr. de Costa.

At the election on July 22, ballot boxes were provided only for the petitioner and Mr. Jayasinghe. The poll resulted in 963 votes being cast for Mr. Jayasinghe and 641 votes for the petitioner.

On the above mentioned facts the petition states that the election of Mr. Jayasinghe is void. He contends (*a*) that Mr. de Costa should not have been allowed to withdraw on July 18, as a candidate could withdraw under section 11 (4) only " before the hour specified in the notice under section 10 as the time limit for the delivery of nomination papers." Which in this case was 10.30 a.m. on July 3, and (*b*) that, therefore, ballot boxes should have been provided at the reception of ballot papers in favour of

Mr. de Costa, as required by rule 3 of the Rules in the First Schedule of the Ordinance. He pleads that he had "been gravely prejudiced" by the failure to place such ballot boxes. He explains as follows in the affidavit the manner in which he has been prejudiced :

"**Paragraph 9.** I am a Burgher and a Christian and the said Mr. Jayasinghe is a Sinhalese and a Buddhist. I state that the racial and religious cry was raised in the said electorate and that my defeat at the said election was due to the said cause."

"**Paragraph 10.** The said Mr. de Costa is also a Sinhalese and a Buddhist and if the said Mr. de Costa's ballot box had been placed in the Polling Booth votes of the Sinhalese Buddhists would have been divided. I, therefore, state that I have been gravely prejudiced by the act of the said Presiding Officer."

It was admitted at the argument before me that Mr. Jayasinghe has accepted and acted in the office of a member of the Urban Council. It was also admitted that the petitioner did not raise any objection until August 4, when he forwarded a written objection to the respondent under section 19 of the Ordinance. The respondent replied to that letter that he saw no reason to declare the election null and void.

It is argued for the respondent on the authority of the *Application for a Writ of Mandamus on the Chairman of the Colombo Municipal Council* (1913 – 18 N.L.R. 97) that a Writ of Mandamus does not lie in the present case.

The order of this court made on July 17, directed the Assistant Government Agent to accept the nomination paper of Mr. de Costa. There was no further direction given in the order as to what should be done after the acceptance of that paper. In the absence of any express provision in the Ordinance the Assistant Government Agent construed the order of this court as extending the time limit fixed by the original notice under section 10 for the delivery and acceptance of the nomination paper of Mr. de Costa and proceeded to act as if July 18 was the date specified in that notice. In accordance with that view the Assistant Government Agent permitted Mr. de Costa to withdraw immediately after he delivered the nomination paper. In the special circumstances of this case I am not prepared to hold that the view taken by the Assistant Government Agent was wrong.

Even if a Writ of Mandamus could issue in the present case there is a serious objection to the present application. The petitioner wants to have the election declared void but has failed to make Mr. Jayasinghe a party respondent. The petitioner's counsel did not at any stage move to have him added as a party. The application must fail on that ground also (*vide In the matter of an Application of John Neill Keith for a Writ of Mandamus on the Government Agent Western Province* (1880 – 3 S.C.C. 12).

There is moreover no evidence before me to show that the petitioner has been "gravely prejudiced" or prejudiced in any manner by Mr. de Costa being permitted to withdraw on July 18. I am unable to draw from the mere statement of belief referred to in the affidavit of the petition any inference that some of the voters who voted for Mr. Jayasinghe would have voted for Mr. de Costa if a ballot box was placed for Mr. de Costa and that it would have resulted in his being returned as a member for the ward.

I discharge the rule with costs.

*Rule discharged.*

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*Present:* WIJEYEWARDENE, J.

## DE ZOYSA vs KULATILEKE

*In the matter of an Application for a Writ of* Quo Warranto *against Semage Salman Kulatileke—Application No.* 468.
Argued on 2nd March, 1945.
Decided on 13th March, 1945.

*Writ of* Quo Warranto—*Election as member of Municipal Council—Does writ lie when member not in office* de facto.

**Held :** That an application for a writ of *quo warranto* to set aside an election to a Municipal Council will not be granted when, at the time the rule *nisi* was issued, the person elected had not attended any meeting of the Council or done any other act showing that he had acted in or accepted the office of Municipal Councillor.

**Cases referred to :** *The Queen vs Slatter* (1840 – 113 E. R. 507)
*The Queen vs Quayle* (1840 – 113 E. R. 508)

The petitioner appeared in person.

*C. S. Barr-Kumarakulasingham*, with *Vernon Wijetunga*, for the respondent.

WIJEYEWARDENE, J.

This is an application for a mandate in the nature of a writ of *quo warranto*. The petitioner seeks to have it declared that the election of the respondent as member for the Kuppiyawatta Ward in the Colombo Municipal Council is null and void.

The respondent on whom a rule *nisi* was served has taken a preliminary objection that the petitioner is not entitled to the writ as the respondent was not in office *de facto* either at the time the petitioner made his application or the court issued the rule *nisi*.

The only material allegation in the petitioner's affidavit relevant to this objection is in paragraph 13 which reads :

"The Returning Officer declared the respondent elected, and the respondent was by Gazette No. 9311 of 15th September, 1944, declared elected as Councillor for the Kuppiyawatta Ward by the Municipal Commissioner."

It was conceded by the petitioner that, even at the time the rule *nisi* was issued, the respondent had not attended any meeting of the Council or done any other act showing that he had acted in or accepted the office of Municipal Councillor.

In these circumstances I am compelled to uphold the preliminary objection (*vide The Queen vs Slatter* (1840–113 Eng. Rep. 507) and *The Queen vs Quayle* (1840 – 113 Eng. Rep. 508).

I discharge the rule with costs.

*Rule discharged.*

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*Present:* ROSE, J.

SHERIFF DEEN (Inspector of Police) vs THOMAS

*S. C. No.* 1033—*M. C. Colombo No.* 42129.
Argued & Decided on 16th February, 1945.

*Right of accused or his advocate to cross-examine witness for the prosecution recalled by the magistrate—Criminal Procedure Code section* 189 (2).

The complainant in a case was recalled by the magistrate and gave further evidence on which no cross-examination by counsel for the defence was permitted. The magistrate convicted the accused and referred in his judgment to matters elicited when the complainant was recalled.

**Held :** That the conviction cannot be upheld.

*Nihal Gunasekera*, with *P. Malalgoda*, for the appellant.
*T. S. Fernando, Crown Counsel*, for the Crown.

ROSE, J.

This is a most unfortunate matter in which there would appear to be ample evidence on the record which would justify the conviction of the appellant. Counsel for the appellant, however, raises a point of law. It appears on page 10 of the proceedings that the complainant who alleged that his pocket was picked was recalled by the magistrate and questioned because the magistrate wished a certain point or points to be cleared up to the satisfaction of his own mind. The witness was recalled and described the position of the money, Rs. 250 in his pocket. He described the bundles, how much was in each bundle etc., and he says in addition that he had a note book which was separate, not tied to the cash bundles. Counsel for the defence then asked for permission to cross-examine the complainant on these points which he was clearly entitled to do under the provisions of section 189 (2) of the Criminal Procedure Code. The magistrate refused his application.

The defence was a denial and when the magistrate came to deliver his judgment he referred to these matters elicited when the witness was recalled, which indicates that he relied to some extent at any rate upon these matters.

Mr. Fernando has asked me to say that no injustice has followed as there was abundant evidence apart from those matters which would justify the conviction of the appellant. I feel, however, that in the absence of a section expressly giving an appellate court such a discretion, it would be rather stretching section 425 of the Criminal Procedure Code to apply it to a case where the accused or his advocate was not permitted to cross-examine on material matters a witness recalled by a magistrate.

It seems to me that in this particular case it is not open to the Crown to take the view that there was nothing material in the evidence so adduced, owing to the fact that the magistrate referred to it and relied upon it in his judgment. For these reasons the appeal will be allowed and the case remitted for re-trial.

*Appeal allowed and case sent b*

## *IN THE COURT OF CRIMINAL APPEAL*

*Present:* KEUNEMAN, J. (President), WIJEYEWARDENE, J. & JAYETILEKE, J.

## THE KING vs FERNANDO ET AL

*S. C. No. 1—M. C. Colombo No. 27483.*
*Appeals Nos. 4-5 of 1945—Applications Nos. 5-6 of 1945*
Argued on 27th February, 1945.
Decided on 12th March, 1945.

*Court of Criminal Appeal—Two accused charged with murder of one man—Fatal injury caused by first accused—No evidence that injury caused by second accused either accelerated or contributed to death of deceased—Common intention—Grave and sudden provocation—Misdirection.*

Two accused were charged with the murder of the deceased. The only fatal injury was that inflicted by the first accused, while the injury inflicted by the second accused neither accelerated nor contributed to the death of the deceased. The trial judge directed the jury that if they thought there was no common intention and that the second accused acted independently, under grave and sudden provocation, his offence would be one of culpable homicide not amounting to murder. The jury found the first accused guilty of murder and the second accused guilty of culpable homicide not amounting to murder.

**Held :** That this was a misdirection in the absence of any evidence that the injury caused by the second accused either accelerated or contributed to the death of the deceased, and that the proper verdict against the second accused would be one of attempting to commit culpable homicide not amounting to murder where hurt has been caused.

*G. E. Chitty*, for the accused-appellants.
*E. H. T. Gunasekera, Crown Counsel*, for the Crown.

KEUNEMAN J. (President)

The appeal and the application of the 1st accused have already been dismissed, and the matter that remains relates to the 2nd accused.

The deceased in this case had two injuries :

(1) An incised wound on the left side of the front of the chest penetrating into the chest, and causing a wound on the left ventricle of the heart, which was necessarily fatal.

(2) An incised wound on the back of the lower end of the left side of the abdomen, which penetrated to a depth of 1½ inches, but no internal injury was discovered. No bone was cut, and there is no evidence that this injury endangered life, or contributed to the death of the deceased.

The evidence showed that the 1st accused caused injury 1 while the deceased was held by the 2nd accused, and that thereafter the 2nd accused caused injury 2, and it is clear that the majority of the jury so held.

In his charge to the jury the learned trial judge dealt fully and adequately with the question of common intention on the part of the two accused. He also added :

"If you accept the view that he had no intention of acting with his brother. . . . .then you have to consider what he did later. . . .Then he would be liable on his own account, that is, as an independent act of his own, and not liable in the same way as the 1st accused. He would be free of any complicity in the accused's stabbing, but there would be a case to consider of his own act. . . ."

Thereafter, the trial judge dealt with the evidence that the 2nd accused acted under grave and sudden provocation, and added: "If you think it was an independent act, and there was grave and sudden provocation, then the offence would be culpable homicide not amounting to murder."

Later, the trial judge added that in the absence of common intention, "If there was grave and sudden provocation, the offence would be culpable homicide not amounting to murder. If there was no grave and sudden provocation, it would be a case of murder itself."

Thereafter the jury by a majority brought in a verdict of culpable homicide against the 2nd accused. Objection has been taken to the two latter passages of the charge, and we agree that on the evidence available the charge is incorrect. It would have been correct if there was any evidence to shew that injury 2 either accelerated or contributed to the death of the deceased. But there was no evidence to this effect, and we are of opinion that the conviction of the 2nd accused for culpable homicide cannot be supported. At the same time it is clear that the 2nd accused has correctly been found guilty of an offence, but it is a matter of difficulty to decide what verdict should be substituted in place of the present verdict. The medical evidence certainly does not definitely show that injury 2 amounted to grievous hurt or endangered life.

However, after the verdict, for the purpose of imposing sentence, the trial judge enquired

from the jury what the effect of their verdict was, and the jury declared that they had held that the 2nd accused as well as the 1st accused intended to kill the deceased but had acted under grave and sudden provocation. We do not, however, know what the verdict was on the question of common intention between the two accused, and the 2nd accused must have the benefit of that. As regards his own offence, regarded as an independent offence, we know that the majority of the jury held that he intended to kill. The injury he inflicted was with a dangerous weapon in a part of the body where danger to life was evident *viz.* the back of the abdomen and the blade had penetrated 1½ inches. In all the circumstances we think the correct verdict to be substituted for the present one is "Guilty of an attempt to commit culpable homicide not amounting to murder." Had the trial judge based his charge on the attempt we do not think objection would have been taken to his charge.

We accordingly substitute for the verdict arrived at by the jury the verdict "Guilty of an attempt to commit culpable homicide not amounting to murder where hurt has been caused." We delete the present sentence and impose on the 2nd accused a sentence of four years' rigorous imprisonment.

*Verdict substituted.*

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*Present:* ROSE, J.

LA BROOY (Excise Inspector) vs FERNANDO

*S. C. No.* 1192—*M. C. Panadura No.* 28704.
Argued & Decided on 15th February, 1945.

*Excise Ordinance section* 50—*Presumption—When does it arise.*

**Held :** That the presumption under section 50 of the Excise Ordinance only arises once possession has been established.

*T. S. Fernando, Crown Counsel,* for the complainant-appellant.
*P. Malalgoda,* for the accused-respondent.

ROSE, J.

This is an appeal with the leave of the Attorney-General from an acquittal by the magistrate. The respondent was charged on three counts with being in possession of certain articles contra the provisions of the Excise Ordinance (Chapter 42), and Mr. Fernando asks me to say that the magistrate was wrong in acquitting in this case. The first point taken is that the magistrate should have been satisfied that the possession by the respondent had not been proved. Now, I would say in passing that Mr. Fernando invoked section 50 of the Excise Ordinance and contended that there was a presumption in his favour to which the magistrate should have given effect. It is clear, however, that this presumption only arises once possession has been established, and the point, therefore, which I have to consider in the present matter is whether the magistrate should on the evidence have come to the conclusion that the possession was proved.

The only evidence of possession was given by two witnesses, Mr. Charles and Mr. La Brooy, and La Brooy says that the accused is the chief occupier of the house and at a later stage he said "I cannot say whether more than two persons are living in the house." Charles says, "I do not know the inmates of the accused's house. I do not know whether anyone else is living in this house." On that the magistrate makes the following observations: He says, "The prosecution witnesses said that they did not know who occupied this house besides the accused and his daughter." It seems to me that that is a fair summary of the evidence for the prosecution. The magistrate goes on to say that the man is described as the chief occupier of the house and that there is no evidence before him as to how many other occupiers there may have been. So in his opinion there is no ground for his taking the view that the chief occupier is in possession of everything that was found in the house. It seems to me that is a perfectly reasonable view to take, and I cannot therefore say that the magistrate was wrong in having drawn the inferences he did. It was perfectly open to him for the reasons he gave to say that he was not satisfied with the prosecution evidence.

There is a further point which was raised by Crown Counsel relating to the key. It appears that one of these two men, La Brooy, asked for the key of the wooden box in which these bottles

and many other articles were contained, whereupon R. Samaratunga produced this key and the box was then opened and various articles were found, amongst them some bottles of arrack.

Mr. Fernando states that the production of the key is "conduct" within the meaning of section 50 and therefore it was for the respondent to give a satisfactory account of the facts. The magistrate refers to this question of the key and he comes to the conclusion — and again I am unable to say he is wrong in coming to that conclusion — that it is not in his mind conclusive. It would be wrong for me to say that he was bound to draw the inferences from this key which the Crown asks to be drawn.

For these reasons I am of opinion that the appeal fails and must be dismissed.

*Appeal dismissed.*

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*Present:* Cannon, J.

## MAHMOOR (S. I. Police) vs AUSTIN SINGHO & ANOTHER

*S. C. No.* 1045–46—*M. C. Balapitiya No.* 49603.
Argued & Decided on 17th January, 1945.

*The Defence (Purchase of Foodstuffs) Regulations*, 1942—*Charge under regulation* 4—*Facts to be proved.*

**Held :** That in a charge made under regulation 4 of the Defence (Purchase of Foodstuffs) Regulations, 1942, for transporting country paddy without a permit, the prosecution must establish that the paddy transported was country paddy.

*Nihal Gunasekera*, for the accused-appellants.
*M. P. Spencer, Crown Counsel*, for the Crown-respondent.

Cannon, J.

The appellants were convicted of transporting 39 kurunies of country paddy from Talawa in Bentota, Wellawita Korale, to Kurundugahadeniya Group in Wellaboda Pattu, without a permit from the proper authority, in breach of regulation 4 of the Defence (Purchase of Foodstuffs) Regulations, 1942.

The material part of regulation 4* is as follows : "No person shall transport any quantity of country paddy, country rice or kurakkan, from any place in Ceylon to any other place in Ceylon, except under the authority of a permit issued on behalf of the Government Agent or Assistant Government Agent of the Province or District within which the first-mentioned place is situated."

The appeal is brought on two grounds : (1) That the paddy transported was not proved to be country paddy, and (2) That proof was not adduced that no permit had been issued to the appellant. "Country paddy" is defined in the regulation as "paddy grown in Ceylon."

For the Crown it is conceded that the only evidence describing the paddy is that of the Sub-Inspector who is recorded as having said "the paddy which was found to be country paddy" was measured at the station etc. This suggests that witness had learnt from somebody else that the paddy had been examined and shown to be country paddy. But this is hearsay evidence, and it does not come within the exception which permits hearsay evidence to prove the truth of a matter.

A perusal of the regulation shows, as Mr. Nihal Gunasekera points out, that the nature of the paddy was a fundamental fact to be established by the prosecution. As this remark of the Inspector is the only reference in the record of the evidence to the description of the paddy, the prosecution has not proved its case, and the appeal must therefore, be allowed and the conviction quashed.

This is not by any means the first case, which I have heard in appeal, in which there has been an absence of proof of an essential fact in the offence charged ; and I sometimes wonder whether the magistrate, when he is hearing a case, makes a note either mental or otherwise of the points which have to be established by the prosecution and those which, if such points are established, constitute a defence.

*Appeal allowed.*



* The words "any grain" have now been substituted for the words "country paddy, country kurakkan" by an amending regulation published in Gazette No. 9380 of March 16, 1945. — Edd.

*Present:* WIJEYEWARDENE, J. & CANNON, J.

## ALLES vs ALLES & SAMAHIM

*S. C. No.* 118 & 119/1944—*D. C.* (*Final*) *Colombo No.* 586/*Divorce.*
Argued on 23rd, 25th, 26th, 27th & 30th April, 1945, and
1st, 2nd, 3rd, 4th, 7th & 10th May, 1945.
Decided on 11th May, 1945.

*Husband and wife—Action by wife for separation—Claim by husband for divorce on ground of wife's adultery—Child born during wedlock—Legitimacy of child—Burden of proof—Damages—Costs—Evidence Ordinance section* 112—*Civil Procedure Code section* 612.

The plaintiff brought this action against her husband for a separation *a mensa et thoro* on the ground of malicious desertion and claimed the custody of the two children of the marriage. The husband denied that he deserted his wife and asked for a dissolution of the marriage on the ground of his wife's adultery with the second defendant. He also denied that he was the father of the younger child, who was born on March 26th, 1942, on the sole ground that he had no access to the wife at any time when the child could have been begotten.

The case for the wife was presented on the footing that the husband had sexual intercourse with her on April 17th, 1941, and August 9th, 1941, and that the younger child was born as a result of the act of coition on August 9th, 1941. The child having been born during the subsistence of a valid marriage, the burden, under section 112 of the Evidence Ordinance, was on the husband to prove that he was not the father of the child. The husband led evidence as regards the wife's adultery. The medical evidence which was given by five witnesses, was considered on the footing that the last menstrual period of the wife was about July 11th to 14th, 1941, and dealt with the questions whether a coitus on August 9th, 1941, could have resulted in conception and whether the child could have been begotten as a result of a coitus on that date. The evidence was at times conflicting, hesitating and doubtful. Apart from this the opinions of text-book writers threw a great deal of doubt on the husband's case. It could not therefore be said with certainty that the medical evidence proved that the younger child could not have been begotten on August 9th, 1941.

**Held :** (i) That the evidence led by the husband had established the charge of adultery.

(ii) That the husband had failed to discharge the burden of disproving that the younger child born during wedlock was not his child.

(iii) That as the damages awarded in a divorce action are compensatory and not punitive, the amount awarded by the trial judge should be reduced.

Per WIJEYEWARDENE, J. : " A child born to a woman during the subsistence of a valid marriage, cannot, I think, be made a bastard on such evidence as is given by the experts in this case. The fact that during the material period of time the plaintiff was on terms of intimacy with the second defendant does not of course entitle the first defendant to ask a court to hold that he is not the father of the child, if he had access to the mother at a time when the child could have been begotten.

" There remains for consideration the question of damages. The damages awarded in a divorce action are compensatory and not punitive. The two main considerations governing the award of such damages are (*a*) the actual value of the wife to the husband and (*b*) the proper compensation to the husband for the injury to his feelings, the blow to his marital honour and the loss to his matrimonial and family life.

" Taking into consideration all these circumstances and also the damages usually awarded in our courts, I think the second defendant has been ordered to pay excessive damages. As my brother thinks, however, that substantial damages should be given in view of the fact that certain suggestions were made against the first defendant in the District Court, I agree to his assessment of the damages at Rs. 10,000."

**Cases referred to :** *Jane Nona vs Leo* (1923–25 N.L.R. 241)
*Gaskill vs Gaskill* (1921 Probate 425)
*Clark vs Clark* (1939–2 A.E.R. 59)
*Cope vs Cope* (1833–1 Moody & Robinson 269)
*Warren vs Warren* (1925 Probate 107.)
*De Silva vs De Silva* (1925–27 N.L.R. 289)

*N. Nadarajah, K.C.*, with *E. B. Wickramanayake, H. W. Jayawardene*, and *G. T. Samarawickreme*, for the plaintiff-appellant in S. C. No. 119 and plaintiff-respondent in S. C. No. 118.

*N. K. Choksy* with *Ivor Misso* and *J. G. T. Weerawatne*, for the second defendant-appellant in S. C. No. 118 and second defendant-respondent in S. C. No. 119.

*H. V. Perera, K.C.*, with *E. G. Wickramanayake, C. J. Ranatunga* and *G. Thomas*, for the first defendant-respondent in both appeals.

WIJEYEWARDENE, J.

The plaintiff instituted this action on April 2nd 1942, against the first defendant asking for a decree of separation *a mensa et thoro* on the ground of malicious desertion and claiming alimony and the custody of her two children Hortense and Joseph Richard.

The 1st defendant filed answer denying that he deserted the plaintiff maliciously and pleading that the plaintiff committed adultery with the 2nd defendant. He denied that he was the father of the younger child, Joseph Richard. He asked for a dissolution of the marriage and the custody of Hortense and claimed Rs. 25,000 as damages against the 2nd defendant.

The 2nd defendant filed an answer and the plaintiff filed a replication denying the allegations made against them.

The District Judge delivered judgment granting a decree for divorce to the 1st defendant and directing the 2nd defendant to pay Rs. 15,000 as damages. He held that the plaintiff had committed adultery with the 2nd defendant and that Joseph Richard was not the child of the first defendant. He gave the custody of Hortense to the first defendant and made no order for alimony in favour of the plaintiff or Joseph Richard.

Both the plaintiff and the 2nd defendant have appealed from the judgment of the District Judge. Appeal No. 118 is the appeal of the 2nd defendant and appeal No. 119, the appeal of the plaintiff.

The 1st defendant is a Barrister-at-law practising in Colombo and was acting as a Crown Counsel during a part of the period material to this action. The 1st defendant's parents were members of a community known as Colombo Chetties. The plaintiff is the child of a Colombo Chetty — a cousin of the 1st defendant's mother — by a Burgher wife. Both the plaintiff and the 1st defendant are described in the marriage certificate as Ceylon Tamils. At the time of their marriage in 1933 the plaintiff was twenty years and the 1st defendant twenty-eight years. Two children were born to the plaintiff, Hortense in 1938 and Joseph Richard on March 26th 1942.

The 2nd defendant is a Doctor in Government Service. He is a Malay, 47 years old, married to a Malay lady and is the father of seven children.

Towards the end of 1940 the 2nd defendant became a very intimate friend of the plaintiff and the first defendant and visited them at their residence, "Merlton," Gregory's Road, Colombo. He began to lunch at "Merlton," at least, every Sunday and go with them frequently to dances and concerts. About this time the 1st defendant had disposed of his car and whenever he and his wife wanted to go shopping or call on their friends the 1st defendant used to telephone to the 2nd defendant for his car. The 2nd defendant, who did not employ a driver, would drive his car to "Merlton" and wait at "Merlton" while the plaintiff and the 1st defendant went in his car. He had to wait sometimes an hour or two at "Merlton" until they returned.

Towards the end of January, 1941, the 1st defendant went to Jaffna to prosecute at the Criminal Sessions of the Supreme Court which opened there on February 1st, leaving at "Merlton" besides the servants, the plaintiff, Merita (a younger sister of the plaintiff) and Noel (a younger brother of the plaintiff) who was away from home for the greater part of the day. On leaving for Jaffna the 1st defendant asked the 2nd defendant to look after his wife and sister-in-law and this was understood by the 2nd defendant to mean that he should call on them during the absence of the 1st defendant and take them in his car when they wanted to go shopping or to attend dances and concerts. The plaintiff herself was in Jaffna from February 27th to March 4th. After returning to Colombo, she remained at "Merlton" till March 20th.

Alice, the cook employed at "Merlton" says that the 2nd defendant visited "Merlton" frequently by day during this period when the 1st defendant was away at Jaffna and the plaintiff was at "Merlton." She saw him going into the spare room and noticed the plaintiff coming out of the room while the 2nd defendant was still in the room. She saw the plaintiff in the drawing room resting her head on the 2nd defendant's lap and the plaintiff and 2nd defendant behaving as an *aluth-joduwa* (newly married couple).

The plaintiff went to Bandarawela for a change about March 20th with Merita and Hortense and stayed at a boarding house run by Mrs. Solomons. On April 12th the 2nd defendant himself was at Bandarawela having gone there two or three days earlier for the Easter Vacation. He was staying at a boarding house run by Mrs. Outschoorn. Dr. Babapulle who was spending a few days at Outschoorn's during Easter says he saw the plaintiff entering the 2nd defendant's room one night after dinner. He is unable to say whether the 2nd defendant was, in fact, in the room. I do not hesitate to accept the evidence of Dr. Babapulle. It is not the case for the plaintiff that she went to the room of the 2nd defendant for some innocent purpose. She denies going there and the 2nd defendant denies any knowledge of a visit by the plaintiff,

On April 17th, 1st defendant was at "Merlton" having come down from Jaffna. There was a birthday party at "Merlton" that day, as it was the birthday of the 1st defendant. The plaintiff came from Bandarawela with Hortense for that party. That evening it was arranged with the knowledge of the 1st defendant that plaintiff, 2nd defendant, Mr. Namasivayam and Miss Ludowyke — the last two being friends of the plaintiff and the two defendants — should go to Bandarawela with Merita for a Tennis Dance at Nuwara Eliya on April 19th and return to Colombo on April 20th. In pursuance of this arrangement, the plaintiff wired to her friend Mrs. Jayewickreme asking her to have dinner and sleeping accommodation ready for two at her bungalow in Bandarawela on the 19th. It was arranged at the time that the plaintiff and Miss Ludowyke should spend the night of April 19th at Mrs. Jayewickreme's. The 2nd defendant intended to go to a Hotel or to Outschoorn's if they had accommodation for the night. He had moreover some friends in Bandarawela with whom he could have stayed. When the party reached Bandarawela, Miss Ludowyke was left behind in Mrs. Solomons' boarding house contrary to the arrangement made in Colombo, and Mr. Namasivayam went to the house of Mr. Dias, a friend of his. The plaintiff went with the 2nd defendant to the bungalow of Mrs. Jayewickreme. Mrs. Jayewickreme had prepared a room with two beds. She did not expect the plaintiff to come with the 2nd defendant. The plaintiff and the 2nd defendant dined at Mrs. Jayewickreme's, and the 2nd defendant did not shew any inclination to leave the bungalow. Mrs. Jayewickreme then directed her brother-in-law to prepare a bed for the 2nd defendant in the spare room adjoining the room set apart for the plaintiff. There was a communicating door between the two rooms which were thus occupied by the plaintiff and the 2nd defendant. These facts are admitted, but the counsel for the plaintiff and the 2nd defendant contended that no inference of misconduct on April 19th should be drawn from those facts. They have not been able to explain why the 2nd defendant did not adhere to his original plan of going to a Hotel or Mrs. Outschoorn's boarding house and preferred to put Mrs. Jayewickreme into unnecessary inconvenience. He is an educated person and he would have noticed that the hostess expected him to go away after dinner. The plaintiff knew the bungalow well having stayed there previously. She must have known that there was a communicating door between the two rooms. However, she chose to remain silent instead of asking the 2nd defendant to go away. She need not have felt any uneasiness about making this request, as she was admittedly a close friend of the 2nd defendant. She knew at this time that there was a good deal of talk about her and the 2nd defendant and yet she preferred not to interfere with the 2nd defendant who was going to place her in a false position by occupying the adjoining room.

The plaintiff and others returned to Colombo on April 20th and the plaintiff continued to live at "Merlton" with Merita and Hortense. Noel was not staying then at "Merlton." The 1st defendant left "Merlton" for Jaffna on April 19th and returned to "Merlton" on August 9th. He then left again for Jaffna on August 10th and returned finally on August 20th to "Merlton" where he continued to reside with the plaintiff until December 19th when he left the house taking Hortense with him.

The plaintiff was taken ill on July 9th 1941 and Merita telephoned at once to Dr. Gunasekere, the family doctor, and the 2nd defendant. The 2nd defendant came first and Dr. Gunasekere who came a little later found him in plaintiff's bed room with the plaintiff while Merita was in the verandah. Dr. Gunasekere thought from the symptoms that the plaintiff's illness was due to renal colic appendicitis or ectopic gestation. He had to examine her next to the skin. For this purpose she had to undress partially. During this examination the 2nd defendant elected to remain in the bed room though he was not there in his capacity as a Doctor attending on the plaintiff.

Alice says that after the plaintiff's return from Bandarawela on April 20th the 2nd defendant spent some nights at "Merlton" and the plaintiff and the 2nd defendant occupied one room on these occasions and that the plaintiff alone was taken out by the 2nd defendant in his car sometimes after dinner. Another servant, Pabilis, refers to an incident by day during this period. The plaintiff was in the spare room with the 2nd defendant when Pabilis found the plaintiff's father coming to the bungalow. Pabilis ran and knocked at the door of the spare room and then the plaintiff rushed out of the room and by going along some passage unseen by the father contrived to make it appear to her father that she had been in her own bed room when her father arrived. The District Judge accepts the evidence of Alice and Pabilis.

As the District Judge appeared to me to have misdirected himself when he proceeded to consider the evidence of adultery on the erroneous assumption that the plaintiff was in March a "sexually starved wife" — an assumption based solely on the fact that the husband

had then been away from her for three or four weeks — I examined the evidence carefully. On that examination I have reached the decision that the 1st defendant has established the charge of adultery.

Now I shall consider the question as to the legitimacy of Joseph Richard who was born on March 26th 1942. Section 112 of the Evidence Ordinance enacts :

> " The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, unless it can be shown that that man had no access to the mother at any time when such person could have been begotten or that he was impotent."

That section has been construed in *Jane Nona vs Leo* (1923–25 N.L.R. 241), which is a decision of the Full Bench and is binding on us. It was held in that case that the word, "access" was used in section 112 of the Evidence Ordinance in the sense of "actual intercourse" and not "opportunity for intercourse." It was further held that our courts should not act on the rule of English Law that parties to a marriage should not be permitted to give evidence as to the fact of the absence of intercourse between them.

This case has been presented on the footing that the 1st defendant had sexual intercourse with the plaintiff on April 17th 1941 and then again on August 9th 1941. It is not suggested that Joseph Richard was born as the result of the act of coition on April 17th 1941 — 343 days before the date of birth. The case of the plaintiff appears to be that the child was born as the result of an act on August 9th 1941. The child having been born to the plaintiff during the subsistence of a valid marriage between her and the 1st defendant the burden rests on the 1st defendant to prove that he is not the father of the child.

Five medical witnesses have given their opinion on this question. Four of them — Dr. Wickremasuriya, Dr. Attygalle, Dr. Navaratnam and Dr. Gunasekera — were called by the 1st defendant while Dr. Thiagarajah was called by the plaintiff. Of these witnesses Dr. Wickremasuriya who is now dead was admittedly regarded as one of the most eminent obstetricians and gynaecologists in Ceylon. Dr. Gunasekera is a general medical practitioner. He did not claim to be an expert in gynaecology or obstetrics and he admitted frankly that he did not study or consider the relevant medical questions for the purpose of giving his opinion.

The medical evidence dealt with the following questions :

(*a*) What was the last menstrual period of the plaintiff ?

(*b*) Could a coitus on August 9th 1941, have resulted in conception ?

(*c*) Could not Joseph Richard have been begotten as the result of a coitus on August 9th 1941 ?

On question (*a*) there is the evidence of the plaintiff that the last menstrual period was about *July 11 to 14, 1941.* Dr. Wickremasuriya says that she made a similar statement to him in December, 1941. The 1st defendant disputes the correctness of the date, as according to Dr. Wickremasuriya, the plaintiff was unable to give the date in October, 1941 when she consulted him first about her pregnancy. It is suggested that in December she gave a late date in order to be in a position to say that the baby was conceived after August 9th when the 1st defendant had access to her. I am not prepared to accept that suggestion. Dr. Wickremasuriya says that the plaintiff did not give the date in October and adds that "she was rather ill at the time and looked emaciated" and "she was rather confused about the date." There is some conflict of evidence between Dr. Wickremasuriya and the plaintiff as to her statement to him in October. We cannot exclude altogether the probability of Dr. Wickremasuriya making a mistake. There is clearly a conflict between Dr. Wickremasuriya and the 1st defendant as to what Dr. Wickremasuriya told the 1st defendant in November 1941 (marginal page 339). The fact is that Dr. Wickremasuriya could not have been expected reasonably to remember all that passed between him and the plaintiff and the 1st defendant about October and November, 1941, when there was no talk of any trouble between the spouses. There is also the evidence of the 1st defendant to the effect that plaintiff told him in September that she had missed her period in September. Probably, she thought at the time that she had her period in August because she had "bleeding" in August. As that "bleeding" cannot be regarded as true menstruation, her statement made to the 1st defendant did, in fact, amount to her saying that her last menstrual period was in July and not earlier. Moreover, Dr. Wickremasuriya has stated that he examined the plaintiff on several occasions during her pregnancy and that he had no reason to think as a result of examination that she had given him an incorrect date. The evidence of Dr. Gunasekera does not necessarily prove that the plaintiff could not have her period on July 11th. I would, therefore, proceed to consider the medical evidence on the footing that the last menstrual period of the plaintiff was about July 11th to 14th 1941.

With regard to question (*b*) Dr. Wickremasuriya says that while the likely period for *fertilization* would be what is known as the mid-

period (*i.e.* 9 to 17 days from the first date of the preceding menstrual period), that fertilization is possible in the case of a normal woman at any time during the inter-menstrual period. He has "seen cases where it has occurred just after and just before the period is due." He says that this possibility is still greater in the case of a woman with irregular periods. The plaintiff's evidence shows that her periods were irregular. Dr. Attygalle says (marginal page 373) that "in the case of irregular people it is not possible for anyone to say with any precision exactly when the ovulation period is." Though he says (marginal page 394) that "it is almost impossible" for conception to take place if the intercourse was "a couple of days before the onset of menstruation," his later evidence (marginal page 394) appears to restrict this impossibility only to normally menstruating women. His observations on the evidence of Dr. Wickremasuriya (marginal pages 383 and 384) seem to suggest that he thought a conception about August 9 was possible in the case of the plaintiff. Though Dr. Attygalle answers each question put to him with greater confidence than Dr. Wickremasuriya and without the caution and restraint of the latter, it is at times difficult to reconcile the different answers given by him in the course of his examination.

Dr. Navaratnam thinks that in the case of a woman with a regular menstrual cycle fertilization is impossible outside the "9th to the 17th day period," but he is prepared to agree (marginal page 425) that if the plaintiff had irregular periods she could have conceived even twenty-eight days after the last menstrual period. Dr. Thiagarajah says that it is possible for any woman — whether her cycle is regular or irregular—to have a fruitful coitus at any time of the inter-menstrual period and adds (marginal page 885) that "the safe period of Ogino and Knaus has been proved to be a failure."

Our attention has been invited to the following passage in "Menstrual Disorders and Sterility" by Mazer & Israel at page 70 :

> "The assumption that ovulation does not occur before the fifteenth day of the expected flow, regardless of the length of the menstrual cycle, is now widely employed as a means of 'natural contraception .....' This method of contraception has not achieved universal acceptance because it is increasingly apparent, as more and more biologic data accumulate, that the reproductive cycle in the human female is complex and variable. There is, for instance, some circumstantial evidence to indicate that ovulation may occur more than once in a single menstrual cycle and that, even in the human, it may be evoked prematurely by coitus. These hypothetical concepts are seemingly supported by authentic clinical records of pregnancy following instances of isolated coitus during any phase of the menstrual cycle, even during menstruation. It is possible that a high degree of sexual excitement during intercourse may evoke the production or the release of a sufficient quantity of gonadotropic hormone in some women to cause 'untimely' ovulation."

The authors conclude the discussion by citing with approval the opinion of C. G. Hartman expressed in "Time of Ovulation in Women" :

> "We still have a long way to go before we can brand as a falsehood a woman's assertion that she conceived in the so-called sterile period of the cycle."

I hold that the plaintiff could have had a fruitful coitus on August 9th, 1941.

As regards question (*c*) it has to be borne in mind that Dr. Wickremasuriya is the only witness who attended on the plaintiff during her pregnancy and was present at the birth of the child. The other medical witnesses have to base their opinions on the evidence given by Dr. Wickremasuriya with regard to the observations made by him.

Dr. Wickremasuriya stated :

1. That on October 23rd 1941, "the uterus was enlarged to *about* four fingers' breadth above the junction of the pubic bone" and that he considered that "she was then within 14 and 16 weeks of gestation *from the last menstrual period*—an average of 15 weeks."
2. That on December 17th, 1941, he heard the foetal heart sounds which are "normally heard about the 20th week but occasionally a little earlier."
3. That the child at the time of delivery was "*for all practical purposes*" a fully developed child and that "*so far as he recollected*" it weighed 6½ lbs., that the skin was smooth, there was sub-cutaneous fat, the finger nails had developed beyond the tips, there was a good growth of hair, the testicles had entered the scrotum, the baby cried lustily, took to the breast and sucked vigorously.

Now with regard to the observations made by Dr. Wickremasuriya on October 23rd and December 17th, it will be noticed that the facts observed by him are quite consistent with a conception about August 9th, as the child would have been on the respective dates in the 15th week (104th day) and 23rd week (159th day) of gestation calculated from the first date of the last menstrual period. Moreover, Dr. Wickremasuriya himself admits that "there is some disagreement among authors of text books" with regard to the height of the uterus at various stages of pregnancy.

With regard to the observations at the time of delivery it has to be noted that in his evidence Dr. Wickremasuriya generally qualifies his statement that the child was fully developed by adding the words "for all practical purposes." Moreover, he does not state the weight precisely but takes care to say that so far as he recollected the child weighed 6½ lbs. Dr. Wickremasuriya stated that he had a good look at the child, as he knew "the case would come to court" but added that he did not adopt anyone of the "various other special methods" for ascertaining whether it was

a full term child. He admitted further that he failed to measure the length of the child. In this connection it has to be noted that according to Johnstone (Text Book of Midwifery, 9th Edition, page 93) "most observers lay more stress upon length than upon weight." Dr. Wickremasuriya gave his opinion that the child might have been conceived roughly about July 18th.

In assessing this opinion it has to be borne in mind that Dr. Wickremasuriya agreed with the views expressed in the following passage at page 47 of Vol. II of Taylor's "Principles and Practice of Medical Jurisprudence" (Ninth Edition) *viz:*

> "The most progressive stage of development is considered to be during the last two months of gestation — the changes which the foetus undergoes are greater and more marked at this than at any other time. The general opinion is that an 8 months child is not with any certainty to be distinguished from one born at the 9th month."

The months mentioned in the above passage are clearly calendar months. Dr. Wickremasuriya agrees further that a child with an uterine existence of 252 days may be a fully developed child. A baby conceived as the result of a coitus on August 9th 1941, and born on March 26th 1942, would have had a uterine existence of nearly 228 days. In making a comparison between such a baby whose date of conception is ascertained by reference to the date of coitus with the cases referred to in the text books or mentioned in records kept in hospitals it should be remembered that the period of gestation in those cases is calculated with reference to the menstrual period. Therefore, for the purpose of comparison the period of gestation of the baby conceived as the result of a coitus on August 9th, 1941, should be calculated as from July 11th, 1941, the first date of the last menstrual period and then the gestation period would be 258 days or over eight calendar months. Such a baby according to Taylor cannot be distinguished with any certainty from a full term baby (See also Taylor (9th Edition) Vol. I page 153).

Dr. Attygalle gives the date of conception as 270 to 275 days before the date of delivery though most of the text book writers mention the lowest limit as 265 days. Dr. Attygalle would thus fix the period between June 24th and June 29th 1941. He says then that he would allow as the extreme limits of variability "two weeks on either side" (marginal page 360). This would fix the latest date of conception according to him as July 13th, 1941.

He says (marginal page 385) that he does not base his opinion "on the features only but on the general observations (Dr. Wickremasuriya) made during the pregnancy period." He says definitely that "it is impossible in the case of a child conceived on August 9th for the uterus to have reached up to four finger breadths above the symphasis on October 23rd." No importance can be attached to this expression of view as he says later (marginal page 387) that he is unable to say what a "four-finger breadth space" is and suggests to cross-examining that he should ascertain it by measuring Dr. Wickremasuriya's fingers.

The method of measurement adopted by Dr. Wickremasuriya was undoubtedly unreliable for the purposes of forming a correct opinion. Paul Titus (The Management of Obstetric Difficulties, 2nd Edition page 111) says:

> "The height of the fundus of the uterus gives valuable information about the duration of the pregnancy, especially if measured routinely at frequent intervals, as, for example, at each antepartum visit."
>
> "These measurements must always be taken from the fixed point of the upper edge of the symphysis pubes, by means of a pelvimeter or similar caliper, in order to have any degree of accuracy or scientific uniformity. It is futile to attempt any estimations of the period of gestation or probable date of confinement by such methods as the number of 'finger-breadths' above the symphasis, or below the ensiform."

Moreover, even where the measurements are accurate any opinion based on them must be qualified. De Lee & Greenhill (Principles and Practice of Obstetrics, 8th Edition page 65) says:

> "Conclusions as to the duration of pregnancy based on the height of the fundus above the pubes must be carefully qualified.....Naturally the accuracy of terminating the duration of pregnancy is not great, being disturbed by the inconsistency of the location of the umbilicus, the elasticity of the belly wall, intra abdominal conditions, the amount of liquor amnii, the size of the child, its position and other factors. The shape and size of the trunk alter uterine relations."

With regard to the hearing of foetal heart beats on December 17th, Dr. Attygalle says it is an "impossibility" in the case of a child conceived about August 9th (marginal page 385) but immediately after he says, "very rarely it may be possible." Later, when he is questioned about it, he recedes so much from the first view of "impossibility" that he corrects counsel by saying that his earlier answer was "not likely" (marginal page 388). Still later he concedes that "probably" the heart beats could have been heard on December 17th.

Dr. Attygalle accepts the view expressed in the passage cited above from Taylor's "Principles and Practice of Medical Jurisprudence" and agrees that he cannot "say without very close observation the difference between a child born in the eighth calendar month" and a child born in the ninth calendar month (marginal page

389). He says again that "any boy born in the ninth or tenth month (lunar month) will have the same characteristics as a full term child" (marginal page 401). He agrees (marginal pages 403 and 404) with the following opinion given at page 95 of Johnstone on "Midwifery":

> "That pregnancy followed by the birth of a fully developed child, may be prolonged or abbreviated is an observed fact.....fully developed children have been recorded as being born after gestation as short as 240 days and as long as 314, 320 and even 331 days from the *commencement of the last period.*"

Now, the periods given by Johnstone are clearly periods calculated from the last menstrual period, Dr. Attygalle himself admits (marginal page 400) that "medical science and authorities have given the characteristics of children reckoned from the notional date." A child born on March 26th 1942, as the result of a coitus on August 9th 1941, would be a child with a gestation period of about 258 days reckoned from the last menstrual period and could, therefore, according to Johnstone's view be a fully developed child.

Dr. Navaratnam says (marginal page 419) that the conception must have been "somewhere about the 19th June" and is prepared to allow two weeks "this way and that way." This would fix the period of conception roughly between June 5th and July 3rd. Later he says more definitely (marginal page 429) that the child could not have been conceived "later than the end of June." Judging solely by the height of the uterus observed by Dr. Wickremasuriya on October 23rd he thinks that the conception must have been between July 1st and 19th, but admits that the height of the uterus is not determined solely by the period of pregnancy and is liable to individual variations. He concedes that foetal heart beats could be heard after the 20th week. He says (marginal page 426) that with a normal monthly cycle and proper ovulation he would have no difficulty in distinguishing between two children born in the ninth calendar month if their periods of uterine existence differ by more than two weeks. When he is asked whether the position would be different if he was considering the case of an irregularly menstruating woman his reply is, "in the case of an irregularly menstruating woman we go by other data."

Dr. Navaratnam adds to the complexity of the problem when he seems to say (marginal page 429) that in the case of a woman with an irregular cycle, the period of gestation should not be determined from the last menstrual period.

Dr. Thiagarajah says the child "forms the characteristics of a full term child in the 36th week" of gestation reckoned from the last menstrual period and that "the subsequent development of the child is in growth and weight not in characteristics." He draws further an inference from the weight of the child that it had a premature delivery caused by the rupture of the membrane which even according to Dr. Wickremasuriya may have hastened the arrival of the baby by about ten days. Dr. Wickremasuriya has stated in evidence that the weight of Hortense the first child of the plaintiff was "somewhere between six and seven, nearer seven." Dr. Thiagarajah says, that generally "subsequent" babies are heavier" and the fact that the child in question weighed less than Hortense tends to prove that this child was born prematurely. His position is (marginal page 846) that, if the last menstrual period is July 11th to 14th, it is impossible to say that a coitus on August 9th could not have "produced this child."

The first defendant denies that he is the father of the child on the sole ground that he had no access to the mother at any time when the child could have been begotten. Could it be said that the medical evidence proves that Joseph Richard could not have been begotten on August 9th? To say so, the medical opinion must be clear and decisive. In this case the opinions of the doctors are at times conflicting where they are not hesitating and doubtful. There are, moreover, the opinions of the text book writers which throw a great deal of doubt on the case of the first defendant.

It was pointed out by counsel for the first defendant that the present case was distinguishable from *Gaskill vs Gaskill* (1921 Probate 425) and *Clark vs Clark* (1939–2 All England Reports 59) as in each of these cases no evidence was led to show that the wife had a lover and the charge of adultery was based solely on the abnormity of the period of pregnancy. But the period in this case is neither so low as in *Clark vs Clark* (*supra*) nor so abnormally long as in *Gaskill vs Gaskill* (*supra*). The period of pregnancy here being 228 days, the improbability of Joseph Richard having been begotten on August 9th 1941, is comparatively slight. A child born to a woman during the subsistence of a valid marriage, cannot, I think, be made a bastard on such evidence as is given by the experts in this case. The fact that during the material period of time the plaintiff was on terms of intimacy with the second defendant does not of course entitle the first defendant to ask a court to hold that he is not the father of the child, if he had access to the mother at a time when the child could have been begotten.

In *Cope vs Cope* (1833–1 Moody & Robinson 269), Alderson, J. said:

> " If you are satisfied that the husband had sexual intercourse with his wife, the presumption of legitimacy is not to be rebutted by its being shewn that other men also had intercourse with the woman. The law will not, under such circumstances, allow a balance of the evidence as to who is most likely to have been the father."

That passage was cited with approval in *Warren vs Warren* (1925 Probate 107).

I hold that the first defendant has failed to prove that Joseph Richard is not his child.

There remains for consideration the question of damages. The damages awarded in a divorce action are compensatory and not punitive. The two main considerations governing the award of such damages are (*a*) the actual value of the wife to the husband and (*b*) the proper compensation to the husband for the injury to his feelings, the blow to his marital honour and the loss to his matrimonial and family life (*De Silva vs De Silva* (1925–27 New Law Reports 289 at 310). The District Judge says that "the actual value of this wife to this husband is nil." As regards the second consideration for the award of damages there is no doubt that the second defendant has betrayed the trust reposed in him by the first defendant. On the other hand, the first defendant has acted very indiscreetly. He encouraged the second defendant — a man of a different race and different creed — to be on the terms of closest friendship with his wife, although the second defendant's wife who is not a Purdah lady refrained from visiting his wife. He placed himself and his wife under obligation to the second defendant. He asked the second defendant to call at " Merlton " during his absence in Jaffna and he did all this though he knew before he left for Jaffna that there had been ugly rumours about the plaintiff (*vide* p. 26). He knew that his mother and plaintiff's father had spoken to plaintiff about these rumours, but he paid no heed to them. In his letter to his mother he said, " All I ask is to be allowed to live my own life in my own way." There is, I think, in this case evidence of carelessness and neglect on the part of the husband in not determining the close association of the second defendant with the plaintiff. The second defendant gets about Rs. 1,000 a month. He has to support his wife and seven children. He has no property and no other source of income. He is in debt and his cheques have been dishonoured. His credit is so low that he is compelled to go to Afghan money-lenders for loans of money.

Taking into consideration all these circumstances and also the damages usually awarded in our courts, I think the second defendant has been ordered to pay excessive damages. As my brother thinks, however, that substantial damages should be given in view of the fact that certain suggestions were made against the first defendant in the District Court, I agree to his assessment of the damages at Rs. 10,000.

I have to refer to two incidental matters at this stage.

When Dr. Thiagarajah was being cross-examined the trial judge put to him the question: " You deny that you have been twisting medical opinion to set up a theory ? " The witness replied, "Yes, I must emphatically protest if any such suggestion is made." The judge thereupon, informed the witness that " no such suggestion has yet been made." In the course of his judgment the judge says about Dr. Thiagarajah: " His cross-examination clearly shows his partisanship and how when dislodged from one point he took refuge behind another. I further hold that being entirely biassed in favour of the side which retained him he has in this case tried to twist scientific facts in order to accord with his theories which he thought would help the plaintiff's case." Dr. Thiagarajah must have been upset by the remark made by the judge when he was under cross-examination. He has no doubt shewn some irritation and impatience under the stress of a long cross-examination though to a less degree than a medical witness called by the first defendant. Some confusion has been created by the failure sometimes to formulate with precision the questions put to medical witnesses. This resulted often in those witnesses understanding a question in a sense different from that intended by the party putting the question. I have examined the evidence of Dr. Thiagarajah and I think I should say in fairness to him that I have no doubt that he gave his opinion in good faith. I may add that I hold the same view with regard to the other medical witnesses.

When the first medical witness, Dr. Wickremasuriya, was giving evidence he was cross-examined by the counsel for the first defendant on an article contributed by Dr. Theobold to the British Medical Journal. Later, when Dr. Attygalle was under cross-examination, it transpired that Dr. Theobold was in Ceylon at the time having come here on a visit. Thereafter, the first defendant filed a list of witnesses containing the name of Dr. Theobold and moved to call him as an expert. Acting under section 175 of the Civil Procedure Code the District Judge refused the application. The counsel for the plaintiff appearing before us applied for leave to call Dr. Theobold even at this stage. In the course of his argument the counsel for the first defendant stated that he would not object to the application. I would have granted

it in the exercise of the powers vested in this court under section 773 of the Civil Procedure Code if the medical evidence led in the case was less uncertain and vague and thus made it desirable to admit the evidence of Dr. Theobold in the interests of the child.

To sum-up, I hold (*a*) that the first defendant has proved the charge of adultery; (*b*) that the first defendant has failed to disprove the legitimacy of Joseph Richard; and (*c*) that the damages should be reduced to Rs. 10,000. The District Judge will have to consider the questions of custody and alimony in respect of Joseph Richard.

I think that under section 612 of the Civil Procedure Code the second defendant alone should have been made liable for the costs of the first defendant. Such costs should not include any expenses incurred by the first defendant in placing before the court the evidence of Dr. Attygalle and Dr. Navaratnam and in respect of the relative proceedings in court as these witnesses were called solely for the purpose of giving expert evidence on the question whether Joseph Richard was a legitimate child. Each party will bear his or her own costs of appeal.

The decree of the District Court will stand subject to the modifications indicated in the two preceding paragraphs.

CANNON, J.

I agree with the conclusions reached by my brother Wijeyewardene, J. I wish to add something about the medical evidence. The learned District Judge thought that Dr. Thiagarajah was a partisan and a biassed witness, and that he had, in consequence, unconsciously strained scientific facts to suit his theories. Mr. Nadarajah asked us to review this criticism, submitting that it was not deserved. The judge based his criticism on the way Dr. Thiagarajah gave his evidence on three aspects of pregnancy, as regards which the judge remarks :

> (1) "He has (perhaps unintentionally) twisted science in order to suit his theories regarding irregular and regular menses, and on the question whether there can be menstruation without ovulation. He first said that menstruation did not depend on ovulation. He then changed that by saying 'You may get menstruation without ovulation and ovulation without menstruation and that for menstruation to take place ovulation may precede it'."
>
> (2) "When he realized that the insemination delivery period might be an important factor in this case, he tried to trim down the effect of Dr. Wickremasuriya's evidence that the I.D.P. is from 265 to 270 days."
>
> (3) "It is a medical axiom that if the membranes rupture before the os dilates, it is called a 'premature rupture,' but Dr. Thiagarajah had the hardihood to suggest that the word 'premature' as used in this connection, meant premature delivery, and had nothing to do with a stage in the labour."

On going through the record of the evidence of Dr. Thiagarajah and, indeed, of all the expert medical witnesses, one is struck by how frequently counsel and the witnesses are at cross-purposes owing to the way in which medical terms were ambiguously used, not only in the questions and answers but also by the writers of the scientific text-books, which were being frequently cited. The word "menstruation," for instance, has different meanings. Such bleeding may be ovulating (called "proper" menstruation) or anovulating (called "pseudo" or "abnormal" menstruation). To the layman such words as "gestation," "fertilization," "conception," may each convey one and the same idea; but to the medical profession each of these words may have more than one meaning. Because the different senses in which such words are used were not sufficiently emphasized in the text-books and in the evidence, confusion of thought was bound to arise, and I am inclined to think that on that account false impressions were sometimes created.

The insemination delivery period of 265-270 days from coitus, given by Dr. Wickremasuriya, was based on the assumption that ovulation occurred about the fifteenth day of the menstruation cycle, but Dr. Thiagarajah was of opinion, like Dr. Wickremasuriya, that ovulation could occur on any day of the menstruation cycle, in which case the insemination delivery period could be from 250 days. It was this way that he appears to have "qualified" Dr. Wickremasuriya's evidence. There was an apparent contradiction in terms, when Dr. Thiagarajah said that the insemination delivery period had no relation to the last menstrual cycle. The context of his evidence, however, indicates that he must have meant that the gestation itself was unaffected by the menstrual cycle. The number of days of the insemination delivery period is admittedly calculated with reference to the last menstrual period. Here the word "cycle" has been loosely used for the word "period."

Dr. Thiagarajah drew a distinction between what he termed a "premature" rupture of the membrane and an "early" rupture. He said that an untimely rupture was called "premature" when it occurred before the onset of labour, and "early" when it happened after such onset, his point being that a premature rupture was likely to hasten birth, while an early one would not. This provoked the judge's comment quoted above.

But the authors of "Midwifery" by Ten Teachers use the same language as Dr. Thiagarajah to distinguish premature rupture before and after labour has begun. And in an article on the subject in "The Journal of Obstetrics & Gynaecology of the British Empire" (Vol. 50, No. 5, published in October 1943), Dr. D. S. Greig, the Medical Officer of a Maternity Hospital, reviews 320 cases and makes the following definition :

> " Premature rupture of membranes is defined as having taken place when the rupture of the membranes precedes labour pains, recognized and acknowledged by the patient."

Apparently the degree of prematurity in relation to its effect is expressed by some medical men by the use of the words "premature" and "early."

It is clear that Dr. Thiagarajah said that premature rupture of the membranes means premature delivery, but here again the context shows that he did not intend this answer to be taken literally, for he had just before stated that such a premature rupture "generally indicates premature delivery." If for the word "means" he had said "generally indicates," he would obviously have more accurately expressed what was in his mind.

The learned judge's criticism of Dr. Thiagarajah appears to arise from contradictions in the evidence due not to equivocation by Dr. Thiagarajah but to the equivocal nature of the medical terms which were being quoted from scientific books by counsel and sometimes put to the witnesses in a univocal sense. This resulted in the evidence not only of Dr. Thiagarajah but of all the expert medical witnesses being sometimes apparently contradictory and therefore confusing. Taking the record of the evidence of Dr. Thiagarajah as a whole and reading it in the light of the phrasecological inexactitudes mentioned, I am left with the impression that Dr. Thiagarajah was giving a *bona fide*, though sometimes obscure, expression of his views on the scientific data.

*Judgment and decree varied.*

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*Present:* HOWARD, C.J.

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## DHARMASENA vs ARIYARATNE

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*S. C. No. 97—M. C. Galle No. 43651.*
Argued on 23rd February, 1945.
Decided on 5th March, 1945.

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*Control of Prices Ordinance, No. 39 of 1939—Order fixing maximum prices for thread and requiring every trader who sells thread to exhibit notice setting out prices so fixed—Failure to exhibit notice—No proof that thread actually sold—Validity of conviction.*

An order fixing maximum prices for thread under the Control of Prices Ordinance required every trader who " sells " thread to exhibit a notice setting out the prices so fixed. The accused was convicted with having failed to exhibit the notice. There was no proof that he sold thread to any person on the premises.

**Held :** That an actual sale of thread must be proved and that proof of mere exposure for sale is not sufficient to justify a conviction.

*M. C. Abeywardene*, for the appellant.
No appearance for the Attorney-General.

HOWARD, C.J.

The appellant in this case was charged and convicted of being a trader who sells (1) Taj Mahal Thread, (2) Telephone Thread, and fails to exhibit in a conspicuous place in his premises within the Municipal limits of Galle a notice setting out the maximum prices fixed for the said articles in breach of regulation 5 of the order published in the Government Gazette No. 9201 of the 19th November, 1943. There was a similar charge and conviction in respect of shaving soap.

The Crown tendered evidence to the effect that the articles in question were exposed for sale in the premises of the appellant who kept a bakery. There was no proof of an actual sale to any person who had come on to the premises to buy one of these articles. In these circumstances counsel for the appellant has argued that the conviction cannot be maintained. It would appear that the matter is covered by authority. In S. C. No. 994, M. C. Negombo No. 42647* argued and decided on the 17th January, 1945, Cannon, J. has held that an actual sale must be proved and a mere exposure for sale of articles

does not constitute an offence. I see no reason for not following the judgment of Cannon, J. It would be a very simple matter for those who are responsible for the control of prices to have an amending regulation enacted which makes it an offence to expose articles for sale without a notice setting out the maximum prices. In the circumstances the appeal is allowed and the conviction set aside.

*Appeal allowed.*

* *Present:* CANNON, J.

P. S. 2095 DASSANAIKE vs SILVA

*S. C. No.* 994—*M. C. Negombo No.* 42647.
Argued & Decided on 17th January, 1945.

*Mackenzie Pereira*, for the accused-appellant.
*M. P. Spencer, Crown Counsel*, for the Crown-respondent.

CANNON, J.

The appellant was summoned for, that he being a trader in thread, failed to exhibit in a conspicuous position a notice setting out the maximum controlled price of Telephone Brand thread, in breach of Condition V of the orders made under section 3 of Ordinance 39 of 1939 by the Controller of Prices (Miscellaneous Articles).

The evidence shows that there were 14 balls of such thread in the show case in the appellant's boutique, and that there was no maximum controlled price of the thread exhibited in the boutique. The magistrate convicted the appellant. He appeals on the ground that as no sale of the thread took place he was not guilty of any offence under Paragraph V, which has been, I think, erroneously described as a condition in the summons. By Paragraph V the Controller directs in the following words: "That any trader who at any premises sells any thread of the description and grade specified in the schedule hereto shall exhibit in a conspicuous position at those premises a notice in which there shall be set out the maximum price fixed by this order in respect of that description and grade."

It is not disputed that the thread in question is of the description and grade mentioned in the schedule; or that there was no sale; but it is contended against the appellant that the exposure of goods for sale brought him within the terms of the order.

Only one authority has been cited to me, namely, *Pakiampillai vs Merry* (44 N.L.R. 142). In that case Wijeyewardene, J. expressed the opinion that it was not necessary for the purpose of a prosecution of this nature to prove a contract of sale "enforceable by action" within the meaning of section 4 of the Sale of Goods Ordinance. That case, however, is distinguishable from this. In that case there was a transaction of sale and in this there was no such transaction at all. In that case the learned judge undoubtedly meant to say that where there has been what purported to be a transaction of sale, then whether or not it might prove ultimately to be a defective contract, this would not affect the vendor's liability under the Ordinance in question. That case is, therefore, not an authority for the submission of the respondent. For the Crown it has also been suggested that the words in paragraph 5, "any trader who sells any thread" are words of description meaning any trader whose business includes the selling of thread, and do not mean that an actual sale is required. Reference to paragraphs 3, 4 and 6 of the order shows, however, that the draughtsman was referring to the transaction of sale, not to the description of the vendor. Paragraph 3 states that "any sale of any thread shall be deemed" etc. Paragraph 4 says that "every person who sells any thread" shall give a receipt for the amount. Paragraph 6 directs that "every trader who has sold thread in the 3 months prior to the date of the order shall" etc.

As regards the argument that the word "sells" in paragraph 5 is meant to catch up an exposure for sale, one must look to the rules for the interpretation of statutes. But, first of all, a reference to two important English statutes may be helpful. Their phraseology indicates that the legislature was treating the word "sells" as a transaction quite distinct from exposure for sale. In the Food and Drugs Act 1938, section 1 (ii) reads as follows: "No person shall sell, or have in his possession for the purpose of sale, any food or drug" etc. In the Fertilizers and Feeding Stuffs Act 1926, section 7 (i) reads: "Any person who sells or offers or exposes for sale for use as food etc., or has in his possession, packed and prepared, for sale for such use" etc. Maxwell on the Interpretation of Statutes, compendiously summarizes the principles applicable to this case. In the 8th edition at p. 231, appears the following: "Where an enactment may entail penal consequences, no violence must be done to its language to bring people within it who is not within its express language. To determine that a case is within the intention of a statute, its language must authorize the court to say so, but it is not admissible to carry the principle that a case which is within the mischief of a statute is within its provisions so far as to punish a crime not specified in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated."

I think the exposure of this thread for sale was within the mischief aimed at by this Order, but the Order does not say so. For the above reasons I am unable to read into the word "sells" the words "exposed for sale." The appeal must be allowed and the conviction quashed.

*Appeal allowed.*

*Present:* WIJEYEWARDENE, J.

## PERERA vs NONAHAMY

*S. C. No.* 302—*Workmen's Compensation No.* C3/58/43.
Argued on 18th May, 1945.
Decided on 21st May, 1945.

*Workmen's Compensation Ordinance* (*Chapter* 117) *Schedule II section* 1—*Person employed in loading and unloading goods from lorry—Is he a person employed in connection with the "operation" of the lorry.*

**Held :** That the word "operation" in schedule II section 1 of the Workmen's Compensation Ordinance includes such activities as the loading and unloading of goods in the case of lorries "used for the carriage of.....goods for hire, or for industrial or commercial purposes," and that a person so employed is a "workman" within the meaning of the Ordinance.

**Cases referred to:** *Manicam vs Sultan Abdul Cader Brothers* (1936 – 38 N.L.R. 28) *

*H. V. Perera, K.C.*, with *N. M. de Silva*, and *G. T. Samarawickrema*, for the defendant-appellant.

*S. W. Jayasuriya*, for the applicant-respondent.

WIJEYEWARDENE, J.

This is an appeal against an order made by the Commissioner under the Workmen's Compensation Ordinance awarding compensation to the applicant-respondent as the dependant of one Noris who died in consequence of injuries sustained by him while travelling in motor lorry No. Z4225.

It was argued in appeal (i) that the appellant was not the employer of Noris and (ii) that Noris was not a workman within the meaning of the Ordinance.

I hold against the appellant on the first point, as there is evidence in the case to support the finding of the Commissioner.

As regards the second point the evidence of the applicant and some of her witnesses was that Noris worked in the motor lorry loading and unloading goods and that he was employed also as a cleaner of the lorry. Reading the judgment as a whole I have no doubt that the Commissioner accepted that evidence, but towards the end of his order he said, "At the time of his (Noris') death he was engaged in work connected with the unloading of goods from the lorry Z 4225 and in view of this the deceased was a workman." Basing his argument on this paragraph in the order, the counsel for the appellant contended that the Commissioner has accepted only the evidence that Noris was employed in the loading and unloading of goods and that on that finding Noris could not be regarded as a workman. His argument was briefly as follows: The Ordinance mentions clearly in schedule II the only persons who could be regarded as workmen. The section of that schedule applicable to the present case is section 1 which refers to persons "employed, otherwise than in a clerical capacity, in connection with the operation or maintenance of any mechanically propelled vehicle ( including a tramcar ) used for the carriage or conveyance of passengers or goods for hire, or for industrial or commercial purposes." A man employed in loading and unloading goods cannot be regarded as a person employed in connection with the "operation" of the lorry, as that word refers to the actual mechanical propulsion of the lorry.

I am unable to entertain that argument. If the word "operation" in that section has the limited meaning sought to be given to it, there was no necessity for the express provision in that section excluding those employed in a "clerical capacity." I think the word "operation" is used in a much wider sense and includes such activities as the loading and unloading of goods in the case of lorries "used for the carriage of .....goods for hire, or for industrial or commercial purposes." I am in respectful agreement with the view taken by Soertsz, J. in *Manicam vs Sultan Abdul Cader Brothers* (1936 – 38 N.L.R. 28). *

I dismiss the appeal with costs.

*Appeal dismissed.*



* 5 C.L.W. 61 (Edd.)

*Present:* WIJEYEWARDENE, J.

## NANAYAKKARA vs THE G.A., WESTERN PROVINCE

*S. C. Application No. 95 A of 1943.*

*In the matter of an Application for an order on the Postmaster-General to produce an original telegram in connection with an Application for a Writ of Mandamus or in the alternative for a Writ of Certiorari under section 42, Chapter 6 of the Legislative Enactments, on the Government Agent, Western Province and W.K. Daniel of "Anoma," Edmonton Road, Kirillapone, Nugegoda.*

Argued & Decided on 21st May, 1945.

Reasons delivered on 23rd May, 1945.

*Application for an order on the Postmaster-General to produce a telegram—Inherent powers of the Supreme Court—Principle governing their exercise.*

**Held :** That, in the absence of any applicable statutory provision, empowering the Supreme Court to order the production of a telegram in the custody of the telegraph authorities the court will not order such production in the exercise of its inherent powers.

Per WIJEYEWARDENE, J.: "It is a sound legal principle that a decision given in the exercise of such powers should not be inconsistent with the express intention of the legislature."

**Cases referred to :** *Tomline vs Tyler* (1880 - 33 L.T.R. 187).

*H. W. Jayawardene*, in support.
*H. A. Wijemanne, Crown Counsel*, for the Crown.

WIJEYEWARDENE, J.

The petitioner applies for an order on the Postmaster-General to produce the original of a telegram alleged to have been sent by one D. J. Wijeyeratne to the Government Agent, Western Province, on December 11, 1944. The present application is an incidental step in the proceedings instituted by the petitioner against the Government Agent, Western Province and another praying for a Writ of Mandamus or in the alternative for a Writ of Certiorari under section 42 of the Courts Ordinance.

The petitioner's counsel was unable to cite any statutory provision other than section 67 of the Criminal Procedure Code which empowers this court to make an order in respect of a telegram in the custody of the telegraph authorities. That section refers to proceedings under the Criminal Procedure Code and is inapplicable to the present proceedings. The petitioner's counsel invited me to grant the application "in the exercise of the inherent powers of this court." It is a sound legal principle that a decision given in the exercise of such powers should not be inconsistent with the express intention of the legislature. Now rule 171 of the Ceylon Telegraph Rules made under section 5 of the Telegraph Ordinance (*vide* Subsidiary Legislature of Ceylon Vol. 2 p. 386) provides that "the originals or copies of telegrams shall not be shown, or the contents communicated, to any person other than the sender or the addressee after proof of identity, or the authorized representative of either of them." Effect has to be given to that rule except in those cases where its operation has been limited by some other provision of the law. It has to be noted that the English cases (*e.g. Tomline vs Tyler* (1880) 33 L.T.R. 187 at 188) with regard to the production of telegrams are not of assistance in deciding the present question as section 23 of the Telegraph Act 1869 (32 & 33 Victoria c.73) places officers of the Post Office under the same obligation as any other person to produce "in any court of law when duly required so to do any written or printed message or communication."

For the reasons given above I refuse the application.

*Application refused.*

*Present:* DIAS (Commissioner of Assize)

## THE KING vs THELENIS APPUHAMY & OTHERS

*Application under section* 224 (1) *of the Criminal Procedure Code.*
Argued on 4th June, 1945.
Decided on 5th June, 1945.

*Criminal Procedure Code sections* 165 *B and* 224 (1).

The accused had elected to be tried by a Tamil-speaking jury. Application was made by the Crown for an order under section 224 (1) of the Criminal Procedure Code directing that the accused be tried by an English-speaking jury. It was urged that the accused were Sinhalese and that all the witnesses were Sinhalese and that there was no special reason why the accused should be tried by a Tamil-speaking jury. It was also urged that a great deal of time would unnecessarily be taken up in trying the prisoners if a Tamil-speaking jury were empanelled.

The court made order directing that the accused should be tried by an English-speaking jury.

*H. H. Basnayake, Acting Solicitor-General,* with *P. S. W. Abeywardene, Crown Counsel,* for the Attorney-General.

*Nihal Gunasekera,* for the respondents.

DIAS (Commissioner of Assize)

In the Magistrate's Court the prisoners, who are all Sinhalese, elected under section 165 B of the Criminal Procedure Code to be tried by a Tamil-speaking jury. The Solicitor-General has moved the court under section 224 (1) for a direction that the trial should take place before an English-speaking jury.

It is submitted on behalf of the prosecution that the prisoners and all the witnesses are Sinhalese. It is urged that if the trial takes place before a Tamil-speaking jury every question put to the witnesses will have to be translated from English into Tamil for the benefit of the jury, and into Sinhalese so that the witness may understand the question. Furthermore, the evidence would have to be interpreted from the Sinhalese language to English which is the language of the court and then to Tamil. The Crown submits that the resultant delays in the progress of the trial would, while amounting to a waste of public time, confer no corresponding advantage on the accused. It is also submitted that no adequate reasons have been shown why these Sinhalese accused should be tried by a Tamil-speaking jury.

Counsel for the accused informed the court that the accused persisted in their desire to be tried by a Tamil-speaking jury ; and that he was instructed that his clients fear that "a Sinhalese-speaking jury will be influenced by the other side." The accused, however, did not anticipate that such a thing would happen were the trial to take place before a Tamil-speaking jury. Counsel suggested that it might be possible to select from amongst the Tamil-speaking jurors some gentlemen who could speak English, so that the double interpretation might thereby be avoided.

The last suggestion cannot be entertained. It would be quite improper and irregular to select English-speaking persons from amongst a panel of Tamil-speaking jurors and then treat them as if they were an English-speaking jury. The court cannot be a party to such an arrangement. If a Tamil-speaking jury is summoned, they must be treated as such. The jurors must be selected by lot in the usual way regardless of whether they can speak English and the questions to the witnesses, the evidence, the speeches of counsel and the summing-up must all be interpreted to them in Tamil.

A question similar to that which has now arisen was recently decided by me,* and what I then decided applies to the facts of this case. Under section 165 B when a prisoner elects his jury he " shall be *bound* by and *may* be tried " according to his election, subject, however, in all cases to the provisions of section 224. Section 224 (1) provides that the jury shall be taken from the panel elected by the accused, " *unless the court otherwise directs.*" A judicial discretion is thus vested in the trial judge as to whether he will " otherwise direct."

I cannot see on what grounds these accused fear that a Sinhalese-speaking jury would be influenced by " the other side." I presume the " other side " refers to the private aggrieved parties and not to His Majesty's Attorney-General who is the " other party " to this case. No affidavit has been filed or other evidence placed before me to show that these accused entertain any reasonable grounds for their fears. There is no material whatever before me to show that

the fears entertained by the accused have any reasonable foundations in fact. One must assume that jurors are honest men. If the trial lasts for more than one day, the oath of separation will be administered to the jury under section 241 (2). In proper cases the court is empowered by section 241 (1) to direct that the jury shall be kept together during any adjournment. If a juror is proved to have held any improper communication with a person other than a fellow juror before the verdict is given, he renders himself liable to the penalties of contempt of court — section 241 (3). If a Sinhalese-speaking jury can be tampered with, what reason is there for supposing that a Tamil-speaking jury or an English-speaking jury for a matter of that, will be immune from such attempts ? I am clearly of the view that the reason given by the accused for their election of a Tamil-speaking jury does not carry conviction.

After careful consideration I am compelled to hold that no reasonable grounds exist for the apprehensions of the defence. Convenience demands that this trial should take place before an English-speaking jury, particularly as no prejudice whatever will be caused to any of these prisoners by being so tried. Had the accused elected to be tried by a Sinhalese-speaking jury, an application by the Crown for a trial by some other jury would require cogent grounds to succeed. In this case the attitude of the accused is unreasonable, while the position taken up by the Crown is both fair and reasonable. I, therefore, think that this is a case in which the court ought to exercise its discretion under section 224 (1).

I, therefore, direct that this trial shall be held before an English-speaking jury.

*Application allowed.*

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## *IN THE COURT OF CRIMINAL APPEAL*

*Present:* Soertsz, S.P.J. (President), Keuneman, J. & Wijeyewardene, J.

## REX vs FERNANDO

*Application No. 28 of 1945—S. C. No. 3—M. C. Colombo No. 32915.*
Argued on 14th May, 1945.
Decided on 17th May, 1945.

*Court of Criminal Appeal—Evidence of witness called by the Crown and then dealt with as adverse—Must it be excluded from the case—Meaning of the words "without premeditation" in Penal Code section 294, exception 4—Misdirection.*

**Held :** (i) That the fact that a witness is dealt with as adverse and cross-examined to credit, in no way warrants a direction to the jury that they are bound in law to place no reliance on his evidence.

(ii) That an explanation of the word "premeditation" in exception 4 to section 294 of the Penal Code as if it was synonymous with "intention" is a misdirection.

**Cases referred to :** *Profulla Kumar Sakar vs Emperor* (A.I.R. 1931, Cal. 401).

*H. V. Perera, K.C.*, with *Nihal Gunasekera*, and *S. W. Jayasuriya*, for the appellant.
*E. H. T. Gunasekera, Crown Counsel*, for the Crown.

Soertsz, S.P.J. (President)

The appellant and another were put on their trial on a charge of murder. The jury returned a unanimous verdict acquitting the other accused and finding the appellant guilty of the offence charged. The main points counsel for the appellant submitted for our consideration were :

(*a*) That the jury were wrongly directed in that the evidence of Wijepala called by the Crown and treated by it, with the permission of the court, as an adverse or hostile witness, was submitted by the judge for the consideration of the jury. Counsel's contention was that Wijepala's evidence should have been excluded altogether and that, if that had been done, there was no other evidence to go to the jury in support of the charge.

(*b*) Alternatively, that in view of the fact that Wijepala began his evidence at the trial by recanting a substantial part of the evidence given by him in the court below, to the effect that the assailant of the deceased was the appellant, and reverting to that statement only when he was treated as an adverse witness and confronted with his deposition in the court below, there was non-

direction when the trial judge failed to caution the jury to examine his evidence critically, and to invite their attention to the contradictory and otherwise unsatisfactory nature of his evidence at the trial.

(*c*) That the judge, as it would appear from his charge, having formed the view that corroboration of Wijepala's evidence was necessary, misdirected the jury by telling them that such corroboration was forthcoming from the fact that Wijepala was clearly shown to have been present on the scene.

(*d*) That the trial judge misdirected the jury in regard to the operation of exception 4 under section 294 of the Penal Code by the terms of his explanation of the words " without premeditation " and by telling them that if they were not satisfied that the appellant was acting without premeditation in the meaning of the words as given by him to them, they need not address themselves any further to a consideration of that exception.

(*e*) Counsel also submitted that the charge taken as a whole must have served to confuse rather than assist the jury, and he asked for a retrial.

To deal with the last objection first, we find that although parts of the charge were somewhat obscure and misleading, it is quite impossible for us to hold that, in consequence, there was such a miscarriage of justice as counsel contends there was.

In regard to (*a*) we are in respectful agreement with the view taken by a Full Bench of the Calcutta High Court in *Profulla Kumar Sakar vs Emperor* (A.I.R. 1931 Cal. 401) that the fact that a witness is dealt with as adverse and is cross-examined to credit, in no way warrants a direction to the jury that they are bound in law to place no reliance on his evidence. It is for the jury to examine the whole of the evidence of such a witness so far as it affects both parties favourably or unfavourably for what, in their opinion, it is worth. We, therefore, rule that the evidence of Wijepala was rightly admitted for consideration by the jury.

As for contention (*b*), although we are of opinion that some part of counsel's criticism of the charge was justified, we find that, on the whole, the jury had before them in consequence of the examination-in-chief and cross-examination of that witness, all the assistance necessary to enable them correctly to appraise the value of that evidence, for the trial judge, although he indicated his own view of that evidence, quite clearly directed the jury that they were not bound by his view but could form their own upon the evidence.

In regard to (*c*) we agree that the judge's observation that the fact that Wijepala was clearly shown to have been present afforded corroboration of his evidence, was quite erroneous, but that error was dispelled by the intervention of Crown Counsel and, in our opinion, no prejudice could have been caused to the appellant by that error of the judge. The learned judge appears to have entertained the impression that, in all cases, a rule of practice requires a jury to be warned not to convict a man on the uncorroborated testimony of a single witness. There is, of course, no such rule. The judge was evidently thinking of the evidence of accomplices. But, in this instance, even if Wijepala's evidence was uncorroborated, and the learned judge invited their attention to the fact of his presence at the scene as constituting corroboration, we do not think any prejudice was caused by that fact. Examining the case for ourselves, we find that there was some circumstantial corroboration of Wijepala's evidence in regard to the deceased man's assailant, afforded by the blood stains found on the shirt of the appellant. The location of those stains supports Wijepala's description of the attack. The appellant's explanation, in court, of those stains on the shirt was contradicted by the statement he made to the Police.

In regard to (*d*) we are in agreement with counsel for the appellant. The trial judge explained " premeditation " as if it was synonymous with " intention." There was, then, misdirection in that respect. The jury, in view of that misdirection, and also in view of the observation made by the judge that if they were not satisfied that the condition " without premeditation " was present on the evidence, they need not consider that exception any further, probably refrained from such further consideration.

On a careful examination of the evidence we think that, properly directed, the jury could reasonably have found that the appellant's case came within that exception. There is evidence forthcoming from the prosecution that a quarrel arose suddenly, that upon it the deceased struck the first blow and a fight arose, and that the appellant dealt only one blow with his knife.

For these reasons, at the conclusion of the hearing of the appeal, we set aside the conviction for murder and found the appellant guilty of culpable homicide not amounting to murder and sentenced him to twelve years' rigorous imprisonment.

*Conviction and sentence varied.*

*Present:* DE KRETSER, J.

## JAYASEKERA HAMINE vs AGIDA HAMINE

*S. C. No. 65/44—C. R. Colombo No. 87297.*
Argued on 9th November, 1944.
Decided on 8th December, 1944.

*Servitude of footway—Can right to free use of footway be obstructed—Right to use bicycle or wheelbarrow on footway.*

The plaintiff claimed a right of footway, three feet wide, over the defendant's land. The defendant had, by placing obstructions at certain points of the footway to prevent cattle trespass, restricted the free use of the footway by the plaintiff.

**Held :** That the plaintiff was entitled to the use of the footway, free from any obstruction.

Per DE KRETSER, J. : " The rights to use a bicycle and a wheelbarrow are not free from difficulty. .....I am inclined to think that a right to use a bicycle or to use a wheelbarrow should be conceded to a person entitled to a footpath."

*L. A. Rajapakse, K.C.*, with *Kingsley Herat*, for the plaintiff-appellant.
*N. E. Weerasooriya, K.C.*, with *E. B. Wickramanayake*, for the defendant-respondent.

DE KRETSER, J.

The plaintiff brought this action on the 13th of October, 1942, alleging that a path used by her, and on which a wheelbarrow and cycle were used, had been obstructed by the defendant on the 17th of May, 1942, and deviated at one end to a ditch. The path was shown in an annexed sketch and later in a plan. Defendant filed answer stating that plaintiff's right, *if any*, was only one of proceeding on foot along the northern boundary and that the coconut logs of which plaintiff complained had always been in existence in order to prevent cattle trespass. The logs of which in particular plaintiff complained were two placed right on the path at each terminus of it on defendant's land. Between plaintiff's and defendant's land there is a ditch which is crossed by a footbridge made of coconut logs. Plaintiff's land is on a higher elevation. The plan shows a fence along the western boundary of defendant's land with a gap in it, each end of the gap being flanked by a coconut log standing about 3 feet from the ground, and a third log forms a triangle with these two. The same contrivance was erected at the end where the path meets the footbridge. The surveyor gave evidence and stated that the space between the stumps at the gap was 15 inches, on another side of the triangle it was 16 inches and on the third 19 inches. The ditch was spanned by two logs placed side by side.

At the trial which extended from the 31st March to the 3rd of November the following issues were raised :

1. Is the plaintiff entitled to the use of the way demarcated in plan No. 3436 dated 14th March, 1943 ?
2. Is plaintiff entitled to use a wheelbarrow and a bicycle along the said way ?
3. Prescriptive rights of parties.
4. Did the defendant on or about the 17th of May, 1942, wrongfully and unlawfully obstruct the free use of the said path ?
5. Damages.
6. If issue No. 1 is answered in the affirmative is the plaintiff's right limited as set out in paragraph 3 of the answer ?

The learned trial judge inspected the land on the 9th of July and he made his order on the 3rd of November, declaring the plaintiff entitled to a footway along the trace marked in the plan but with its end near the road shifted to a distance of one fathom from the drain on the north. He allowed the logs to stand and ordered that a minimum space of 16 inches should be allowed between the logs. He disallowed the right to use a bicycle or a wheelbarrow.

He seems to have approached the case from the wrong point of view. It was conceded in the course of the trial that plaintiff was entitled to a footway three feet wide, and the defence was that the contrivance of logs was one defendant was entitled to put up in order to protect the land from cattle. He has not considered the law nor has he correctly appreciated the facts. The plaintiff was entitled, and had been entitled to well over 30 years, to the free use of the footway, and the obstructions necessarily restricted the right. She was, therefore, entitled to have them removed. Defendant was entitled to protect the land, but only in such a way that the plaintiff ( and this includes all those visiting or having business with her ) had the free use of the path at all times. The question was not whether plaintiff could wriggle through the contrivance,

but whether she had the full and free use of the path. That she has not, and the obstructions must be removed.

One Andris, a relative of the defendant, is clearly the person responsible for the obstruction. He instructed defendant's lawyers, he gave evidence, and it is clear these obstructions were maliciously erected on a pretext of preventing cattle trespass. Mr. Weerasooriya was of opinion that cattle are so stupid that while they will walk straight ahead they will not wriggle through a stile. It may be difficult for them to bend about as they have long bodies but I fail to see why they should make a bee-line for the middle post and not start their trespass at one end and walk right through the side of the so-called stile unless they were in very good condition. Be that as it may, the plaintiff is entitled to have the obstruction removed. The question of gates is considered in Hall & Kellaway in their book on Servitudes at page 77 and they quote cases decided in South Africa where it was held that the question whether an obstruction hindered free passage is purely a question of fact to be decided on the circumstances of each case. The court had ordered the removal of a gate which used to be kept locked at times and so prevented the full use of the path. Voet deals with the matter at Bk.8.3.4. A gate across the path, which could be opened at all times, allows the use of the path and may be permitted ( it is usually a matter of agreement ) but an obstruction is quite a different thing.

As I shall show later, even on the facts the plaintiff is entitled to the path she claims.

The rights to use a bicycle and a wheelbarrow are not free from difficulty. They were modes of conveyance not known to the Roman law or to the Dutch law and the claim to use them can only be decided on principle. The Roman law divided servitudes relating to passages into *iter* ( 3 or 4 feet wide ), *actus* ( usually 8 feet wide ) and *via* ( usually 12 feet wide ), each succeeding right including the previous ones. The chief principle, if not the only one, seems to have been the extent of the burden on the servient tenement. The upkeep of the passage lay on the dominant owner and everything necessary for the use of the right was impliedly given. Accordingly plaintiff would be entitled to erect a footbridge 3 feet wide over the ditch separating her land from the defendant's.

The Roman law allowed under the right of *iter* the right of going over the passage on foot, on horseback or by being carried over it. Grotius, however, ( "Introduction" Bk. 2 c. 35 s.1 ) divides *iter* into footway and bridle-path and seems to make them different servitudes. He quotes no authority and gives no reasons. Voet ( 8.3.1 ) follows that division and quotes Grotius as his authority, adding that it was according to their custom to call one a footpath and the other a bridle-path. There is undoubtedly a difference in nomenclature, and to that extent the division is justified. One has to infer that because they were distinguished, therefore, they are different. Voet says " it is to be noted that according to our custom *iter* is properly restricted to the right of going on foot and it is different from going on horseback. The right of going on horseback was recognized but it was no longer treated as *iter* but as a special servitude. It was not *iter* nor was it *actus* or *via*. They had in fact divided up *iter*. Grotius says the right of bridle-path included that of footpath. But why? The space apparently was the same but possibly a horse may prove restive and so trespass outside the path or damage any protecting fence.

*Actus* was intended for driving cattle, even one, and vehicles. If so, is another principle recognized *viz.* the possibility of damage to the servient owner? *Actus* was normally 8 feet wide, indicating the size of the vehicle contemplated. The considerations, therefore, seem to have been in the first instance the space occupied and next the possibility of other damage, not to the footpath, but to the remainder of the land. There is a scarcity of authority, whether of writers or of cases, on the subject. Nathan ( Vol. 1 p. 515 *et seq.* ) states the Roman law, mentions the distinction drawn by Grotius and Voet, and adds, "In any case, there is no difference in their mode of exercise." This comment rather suggests that he did not favour the distinction. No cases on the point seem to have arisen in South Africa. Did the Dutch colonists carry with them the customary distinction made in Holland, perhaps for local reasons, and if they did, had it fallen into desuetude? It seems to me it happened in Africa, and the same thing happened in Ceylon. The original law would then remain in force. I am rather inclined to think that a right to use a bicycle or to use a wheelbarrow should be conceded to a person entitled to a footpath. Neither of them requires more space nor can cause damage to the surrounding land.

But the rights can be decided in this case on the evidence, for even if they be separate rights the evidence indicates that they have been obtained by prescriptive user. Not only is the evidence for plaintiff much better than that called for the defendant, but the latter in fact in parts corroborates the evidence led for the plaintiff and in other parts is demonstrably false. The defendant's land is a strip 1/4 acre in extent, the greater

part of which lies to the south of the path. Defendant's assertion that the path was along the northern boundary is only approximately correct. On the north is a drain. The locality is liable to floods and the trial judge had to postpone his inspection once for this reason. Presumably the portion near the drain would suffer most. Defendant's land is not separated from the adjoining land on the south, which she now owns and which at one time belonged to her grandmother and mother. There is a house on that land, which after her mother's death seems to have been rented out in more recent years. Defendant herself lived somewhere else for she speaks of visiting the land once in 3 or 4 months. She came to live on that land in recent times, evacuated during the Japanese raid in April, 1942, and later returned. During her absence Andris looked after the place for her. Plaintiff's land came to her from her husband, who died in 1929. He had a brick-kiln on the land. The land yields some thousands of coconuts, which are sold and transported out of it. Beyond the plaintiff's lands are fields and the owners of these pass over both plaintiff's and defendant's land and transport manure, etc. to their fields. No trouble arose in the time of the defendant's grandmother or mother and defendant herself admits she passes over plaintiff's land. The trouble arose with Andris, who seeks to put the blame on plaintiff's husband's nephew, Edirisinghe, who came to live with them as a boy, and was about 17 years old when her husband died. He then got employed in a Colombo firm and used to go to his work on a bicycle. Andris admits Edirisinghe has been using a bicycle to go to his work and alleges that he never rode along the footpath but kept his bicycle in a house by the road and walked the remainder of the way. Defendant, however, admits having seen Edirisinghe riding along this path. The court intervened and questioned her and she said she had seen him walking along the path but not with the bicycle, wheeling it. It is clear that he did ride his bicycle along this path and had done so since 1929. Plaintiff came to her land after her marriage about 30 years ago. She alleges that at that time there was no fence along the western boundary and her husband used carts for transporting his bricks, etc. Andris says he attended the wedding and the party then walked along the *cart track*. He admits that at that time the bridge was composed of logs, but he says they were put down only temporarily. Now, Andris admits he was looking after one Wijesekere's land and that plaintiff took the lease of that land. Plaintiff adds that her husband had taken a lease before she did. Plaintiff's husband died in 1929. She had then only Edirisinghe as a protector. Andris is clearly very angry with Edirisinghe for he says Edirisinghe came to plaintiff's house originally as a servant and that all the trouble arose after he asserted himself. Even on appeal it was the right to ride a bicycle which was strongly contested. Clearly the obstruction was aimed at Edirisinghe. Soon after her husband died in August, 1929, plaintiff had occasion to complain to the headman on the 3rd of January, 1930, that Andris had on the night of the 2nd thrown stones on her roof. The headman saw the damage, questioned witnesses and Andris, and granted a report. Andris pretends that he was not questioned. We have not been told what followed the report. It has nothing to do with the right of way except by way of explaining the source of trouble.

On the 2nd of July, 1932, plaintiff complained that Andris had obstructed the road by putting up two fences. On the 31st of July she complained that he had come to the compound drunk and abusive and had later removed the footbridge of two logs. Andris' explanation was that it was too wide. Plaintiff seems to have complained to the Government Agent who alleged he could not interfere as it was not a public road. Plaintiff then prosecuted Andris on the 5th of October, 1932. Eventually parties agreed to abide by an order made by the magistrate, without evidence, but after inspection. The magistrate inspected on the 29th of December *i.e.* nearly 6 months after the alleged obstruction. His order was admitted in spite of objection, and in spite of the magistrate having been summoned as a witness. The magistrate records that he found a fairly well defined path. It is this path that the defendant denied in his answer and put in issue but later conceded. The magistrate found two strands of wire at either end but did not think that they could be said to block the path. The charge had been one of wrongful restraint. Plaintiff had alleged that a fence along the southern boundary of the path had been shifted to a parallel line further north. This had nothing to do with the right of way but was apparently an allegation made because it was a fact. The magistrate saw no trace of the fence along the south of the path ( he could scarcely expect to find any ) and he thought, as the posts were eaten by ants and the wire was embedded in the growing trees, the fence had always been where he saw it. It does not seem to have struck him to have the roots of the trees examined. It is well-known that certain trees like the *suriya* can be planted in stumps and transplanted and they would continue to be green and to grow.

It is a common way of making out a fence to be older than it really is and the only effective test is an examination of the roots. However, the question of the fence is immaterial. The magistrate may have been right in considering it not to be a case of wrongful restraint but what we wish to know is the height of the two strands. On this point he only says they do not block the right of passage. Presumably they could be stepped over. A bicycle could easily be carried over it. Normally the two strands would not be more than two feet from the ground. The posts at the end of the fence are at present only about three feet high. Andris says that men carrying coconuts in bags jumped over the two strands. And yet he says these two strands were put there to prevent cattle trespassing, and that by night. Apparently cattle were tethered by day and let loose at night when they might be stolen!

There is no evidence as to how long these two strands remained there, with people jumping over them. The answer alleged that the coconut logs *always* existed. The magistrate makes no mention of them. Andris went the length of saying the logs now there were there for over 10 years and he even explained that the bark had rotted. The surveyor thought them to be a few months old. Defendant said that the logs had taken the place of others which had rotted during her absence from the land *i.e.* in April, 1942. Plaintiff's evidence of their having been put up after the raid is thus confirmed. In re-examination Andris seems to have appreciated the position better for he alleged that the logs had been replaced during the 10 years, the last time being 3 years before the trial. This is not what the defendant says. Now, in 1939 coconut logs had been planted. Defendant described this as an attempt to erect a stile. Plaintiff did not go to a headman but promptly sent a letter through a proctor, threatening an action if the encroachment were not promptly removed. There can be little doubt it was removed for no action followed and it is unlikely that if plaintiff acquiesced in that obstruction she would later complain of a similar one. The truth seems to be that this threat of action frightened the defendant, who was quite aware how big an extension this was on the two strands of wire. It was quite realized at the time of filing answer that there was this difference and hence the allegation that the logs *always* existed. They could not have, for quite respectable evidence given by the headman and a sanitary inspector, against both of whom nothing is urged, shows that there was no obstruction from 1940, not even wires. Defendant came to live on the land about this time and perhaps she realized her need to use the plaintiff's land to go over. Prior to that tenants had lived in the house and Andris faded out after about 1932. He came in again when the defendant left owing to the raid. Plaintiff also left, and realizing how ineffective the two strands of wire had been he then contrived this new method of obstruction. Andris admits that produce from defendant's land had to be carried out and manure brought in. He admitted wheelbarrows and carts were used but alleged that he opened a gap each time and closed it. He stated that the western fence was 15 years old. That fits in with plaintiff's evidence. One Endoris, a close relative of both parties, with no interests in either side, stated that originally the gap was 7 feet wide. It has now come down to 15 inches ! He stated that plaintiff transported her coconuts along this road in wheelbarrows. Andris admitted that wheelbarrows were commonly used in that locality. He admitted that plaintiff re-built her house and completed the work 3 or 4 years before and he alleged that bricks were taken from the brick-kiln on the land and that lime had to be brought from outside but said he had not seen it being brought. The wire away from the obstruction is older and rusty unlike the wire used in narrowing the gap.

I have said enough to show that the right to use a bicycle has been acquired by prescriptive user, with a temporary inconvenience in 1932, which affected its use only at the two ends. The right to use a wheelbarrow has also been established. The trial judge's inference that because there was an obstruction in 1932, therefore, the bicycle and the wheelbarrow could not have been used thereafter is not a logical conclusion and is in the teeth of the evidence.

The decree entered is set aside, save insofar as it orders the gap to be made further to the south. The path should run straight into the road without the deviation now attempted. Decree will be entered for the plaintiff as prayed for, the deviation will be removed. At the trial damages were agreed on at Rs. 5 " for the full period." That was on the 20th March, 1943, and many months have elapsed since then. A further order should be made for the period which may elapse before the obstruction is removed. I would order damages at Rs. 5 a month starting from a period of two weeks after this order is communicated to the parties or their proctors until possession is restored to the plaintiff, who is entitled to have a writ enforcing the order of court and placing her in full possession of her rights. Plaintiff, is also entitled to have her costs both in the court below and in this court.

*Appeal allowed.*

*Present:* HOWARD, C.J. & CANEKERATNE, J.

## WIGNARAJAH vs THE COMMISSIONER OF INCOME TAX

*S. C. No.* 71–8—*Income Tax No.* 748/12.
Argued on 12th & 13th June, 1945.
Decided on 22nd June, 1945.

*Excess Profits Duty—Section* 3 (1) *of the Excess Profits Duty Ordinance No.* 38 *of* 1941—*Question whether assessee carrying on a "business" or whether he is an "employee" is a question of fact—Case stated under section* 74 *of the Income Tax Ordinance.*

**Held :** (i) That the question whether a person is carrying on business or whether he is an "employee" is a question of fact.

(ii) That the Supreme Court will not, on a case stated under section 74 of the Income Tax Ordinance which is also applicable to the Excess Profits Duty Ordinance, interfere with a finding of fact of the Board of Review if there is evidence to support the finding.

**Cases referred to :** *Currie vs Commissioners of Inland Revenue* (12 Tax Cases 245)
*Carr vs Inland Revenue Commissioners* (1944 – 2 All Eng. Rep. 163)
*Webster vs Commissioners of Inland Revenue* (1942 – 2 All Eng. Rep. 518)
*Burt & Co. vs Inland Revenue Commissioners* (1919 – 2 K.B. 668)
*Robbins vs Inland Revenue Commissioners* (1920 – 2 K.B. 677).

*H. V. Perera, K.C.*, with *E. F. N. Gratiaen*, and *D. W. Fernando*, for the assessee-appellant.

*H. H. Basnayake, Acting Solicitor-General*, with *R. A. Kannangara, Crown Counsel*, for the Commissioner of Income Tax, respondent.

HOWARD, C.J.

This is an appeal by the appellant by way of a case stated under the provisions of the Income Tax Ordinance (Cap. 188) and the Excess Profits Duty Ordinance No. 38 of 1941 by the Board of Review, Income Tax, appointed under section 70 of the Income Tax Ordinance. The appellant appealed to the Board of Review against the decision of the Commissioner of Income Tax confirming an assessment of the appellant as being liable to pay a sum of Rs. 31,632/– as Excess Profits Duty on the footing of profits from a business for the accounting period commencing 1st April, 1942, and ending on the 23rd January, 1943. The Board of Review dismissed the appeal.

The facts as established before the Board of Review are as follows: Since the year 1925 Mr. C. Arumugam, now deceased, was the Shroff of the National Bank of India, Ltd. Prior thereto he had been the guarantee broker of Messrs. Lee, Hedges & Co. and after being the Shroff of the Bank continued to assist Messrs. Lee, Hedges & Co. in the buying and selling of plumbago. The arrangement between him and the Company during the material period in regard to the plumbago business was that the profits were to be divided equally between him and the company. Under the arrangement between the company and himself Mr. Arumugam secured sellers of plumbago, used special skill in selecting the required grades of plumbago for export, saw to the loading, unloading, packing and handling of such plumbago. Mr. Arumugam spent his own money on this work which was afterwards refunded, but he used his store without making any charge therefor. After the 1st April, 1942, the Commissioner of Commodity Purchase became the sole exporter of Ceylon plumbago, but the same arrangement continued as Mr. Arumugam received half the fees for passing the plumbago, a duty which the Company had to perform for the Commissioner of Commodity Purchase. The Board of Review on these facts held that Mr. Arumugam and Messrs. Lee, Hedges & Co., Ltd. were engaged in a joint enterprise and that his activities were not those of a mere employee. Those activities by means of which he obtained his income amounted to a "business," within the meaning of section 3 of the Ordinance. The appellant who is the executor of Mr. Arumugam has contended before the Commissioner, the Board of Review and this court that he was not carrying on a business within the meaning of section 3 of the Excess Profits Duty Ordinance No. 38 of 1941, but was an employee of Messrs. Lee, Hedges & Co., Ltd. who had complete control over his activities and remunerated him as employees frequently are by a payment of a proportion of the profits. He was therefore not liable to pay excess profits duty.

In *Currie vs Commissioners of Inland Revenue* (12 Tax Cases 245) it was held that if the Commissioners of Inland Revenue came to a

conclusion of fact without having applied any wrong principle, then their decision is final upon the matter. In his judgment at p. 259 Lord Sterndale, M.R. stated as follows :

> " The first question that has been debated before us is this : Is the question whether a man is carrying on a profession or not, a matter of law or a matter of fact ? I do not know that it is possible to give a positive answer to that question, because it must depend upon the circumstances with which the court is dealing. There may be circumstances in which nobody could arrive at any other finding than that what the man was doing was carrying on a profession ; and therefore, taking it from the point of view of a judge directing a jury, or any other tribunal which has to find the facts, the judge would be bound to direct them that on the facts they could only find that he was carrying on a profession. That reduces it to a question of law. On the other hand, there might be facts on which the direction would have to be given the other way. But between those two extremes there is a very large tract of country in which the matter becomes a question of degree ; and where it becomes a question of degree, it is then undoubtedly, in my opinion, a question of fact ; and if the Commissioners come to a conclusion of fact without having applied any wrong principles, then their decision is final upon the matter."

This decision was followed by a Court of Appeal in *Carr vs Inland Revenue Commissioners* (1944 – 2 All Eng. Rep. 163). At page 166 Scott, L.J. stated as follows :

> " I prefer to follow Lord Sterndale, M.R. in *Currie vs Commissioners of Inland Revenue* (12 Tax Cases 245 at page 336), where he said in very clear language that in a case of an appeal before the Commissioners, where there is some evidence each way, it must be a question of degree, with which it is characteristically the function of the Commissioners to deal, and to deal finally. It is a well-known passage and, in my view, could hardly be improved upon. I do not think it necessary to refer to the other cases cited to us. There was one case, *Webster vs Commissioners of Inland Revenue* (1942 – 2 All Eng. Rep.), in which the Commissioners had held, with evidence before them upon which they might have decided either way, that there was no profession being carried on. In the present case, also with evidence upon which they might have decided either way, they have held that a profession was being carried on. I leave it at that."

Again in *Webster vs Commissioners of Inland Revenue* (1942 – 2 All Eng. Rep. at page 518) Macnaughten, J. stated as follows :

> " The question whether an individual is carrying on a 'profession' is a question of fact, and it has been pointed out that the facts of the case as found by the Commissioners may be such that it would be impossible to hold that he was carrying on a 'profession,' or, on the other hand, that it would be unreasonable to deny that he was carrying on a ' profession' ; and as between those two extremes there may be intermediate cases in which it would be possible for one person to come to one conclusion and for another person to come to the opposite conclusion, but that, if there is evidence to support the conclusion at which the Commissioners have arrived, then that conclusion cannot be set aside by the court."

In the cases of *Currie vs Commissioners of Inland Revenue*, *Carr vs Inland Revenue Commissioners* and *Webster vs Commissioners of Inland Revenue* (*supra*) the question that the Commissioners had to decide was whether the appellants were carrying on a " business " or a " profession". In my opinion the principle laid down by Lord Sterndale would apply when the question is whether the appellant is carrying on a " business" or is merely an "employee." In this connection I would refer to the following passage from the judgment of Scrutton, L.J in *Burt & Co. vs Inland Revenue Commissioners* (1919 – 2 K.B. at p. 668 ) :

> " Where they do not do anything in connection with the sale to get commission on it, it is a transaction, and they appear to me to come entirely within the words ' business of any person taking commissions in respect of any transactions or services rendered.' It is not necessary for us to find as a fact that there is evidence upon which the Commissioners could so find."

Are the circumstances in this case such that nobody could arrive at any other finding than that Mr. Arumugam was an employee of Messrs. Lee, Hedges & Co., Ltd.? In *Robbins vs Inland Revenue Commissioners* ( 1920 – 2 K.B. 677 ) the Court of Appeal upheld the decision of Rowlatt, J. who had reversed the decision of the Special Commissioners confirming an assessment to excess profits duty of Mr. H. E. Robbins, the respondent on appeal. The Court of Appeal held that Robbins was a whole-time servant of a firm called " Felt." He had no " business of a person taking commissions," the business was the business of his employer " Felt," nor had he the business of " an agent of any description " because Parliament did not use these words to cover a whole-time servant who, if an agent, has no business. At page 689 Warrington, L.J. stated as follows :

> " We have had before us a long discussion upon the question whether upon the true construction of the agreement the respondent would properly be described as a servant of the company, and the agreement as one of service. For some purposes the precise nature of the legal relation in this respect may be of importance, but I do not think it is so in the present case. The respondent is substantially in the position of a servant in this respect, that he is bound to perform certain duties for a particular employer and to give his whole time exclusively to the performance of those duties. Can he be properly described as engaged at the same time in a separate business of his own — namely that of earning his remuneration by the work he does as agent for his employer ?
>
> It seems to me that the occupation of a person in such a position would not be naturally described as the carrying on of a business (except of course that of his employer) nor would his remuneration be described as profits of a business."

Also at page 683 the following passage from the judgment of Lord Sterndale, M.R. is most relevant :

> " That, I think, is the construction of the section, and that leaves as the only question, what was the position of Robbins ? Was he a whole-time servant, or was he a person carrying on a business of rendering services for commission or of an agent of any description ? I do not for a moment say there may not be such a business ; in fact the businesses in *Burt & Co. vs Inland Revenue Commissioners* and *Radcliffe vs Inland Revenue Commissioners* were instances where a man was carrying on a business of an agent and carrying on a business of a person remunerated for services by commission. I do not say that it is impossible that a person who was rendering services only to one other person, that is to say, who had to give his whole time to that business, might not be carrying on a business. It would be very much more difficult to see how he was carrying on an independent business ; but I do not say it is impossible. But the question here is, was Robbins in that position ; or, rather, I ought to say, in which position was he ? Was he in the position of a whole-time servant, or was he in the position of a man carrying on a business of rendering services for which he was paid by commission or of an agent of any description ? In order to see that, we have to look at the agreement under which he was employed."

The facts with regard to Robbins' contract with " Felt " and Mr. Arumugam's with Messrs. Lee, Hedges & Co. are very different. It is impossible to describe Mr. Arumugam as a whole-time servant, although he was not in fact rendering services to any other person who was carrying on transactions of buying and selling plumbago. He was not bound to give his whole time exclusively to the performance of his duties in connection with his contract with Messrs. Lee, Hedges & Co. In my opinion there was evidence on which the Board could decide that Mr. Arumugam was carrying on business within section 3 (1) of the Ordinance. They have so held and the decision must stand. The appeal is, therefore, dismissed with costs.

CANEKERATNE, J.

I agree.

*Appeal dismissed.*

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## CASE STATED

*Under the provisions of the Income Tax Ordinance*, 1932, *and the Excess Profits Duty Ordinance*, 1941, *upon the application of*
*Dr. G. Wignarajah, Executor of the Estate of Mr. C. Arumugam, deceased, Appellant.*

1. Since the year 1925, Mr. C. Arumugam, now deceased, was the Shroff of the National Bank of India, Ltd. Prior to that he had been the guarantee broker of Messrs. Lee, Hedges & Co., Ltd. Even after he became the Shroff of the Bank the deceased continued to assist Messrs. Lee, Hedges & Co., Ltd., in their plumbago business. The arrangement between him and the company—during the material period—in regard to the plumbago business was that the profits were to be equally divided between the company and him. The same arrangement continued after the Commissioner of Commodity Purchase became the sole purchaser and exporter. The deceased died on the 23rd January, 1943. His executor, the appellant abovenamed, was accordingly assessed for the accounting period commencing 1st April, 1942 and ending on 23rd January 1943 under the Excess Profits Duty Ordinance, No. 38 of 1941 as being liable to pay a sum of Rs. 33,260/- as Excess Profits Duty on the footing of profits from a business, as follows :

| | | |
|---|---|---|
| (*a*) Share of profits from Messrs. Lee, Hedges & Co's plumbago export trade .. .. .. | Rs. | 27,501 |
| (*b*) Share of profits from Messrs. Lee, Hedges & Co., for work done in connection with contract with Commissioner of Commodity Purchase .. .. | ,, | 31,145 |
| (*c*) Dealer's commission .. .. | ,, | 12,000 |
| (*d*) Royalty from Sri Lanka Mines .. | ,, | 1,628 |
| | Rs. | 72,274 |

2. The executor appealed to the Commissioner on the ground that Mr. Arumugam the deceased was an employee of Messrs. Lee, Hedges & Co., Ltd., remunerated by payment of a share of profits ; that he was so remunerated, as employees are frequently remunerated, by the payment of a proportion of the profits ; that he was an employee as the company had complete control over his activities. It was also contended that Mr. Arumugam could not be said to have carried on business after 1st April 1942 when the Commissioner of Commodity Purchase became the sole exporter of Ceylon plumbago, as he merely received half the fees for passing the plumbago, a duty which the company had to perform for the Commissioner of Commodity Purchase. Lastly, it was submitted, that the commission he received from dealers was an illegal gratification and was not liable to Excess Profits Duty or Income Tax.

3. At the hearing of the appeal by the Commissioner of Income Tax, it was agreed that the Royalty from Sri Lanka Mines amounting to Rs. 1,628/- should be excluded from the assessment. The appellant called Mr. C. F. H. Edwards, the Manager of the Plumbago Department of Messrs. Lee, Hedges & Co., Ltd., in support of his contentions. It was contended by the assessor that the relationship of master and servant did not exist between Mr. Arumugam and the company. He also took up the position that if the deceased was an employee under section 3 (1) (*d*) of the Ordinance, he would still be liable under sub-clause (*i*) of the section as a person taking commissions. The Commissioner confirmed the assessment subject to the exclusion of Rs. 1,628/-. A copy of the Appeal Minute and Reasons relative to the hearing before the Commissioner is annexed to this case stated marked "X (1)."* A copy of the evidence of Mr. Edwards is annexed marked "X (2)."* Copies of the letters marked A1 to A9, produced by the appellant, at that hearing, are also annexed.* Copies of the productions marked R1 to R9 (except R4) which were relied upon by the assessor are also annexed, together with copies of the relevant folios from the Ledger R4 kept by the deceased.*



* Not reproduced

4. Being dissatisfied with the Commissioner's decision the appellant appealed to the Board of Review on grounds set out in the copy of the Grounds of Appeal dated 7th March 1944, a copy whereof is annexed hereto marked "X (3)."*

5. At the hearing before the Board, it was contended by the appellant that the deceased did not carry on a business but only rendered services for a share of profit and that such a person is not a partner in law. Arguments were also adduced to refute the position that the deceased was liable under section 3 (1) (*i*) of the Ordinance. The assessor submitted that no evidence was led to prove that the deceased was not liable for losses in the plumbago business and that his share of the profits may have been ascertained after the deduction of any losses; and that the appellant had not excluded the reasonable presumption from the share of profits that the person participating in them was *prima facie* a partner. He also argued that the books of the deceased shewed that he was doing a business in plumbago, however small. Stress was laid on the fact that in R7, his return for the year 1941/42, the deceased claimed a loss of Rs. 718/32 on sundry purchases and sales of plumbago.

6. The Board dismissed the appeal on the ground that the deceased was not an employee but derived the income in question in carrying on a business within the meaning of section 3 of the Ordinance. A copy of the Decision of the Board is annexed marked "X (4)."* Being dissatisfied with the decision of the Board, the appellant has requested the Board to state a case for the opinion of the Supreme Court on questions of law. The questions are whether, (*a*) the deceased was an employee of the company; or, (*b*) carried on a business within the main provisions of section 3 (1) or under sub-clause 3 (1) (*i*) of the Ordinance, so as to render the activities of the deceased liable to Excess Profits Duty under the Ordinance. We have accordingly stated and signed this case.

Colombo, 18th day of October, 1944.

(1) †

(2) H. E. DE KRETSER

*Members of the Board of Review, Income Tax*

† The signature of Mr. S. Obeyesekera, the other member of the Board of Review who heard the appeal, is not available as he is seriously ill and has been medically advised not to attend to any business.

L. G. GUNASEKARA,
*Clerk to the Board of Review, Income Tax*

Colombo, 18th October, 1944.

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*Present:* KEUNEMAN, J. & JAYETILEKE, J.

## KANAGARATNAM vs ANANTHATHURAI

*S. C. No.* 18—*D. C.* (*Inty.*) *Jaffna No.* 84.
Argued on 20th & 21st June, 1945.
Decided on 21st June, 1945.

*Will—Onus of proving—What should be proved—Suspicious circumstances attaching to execution—Duty of court.*

**Held:** (i) That it is the duty of the propounders of a will or codicil to prove —

(*a*) the fact of execution;

(*b*) the mental competency of the testator; and

(*c*) his knowledge and approval of the contents of the will.

(ii) That where there are suspicious circumstances attaching to the execution of a will or codicil, the onus of removing such suspicion is on the propounders.

Per KEUNEMAN, J.: "Now, in *Berry vs Butlin* there are also laid down certain qualifications which, perhaps, I may quote: 'All that can be truly said is that if a person, whether attorney or not, prepares a will with a legacy to himself it is at most a suspicious circumstance of more or less weight according to the facts of each particular case, in some of no weight at all.....But in no case amounting to more than a circumstance of suspicion demanding the vigilant care and circumspection of the court in investigating the case and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased'."

**Cases referred to:** *Andrado vs Silva* (22 N.L.R. 4)
*Berry vs Butlin* (2 Moore's Privy Council Cases 480)

*H. V. Perera, K.C.*, with *N. Nadarajah, K.C.*, and *H. W. Thambiah*, for the petitioner-appellant.

*V. Kumarasingham*, for the respondent.



* Not reproduced.

KEUNEMAN, J.

In this case the appellant produced will P1 dated 9th May, 1942 and asked for probate of that will. The present respondent produced further documents, X1 and X2, which he alleged had been a later will or codicil duly executed by the deceased. X1 and X2 are said to have been executed on the 3rd October, 1942. As regards the will P1, the present respondent did not dispute the fact that probate should be issued in respect of it, and the judge's finding that probate should be issued in respect of the document P1 must, therefore, be affirmed.

The only question is whether the judge has rightly ordered probate to issue in respect of the documents X1 and X2. Now, it has been clearly laid down in our law (see *Andrado vs Silva* 22 N.L.R. page 4) that "it lies upon the propounders to prove (1) the fact of execution, (2) the mental competency of the testator, (3) his knowledge and approval of the contents of the will. If the circumstances are such that a suspicion arises affecting one of these matters it is for the propounders to remove it."

In this case the learned District Judge has failed to frame issues as he was required to do under section 533 of the Civil Procedure Code, and the case proceeded to trial on certain statements made by counsel. In the course of the proceedings Mr. Advocate Kulasingham who appeared for the present appellant said that he insisted upon the documents being proved in solemn form, that is, the proof of the making of the documents by the testatrix and her mental capacity to make it. Now, undoubtedly the use of the words "in solemn form" appears to catch up all the three elements which are required as proof under our law, but the latter part of his statement may well be interpreted to restrict the elements to two and not three, namely, the making of the documents and the mental capacity of the testatrix, and in view of this somewhat ambiguous statement it is possible that there may have been some misunderstanding by the parties. In fact one of the elements which is laid down as requisite under our law has not been sufficiently considered in the court below or by the judge himself, namely, whether the testatrix knew and approved of the contents of the will, X1 and X2. The judge has not directed his attention to the various pieces of evidence bearing upon the matter, nor has he analysed that evidence and stated his considered conclusions on that matter. In the circumstances, it is difficult to uphold the finding of the judge that the documents X1 and X2 should be admitted to probate.

There is one further matter which may well have been considered by the judge in connection with the issue of probate. In *Berry vs Butlin* (2 Moore's Privy Council Cases, page 480) it has been laid down that "if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument." Now, in this case the evidence led appears to show that the documents X1 and X2 were not drawn up on the instructions of the testatrix and in fact were prepared by the present respondent for his own purposes. Further, the documents X1 and X2 are in the English language which the testatrix could neither read nor write. Accordingly, this was a matter which the court had to bear in mind in considering whether the documents X1 and X2 should be admitted to probate.

Now, in *Berry vs Butlin* (*supra*) there are also laid down certain qualifications which, perhaps, I may quote: "All that can be truly said is that if a person, whether attorney or not, prepares a will with a legacy to himself it is at most a suspicious circumstance of more or less weight according to the facts of each particular case, in some of no weight at all.....But in no case amounting to more than a circumstance of suspicion demanding the vigilant care and circumspection of the court in investigating the case and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased." Further, with regard to the nature and degree of proof that is required in these cases, *Berry vs Butlin* (*supra*) lays down this principle: "Nor can it be necessary that in all such cases even if the testator's capacity is doubtful the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over the instrument. They form no doubt the more satisfactory, but they are not the only satisfactory description of proof, by which the cognizance of the contents of the will may be brought home to the deceased. The court would naturally look for such evidence. In some cases it might be impossible to establish a will without it, but it has no right in every case to require it."

I have given these quotations in full with a view to assisting the judge in further proceedings which we consider necessary in this case. In view of the fact that these two important matters have not received the consideration which they require, it is necessary that we should set aside

the order that probate should issue in respect of the documents X1 and X2, but at the same time we affirm the finding of the District Judge that the testatrix executed this document on the 3rd October, 1942 in the presence of five witnesses who also signed the document as such. We further affirm the finding of the District Judge that the testatrix was of sound mental condition and understood the nature of the acts she was doing when she was signing the codicil.

The matter that remains for decision by the court is whether the testatrix knew and approved of the contents of the documents, and further the court will give consideration to the fact that the documents X1 and X2 appear to have been prepared by the party who now claim a benefit under them and the court will apply the principles laid down in *Berry vs Butlin* (*supra*) or any other English cases which may be cited to the judge. It is very desirable that even at this stage proper issues should be framed to cover the matters now in dispute. The case will go back for trial on the matters referred back to the District Judge.

The costs of this appeal and the inquiry already had will be in the discretion of the District Judge who hears the matter anew.

JAYETILEKE, J.

I agree.

*Case sent back.*

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*Present:* HOWARD, C.J. & CANEKERATNE, J.

## SIYADORIS & OTHERS vs SIMON & ANOTHER

*S. C. No. 57—D. C. Colombo No. 2880.*

Argued on 6th June, 1945.

Decided on 18th June, 1945.

*Co-owners—Prescription among—Long, continued and undisturbed possession of paddy land by some co-owners to the exclusion of others—Execution of deeds by those in possession on the basis of exclusive ownership—Absence of evidence of acquiescence or knowledge on the part of co-owners not in possession—When may ouster be presumed.*

Admittedly, the land in dispute, a paddy field, originally belonged to one Henchappu who had four sons and three daughters. The plaintiffs and the 5th defendant, who are successors in title of the four sons claimed the entire land on the ground that they and their predecessors in title, had by exclusive, continued and uninterrupted possession from 1904 to 1942, acquired a prescriptive title as against the 1-4 defendants who claimed through one of the daughters of Henchappu. The plaintiffs further proved that a number of deeds had been executed during this period on the basis of this exclusive ownership. There was no evidence to shew that the three daughters or those claiming from them knew of the execution of the said deeds or that they acquiesced in the acquisition of such prescriptive title.

**Held :** (i) That in the circumstances the court was not entitled to presume ouster.

(ii) The question as to whether from long, continued, undisturbed and uninterrupted possession ouster may be presumed depends on all the circumstances of the case.

Per HOWARD, C.J. : " Moreover it would appear that the plaintiff Tillekeratne had bought the share of the co-owner, had worked a plumbago pit himself on another land in the neighbourhood, and had never claimed or taken a share in the plumbago which to his knowledge was being dug from the disputed land by the defendants and their lessees. It seems to me that the distinction drawn between the excavation and removal of minerals, an act definitely depreciating the value of the holding, and the taking of natural produce such as fruit of trees or the development of lands for the cultivation of paddy by expenditure incurred by the occupier is both logical and sound."

**Cases referred to :** *Thomas vs Thomas* (1855 2 K. & J. 83)
*Corea vs Appuhamy* (15 N.L.R. 65)
*Brito vs Muttunayagam* (20 N.L.R. 327)
*Cadija Umma vs S. Don Manis Appu* (40 N.L.R. 392)
*Corea vs Perera* (45 N.L.R. 455)
*Fernando vs Fernando* (44 N.L.R. 65)
*Fernando vs Fernando & Others* (27 C.L.W. 71)
*Tillekeratne vs Bastian* (21 N.L.R. 12)
*Hamidu Lebbe vs Ganitha* (27 N.L.R. 33)

*H. V. Perera, K.C.*, with *S. P. Wijeyewickreme*, for the 1st to 4th defendants-appellants.

*N. E. Weerasooriya, K.C.*, with *M. D. H. Jayawardene*, for the plaintiffs-respondents.

HOWARD, C.J.

The 1st to 4th defendants appeal against a judgment of the Additional District Judge of Colombo declaring the plaintiffs entitled to an undivided share in certain land, and ordering that the 1st to 4th defendants be ejected therefrom and the plaintiffs placed in possession. The plaintiffs claimed that they and the 5th defendant were jointly entitled to the land in dispute and that the 1st to 4th defendants who had no manner of right or title to any portion of the said land wrongfully and unlawfully entered into a portion and cut and removed the crop which the plaintiffs had raised thereon. It was conceded that the land in dispute originally belonged to one Henchappu who had 4 sons and 3 daughters. The plaintiffs and the 5th defendant maintained that the 4 sons entered into exclusive possession of the land and acquired a title by prescription. The plaintiffs are the successors-in-title of the 4 sons of Henchappu whilst the 2nd defendant is the son of one of the daughters of Henchappu and the first, third and fourth defendants are her grandchildren. The learned judge held that the 4 sons of Henchappu and their successors were in exclusive possession of the land in question and acquired a prescriptive title thereto. In coming to this conclusion he thought that taking all the circumstances of the case into consideration and having regard to the documents produced, and accepting the fact that the 4 sons of Henchappu and their successors possessed the field to the exclusion of the 3 daughters he was entitled to presume an ouster. It has been contended by Mr. Perera on behalf of the appellants, that inasmuch as the 4 sons and 3 daughters of Henchappu were co-owners, the learned judge was wrong in coming to the conclusion that there had been an ouster. There have been numerous cases on the question as to the acquisition of rights by prescription against co-owners. In *Thomas vs Thomas* (1855–2 K. & J. 83) it was held by Wood, V.C. that possession is never considered adverse if it can be referred to a lawful title. This dictum was cited with approval in the Privy Council case of *Corea vs Appuhamy* (15 N.L.R. 65). In that case the principle was formulated that the possession of one co-parcener could not be held as adverse to the other co-parcener and in spite of 30 years' possession the defendant's title by prescription was not upheld. The possession of one co-owner was the possession of all the co-owners. It was not possible for one co-owner to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. The principle as laid down by the Privy Council in *Corea vs Appuhamy* (*supra*) was cited with approval in the later Privy Council cases of *Brito vs Muttunayagam* (20 N.L.R. 327) and *Cadija Umma vs S. Don Manis Appu* (40 N.L.R. 392). It has been followed in the local cases of *Corea vs Perera* (45 N.L.R. 455), *Fernando vs Fernando* (44 N.L.R. 65) and *Fernando vs Fernando & Others* (27 C.L.W. 71). Doubts, however, as to what was necessary to prove ouster have arisen since the judgment of Bertram, C.J. in *Tillekeratne vs Bastian* (21 N.L.R. 12) who accepted the principle formulated in *Corea vs Appuhamy* (*supra*) by stating that it was not possible for a co-owner to put an end to the title of another co-owner and to initiate a prescriptive title by any secret intention in his own mind and that nothing short of an "ouster or something equivalent to an ouster" could bring about that result. The learned Chief Justice then went on to say that although the question had been argued in the case and discussed in the judgment, the Privy Council in *Corea vs Appuhamy* (*supra*) had not decided whether an ouster could be presumed from the long, continued possession of the co-owner in question. He then proceeded to formulate the principle that it is open to the court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner, has since become adverse. In *Tillekeratne vs Bastian* (*supra*) the claim on the ground of co-ownership had been dormant for a period of more than 40 years. Moreover, the nature of the possession was significant. The land had no plantation worth considering. It was plumbago land and the defendants dug plumbago thereon both by themselves and through lessees all throughout. In these circumstances the principle to which I referred was formulated by the court which held that the defendants had succeeded in establishing their claim to the whole land by prescription. The decision, however, did not go so far as to lay down that ouster could be presumed merely from long and exclusive possession. Such a decision would have been contrary to *Corea vs Appuhamy* (*supra*). It is a question of fact in each case and the question as to whether from long, continued, undisturbed and uninterrupted possession ouster may be presumed depends on all the circumstances of the case. *Vide* judgment of Dalton, J. in *Hamidu Lebbe vs Ganitha* (27 N.L.R. at page 39). In *Tillekeratne vs Bastian* (*supra*) there was long, continued, undisturbed and uninterrupted

possession for a period of over 40 years. The nature of the possession was for the purpose of digging plumbago both by the defendants and their lessees. In this connection de Sampayo, J. in his judgment at page 28 drew a distinction between the possession of land for the purpose of extracting minerals and the possession for the taking of natural produce in the following passage :

> " Moreover, the nature of the possession is significant. The land had no plantation worth considering ; it was plumbago land, and the defendants dug plumbago therein both by themselves and through lessees all throughout. While a co-owner may without any inference of acquiescence in an adverse claim allow such natural produce as the fruits of trees to be taken by the other co-owner, the aspect of things will not be the same in the case where valuable minerals are taken for a long series of years without any division in kind or money."

Moreover, it would appear that the plaintiff, Tillekeratne, had bought the share of the co-owner, had worked a plumbago pit himself on another land in the neighbourhood, and had never claimed or taken a share in the plumbago which to his knowledge was being dug from the disputed land by the defendants and their lessees. It seems to me that the distinction drawn between the excavation and removal of minerals, an act definitely depreciating the value of the holding, and the taking of natural produce such as fruit of trees or the development of lands for the cultivation of paddy by expenditure incurred by the occupier is both logical and sound.

The only matter remaining for consideration is whether the learned judge has correctly upheld the principles to which I have referred and rightly come to the conclusion that he was entitled to presume ouster. It may be conceded that the possession from 1904 to 1942 was long, continued, undisturbed and uninterrupted. But this is not enough. What other circumstances existed leading to the presumption that there was an ouster ? It is suggested that various deeds written on the basis that the 4 sons of Henchappu are the owners supply the other circumstances from which ouster can be presumed. The earliest deed (5D3) dated 4th October, 1894, was by Davith Appu, one of the 4 sons and conveyed an undivided 1/3rd share of the land to Peeris Appu and Deonis Appu. Davith Appu on the assumption that the 4 sons were entitled, should have conveyed 1/4th only. But it is clear that Davith conveyed more than the one-seventh share to which he was entitled if all the brothers and sisters were co-owners. The next document is a deed of lease (P 12) dated 12th January 1901, in which the lessors are two of the sons of Henchappu, Velun and Jeelis, William, a child of Saran who was another son of Henchappu, and Peeris, one of the transferees on 5D3. This deed dealt with the entirety of the land and none of the daughters of Henchappu joined in. There is also another deed dated the 20th January, 1904 (5D1) in which Velun, one of the sons of Henchappu, reciting that he was entitled to an undivided 1/4th share of the land which he and his 3 brothers held and possessed by right of *sam-buddi* possession and *aswedduminzing* sold to his daughter and her husband an extent of 10 kurunies. This deed ignores the right of the daughters of Henchappu. But do these deeds inevitably point to an acquiescence by the daughters of Henchappu in the acquisition of their rights as co-owners by the sons ? Was the making of these deeds something equivalent to an ouster ? The land was being cultivated by the growing of paddy and hence any inference of acquiescence would not arise as it did in the case of *Tillekeratne vs Bastian* (*supra*) where the co-owner stood by when plumbago was excavated and removed. Moreover, there is no evidence that the daughters of Henchappu knew of the execution of the various deeds. Without such proof there was nothing more than a secret intention in the minds of the transferors and lessors to initiate a prescriptive title and put an end to the co-owners' co-possession. This is not sufficient to constitute ouster.

The judgment of the District Court is set aside and judgment must be entered for the 1st to 4th defendants with costs in this court and the court below.

CANEKERATNE, J.

I agree.

*Judgment set aside.*

*Present:* SOERTSZ, S.P.J.

## JOHN APPUHAMY vs DAVID

*S. C. No.* 174—*C. R. Colombo No.* 94677.
Argued on 3rd May, 1945.
Decided on 17th May, 1945.

*Landlord and Tenant—Action for ejectment—Premises reasonably required for the use of the landlord—Extent to which landlord's rights should be interfered with—Rent Restriction Ordinance, No.* 60 *of* 1943, *section* 8.

Plaintiff sued his tenant, the defendant, for ejectment from a room in premises No. 215, Hultsdorf Street, on the ground that the room in question was reasonably required for his occupation. Plaintiff stated in his evidence that his chief business was supplying meals to the Fiscal's Office and others at Hultsdorf and the premises No. 179/181, situated close by, and in which he was carrying on the said business were about to be demolished for a fire gap on the orders of the Civil Defence Commissioner. He further added that when he vacated No. 179/181 he had to prepare the meals he supplied in the back portion of the premises No. 215 and that there was no other suitable place for dishing out the meals except the room occupied by the defendant.

The evidence also indicated (*a*) that premises No. 215 consisted of 7 rooms, kitchen, 3 garages, and some broad verandahs and that the plaintiff was already using one room and the kitchen, that two other rooms were occupied by his own people and the remaining rooms by some Proctors; (*b*) that plaintiff had other premises in the vicinity where his brother and brother-in-law carried on similar business; (*c*) that plaintiff had already converted one of the garages into a room; (*d*) that another room in the same street was available to the defendant.

The defendant's evidence was to the effect (*a*) that he was a Licensed Surveyor who had been practising at Hultsdorf for several years having fairly extensive court work; (*b*) that the room available in Hultsdorf Street was not suitable for his work; (*c*) that in addition to himself an Auctioneer & Broker occupied the room; (*d*) that the plaintiff could enclose a verandah or use a garage for the purpose.

**Held:** (i) That in the circumstances, the landlord reasonably required the premises for his occupation.

(ii) That a tenant is not entitled to stay on because some sort of makeshift arrangement can be resorted to by the landlord.

*L. A. Rajapakse, K.C.*, with *M. M. Kumarakulasingham*, for the plaintiff-appellant.
*H. W. Jayawardene*, for the defendant-respondent.

SOERTSZ, S.P.J.

I have examined the evidence in this case very carefully and I am satisfied that the plaintiff's need is greater than that of the defendant. This seems to me to be a case in which it can be said that the landlord reasonably requires the premises for himself. The view taken by the Commissioner appears to be that so long as some sort of makeshift arrangement can be resorted to by the landlord, the tenant is entitled to stay on. I am not disposed to endorse that view. The dice are already heavily loaded against landlords and I do not think we should resort to extreme measures to take away from him so drastically what in normal times would have been his undoubted right.

I set aside the order of the Commissioner with costs in both courts and direct that an order for ejectment be entered and that it be carried out unless the defendant vacates the premises in time to enable the plaintiff to go into occupation by the 1st of August, 1945.

*Order set aside.*

*Present:* CANEKERATNE, J.

## SERGEANT ATTANAYAKE vs MARTINU

*S. C. No.* 325—*M. C. Negombo No.* 44172.
Argued & Decided on 4th July, 1945.

*Motor Car Ordinance No.* 45 *of* 1938—*Lorry licensed for the carriage of goods—Is it an offence under section* 42 (1) *to carry pigs.*

**Held :** That where a lorry had been duly licensed to carry goods it was no offence under section 42 (1) of the Motor Car Ordinance No. 45 of 1938 to carry pigs as the word "goods" includes pigs.

*P. Malalgoda*, for the accused-appellant.
*T. K. Curtis, Crown Counsel*, for the Attorney-General.

CANEKERATNE, J.

The accused is charged with carrying 14 pigs in his lorry in breach of section 42 (1) of Ordinance No. 45 of 1938. The accused has a licence for the carriage of goods issued by a competent authority. There is no definition of the word "goods" in the Ordinance. The word "goods" is generally taken in English law to define personal property of every kind as distinct from chattels real, this would include all tangible movable property except money, that is, things movable which may be annexed or attendant on the person of the owner and carried about with him from one part of the world to another. They may be classified as things animate and things inanimate. The former class would include cattle and pigs, the latter, furniture and other things.

The Ordinance seems to divide motor vehicles into two classes, those licensed to carry passengers for reward or not ; vehicles licensed to carry goods. The intention of the legislature should be taken to provide for the carriage of all things and persons. Considering all these circumstances I should think that the word "goods" include pigs. I, therefore, set aside the conviction of the accused.

*Conviction set aside.*

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*Present:* HOWARD, C.J., KEUNEMAN, J. & JAYETILEKE, J.

## IN RE WIJESINGHE

*In the Matter of a Rule Issued on M. P. Wijesinghe, Proctor.*
Argued & Decided on 11th June, 1945.

*Proctor—Conviction for misappropriation of money entrusted by clients—Removal from Roll.*

The respondent, a Proctor, was convicted for misappropriating a sum of Rs. 330/33 entrusted to him by his clients for the purpose of redeeming a mortgage bond. An application was made by the Solicitor-General for an order removing the respondent from the Roll of Proctors.
The application was granted.

*H. H. Basnayake, Acting Solicitor-General*, with *H. A. Wijemanne, Crown Counsel*, in support of the rule.
*E. F. N. Gratiaen* with *D. M. Weerasinghe*, for the respondent.

HOWARD, C.J.

The Solicitor-General in this case asks that the respondent should be removed from the Roll of Proctors on the ground that he has misappropriated money entrusted to him as a Proctor. He was charged in the District Court of Colombo with misappropriating a sum of Rs. 330/33 entrusted to him by his clients for the purpose of redeeming a mortgage bond made out in favour of one Mrs. M. S. J. Bowen and Miss Q. Bowen. He was convicted of this offence and sentenced to pay a fine of Rs. 500/– or in default to undergo 6 months' rigorous imprisonment.

He appealed against his conviction to the Supreme Court and the appeal was dismissed. He has further asked for leave to appeal to the Judicial Committee of the Privy Council and that leave has been refused. We are asked by Mr. Gratiaen on his behalf not to take the extreme step of removing him from the Roll on the following grounds: (*a*) that he has been a Proctor since 1919; (*b*) that he has had a large practice in the District Court and was a well-known practitioner; (*c*) that at the time, or directly afterwards, in the year 1941, he was seriously ill and would have probably restored this money if it had not been for this illness; (*d*) that this is an isolated transaction and that he has not been guilty of any lapses in the course of his professional career. We quite appreciate that this is an isolated transaction, but, on the other hand, it is difficult to imagine a more serious offence. He was entrusted with this property in his capacity as a Proctor and we think that it would be calculated to disturb the confidence that should exist between Proctor and client if we were to do anything except remove him from the Roll of Proctors for what he has done. It is always open to him to apply to be restored to the Roll, in the future.

In these circumstances the motion of the Solicitor-General is granted and we direct that the respondent be removed from the Roll of Proctors.

KEUNEMAN, J.
I agree.

JAYETILEKE, J.
I agree.

*Struck off the Roll.*

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*Present:* JAYETILEKE, J.

## ABEYWARDENE vs AMARADASA

*S. C. No.* 36—*C. R. Colombo No.* 92957.
Argued on 28th June, 1945.
Decided on 11th July, 1945.

*Rent Restriction Ordinance No.* 60 *of* 1942—*Application of section* 8 *proviso* (*c*).

**Held:** That the word "his" in proviso (*c*) to section 8 of the Rent Restriction Ordinance refers to the landlord only and not to both the landlord and a member of the family.

**Cases referred to:** *Doe vs Dodd* (5 B. & Ad. 689)

*L. A. Rajapakse*, K.C., with *J. V. Fernandopulle*, for the plaintiff-appellant.
*N. Nadarajah*, K.C., with *V. Tillainathan*, for the defendant-respondent.

JAYETILEKE, J.

This is an action for ejectment. Prior to the dates material to this action the plaintiff let premises No. 7, Shoe Road, Kotahena, to the defendant at a monthly rental of Rs. 70. On September 22nd 1943, the plaintiff gave the defendant notice to quit and deliver possession of the said premises on October 31st 1943. The defendant contends that section 8 (*c*) of the Rent Restriction Ordinance, No. 60 of 1942, cannot apply to a case where the premises are required by the landlord for the purpose of setting up a dependant in business. The section reads:

> "(*c*) The premises are, in the opinion of the court, reasonably required for occupation as a residence for the landlord or any member of the family of the landlord or for the purposes of his trade, business, profession, vocation or employment, or;"

The question is whether the word "his" in the concluding sentence refers to the landlord or to both the landlord and a member of the family.

In *Doe vs Dodd* (5 B. & Ad. 689) Taunton, J. said: "Where A demises to B for the term of his life, the word 'his' would, in ordinary construction, apply to B as the last antecedent"

The language of section 8 (*c*) is clear and unambiguous. Where the words of a statute are precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense. The words themselves in such a case, best declaring the intention of the legislature. (Maxwell on the Interpretation of Statutes 8th Edition, page 1.)

The general structure of section 8 (*c*) is that the word "his" refers to the last party named, namely, the landlord.

The observations of Taunton, J., which I have quoted above, seem to me good sense as well as good law, and I have no hesitation in applying them to the present case and holding that the word "his" refers to the landlord. I would accordingly dismiss the appeal with costs.

*Appeal dismissed.*

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*Present:* WIJEYEWARDENE, J.

## THANGARASA vs THARRONACHARI

*S. C. No.* 184/1945—*M. C. Kalmunai No.* 675.
Argued & Decided on 29th May, 1945.

*Criminal Law—Previous conviction of accused—When should it be taken into account in imposing sentence.*

**Held :** That a previous conviction is relevant only when a court has to consider the applicability of some ordinance, such as the Prevention of Crimes Ordinance, and should not otherwise be taken into account in imposing sentence.

**Cases referred to :** *Betteridge's Case* (1942 – 28 C.A.R. 171).

*C. T. Olegasegaram*, for the accused-appellant.
No appearance for the complainant-respondent.

WIJEYEWARDENE, J.

The accused was convicted on charges of (*a*) theft of an ear-stud worth Rs. 9/– from one Seenithamby and (*b*) assaulting Seenithamby. The magistrate sentenced him to 4 months' rigorous imprisonment on the first count and 2 weeks' rigorous imprisonment on the second count and directed the sentences to run consecutively.

The evidence shows that the accused had a quarrel with Seenithamby's daughter and was removing a grinding stone when Seenithamby ran to the spot and questioned the accused. There was then a fight between the accused and Seenithamby in the course of which the accused assaulted Seenithamby and took away his ear-stud.

I see no reason to interfere with the conviction. As regards the sentence there is, no doubt, evidence that the accused was previously convicted in 1940 when he was a young man of twenty. A previous conviction is relevant when a court has to consider the applicability of some ordinance as the Prevention of Crimes Ordinance. Otherwise it is not right to take such a conviction into consideration in imposing a sentence. I would in this connection refer to *Betteridge's Case* (1942 – 28 C.A.R. 171) where Caldecote, L.C.J. said :

> " It is not right to hold over a man's past offences which have been dealt with by appropriate sentences, as we must assume past offences have been dealt with, and add them up and increase accordingly the severity of the sentence for a later offence. That is dangerously like punishing a man twice over for one offence. If a man who has been convicted shows himself unresponsive to leniency and persists in a life of crime, that is a reason for giving him the proper and deserved sentence in the particular case. If, on the other hand, there are some merits, it may be that the court will treat him more leniently because he has shown himself in some way responsive to the warnings which he has had."

In the circumstances of this case, I think a sentence of 2 months' rigorous imprisonment would be an adequate punishment on the first charge. The sentence passed by the magistrate on the second charge will stand and the sentences will run consecutively.

*Sentences varied.*

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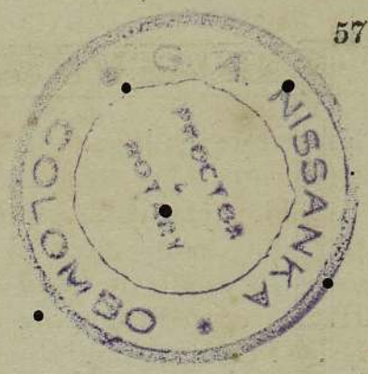

*Present:* HOWARD, C.J. & KEUNEMAN, J.

## MITCHELL vs FERNANDO

*S. C. No.* 344—*D. C.* (*F*) *Colombo No.* 731.
Argued on 31st May & 1st June, 1945.
Decided on 18th June, 1945.

*Mortgage Bond—Hypothecation of shares in a company—Delivery of share certificates to mortgagee—Absence of provision for registration—Subsequent sale in execution and purchase of shares by party with knowledge of existence of mortgage—Rights of such purchaser—Law governing such hypothecation—English or Roman-Dutch law.*

The plaintiff sued the 1st and 2nd defendants as executors of the last will and testament of H. Bastian Fernando, deceased, for the recovery of a sum of Rs. 144,541/25 and interest due on a mortgage bond dated 28th September 1922, whereby 900 shares in the Chilaw Coconut Co., Ltd. (now H. Bastian Fernando Estates, Ltd.) had been hypothecated to the plaintiff. The 3rd defendant was added as a party on the footing that she, with knowledge of the aforesaid mortgage had caused to be seized and sold and herself purchased the said shares.

The 1st and 2nd defendants consented to judgment and the action against the 3rd defendant was contested.

It was established :

(*a*) That the share certificates mortgaged to the plaintiff were deposited with him along with the bond and had always been in his possession.

(*b*) That the plaintiff notified his claim as mortgagee to the company.

(*c*) That two conditions were necessary for the transfer of the shares in question, *viz.* :

(i) Approval of the transfer by the Board of Directors.

(ii) A transfer duly executed and registered in the books of the company, and that neither of them had been satisfied in the case of the plaintiff.

(*d*) That the 3rd defendant prior to her purchase at the Fiscal's sale actually had notice of the existence of the mortgage in favour of the plaintiff and that she got the shares she purchased registered in the company's books in her name.

It was clear that under our law there is no provision which requires that such a mortgage or pledge should be registered.

The learned District Judge dismissed the plaintiff's action as against the 3rd defendant and the plaintiff appealed.

**Held :** (i) That the mortgage or pledge of shares in a company is not a matter with respect to Joint Stock Companies and the law applicable is the Roman-Dutch law and not the English law.

(ii) That physical delivery of share certificates (which are only the documentary evidence of title) cannot be said to constitute delivery of the right mortgaged.

(iii) That as regards delivery of possession the mortgagee of an incorporeal right stands on the same footing as that of a corporeal right.

(iv) That the 3rd defendant inasmuch as she had actual notice of the existence of the mortgage did not stand in any other better position in respect of the shares in question than the mortgagor himself and that in consequence the plaintiff is entitled to resort to the shares in the hands of the 3rd defendant and is not merely restricted to claim in the amount realized at the execution sale.

**Cases referred to :** *Hongkong & Shanghai Bank vs Krishnapillai* (33 N.L.R. 249)
*Tatham vs Andree* (1 Moore's P.C. Cases (N.S.) 386 ; 15 English Reports 747)
*Miller vs Young* (Ramanathan 1872 ; '75 p. 23)
*Ramen Chetty vs Campbell* (2 N.L.R. 94)
*Casy Lebbe Marikar vs Aydroos Lebbe Marikar ex parte M. M. Abdul Rahman* (1 C.L.R. 1)
*Meera Saibo vs Muttu Chetty* (3 C.L.R. 37)
*Vellaiappa Chetty vs Pitche Maula* (4 N.L.R. 311)
*Mohideen vs Aboubacker* (8 C.W.R. 118)
*Adicappa Chetty vs Perera* (30 N.L.R. 27)
*Societe Generale de Paris vs Walker* (L.R. 11 A.C. 20)
*Smith vs Farelly's Trustee* (1904 T.S. at 954)
*Rothschild vs Lowndes* (1908 T.S. at p. 498)
*National Bank vs Cohen's Trustee* (1911 A.D. at p. 246)
*Coaton vs Alexander* (1879–9 Buchanan 17)

*N. Nadarajah, K.C.*, with *E. F. N. Gratiaen* and *S. J. C. Kadirgamar*, for the plaintiff-appellant.

*H. V. Perera, K.C.*, with *S. J. V. Chelvanayagam, E. B. Wickramanayake* and *V. Wijetunge*, for the 3rd defendant-respondent.

KEUNEMAN, J.

The plaintiff brought this action against the 1st and 2nd defendants-respondents as executors of the last will and testament of H. Bastian Fernando, deceased, for a sum of Rs. 144,541/25 and further interest thereon, on bond marked A dated the 28th September, 1922. The bond purported to hypothecate 900 shares in the Chilaw Coconut Company, Ltd., now called H. Bastian Fernando Estates, Ltd., bearing Nos. 3501 to 3600 and 3701 to 4500 inclusive. The 3rd defendant was added as a party to the action so as to be bound by the decree, on the footing that she, with notice of the mortgage abovementioned, had caused to be seized and sold and herself purchased the said shares.

The 1st and 2nd defendants consented to judgment, and the action as against the 3rd defendant was dismissed with costs, and the plaintiff now appeals against that judgment.

The facts were not substantially in dispute in this appeal.

It appeared in evidence that the share certificates of the shares mortgaged to the plaintiff were deposited with the plaintiff along with the bond A, and it is not now in dispute that these certificates have always been in the possession of the plaintiff up to date. It further appeared that the plaintiff notified his claim as mortgagee to the company, and in the company's register (P24) pencil notes were made against the relevant shares indicative of the mortgage created. It is clear however that under our law there is no provision that such a mortgage or pledge of shares should be registered. Ordinance No. 8 of 1871 and the later Registration of Documents Ordinance (Chapter 101) which relate to the registration of bills of sale do not apply to shares in companies.

While these shares were subject to the above mortgage, Dr. C. S. Peiris, who held a money decree in D.C. Colombo No. 52407, caused to be seized in execution on the 31st July, 1933 and to be sold on the 13th September, 1933 and himself purchased on behalf of his wife the 3rd defendant, a block of 2,540 shares in H. Bastian Fernando Estates, Ltd. registered in the name of the late H. Bastian Fernando. Fiscal's conveyance P6 was issued to the purchaser whereby "all the right title and interest of the defendants aforesaid in the said property" was transferred. "The defendants aforesaid," were the 1st and 2nd defendants, the executors of the last will of H. Bastian Fernando. It may be added that although the share numbers were not given, the 2,540 shares included all the shares registered in the name of H. Bastian Fernando in the company and therefore would catch up the shares now in question. Thereafter, the shares now in question were registered in the company's register under the name of the 3rd defendant. This was done on the 30th October, 1942, shortly before the present action.

Several issues were framed at the trial, and the findings of the District Judge may be summarized as follows :

(*a*) That the mortgage created by document A was a mortgage of an incorporeal movable and that there was no provision in law that a mortgage in respect of shares in a company be registered ;

(*b*) That the law applicable to the matter was the Roman-Dutch law ;

(*c*) That there was an absence of delivery to the plaintiff of the incorporeal thing mortgaged. The District Judge did not consider that the delivery of the share certificates amounted to delivery of the shares mortgaged;

(*d*) That as a consequence of (*c*) the mortgagee (plaintiff) could not prevent the sale of movable property in execution of a third party's writ ;

(*e*) That after the sale under the third party's writ the mortgagee could no longer follow the thing mortgaged but had merely a right to claim preference in the proceeds of that sale ;

(*f*) That the rules laid down in the Roman-Dutch law with regard to the mortgage of corporeal movables also applied to the mortgage of incorporeal movables, more particularly the rules relating to delivery of the thing mortgaged ;

(*g*) That the 3rd defendant prior to her purchase at the Fiscal's sale had actually notice of the existence of the mortgage in favour of the plaintiff in respect of the shares in question;

(*h*) That under the law of Ceylon the finding on (*g*) did not make the 3rd defendant's purchase of the shares at the Fiscal's sale subject to the mortgage in favour of the plaintiff ;

(*i*) That the plaintiff's claim was not prescribed.

I may add that the findings with regard to (*a*), (*g*) and (*i*) were not disputed in appeal, and I am of opinion that they are correct.

As regards finding (*b*) of the District Judge, it appears from the judgment that in the court below it was "common ground" that the Roman-Dutch law applied to the rights of the parties. In appeal, however, the argument was advanced that Chapter 66 section 3 — or the previous Ordinance 22 of 1866 — applied, as this was a question "with respect to the law of joint stock companies" and that this matter was governed by the English law. In my opinion the present matter relates to the mortgage of movables and is not a matter with respect to joint stock companies. In *Hongkong & Shanghai Bank vs Krishnapillai* (33 N.L.R. 249) a similar argument was advanced without success, and it was held that "the right of a pledgee to sell his security without recourse to a court of law is peculiar to the English law of mortgage and pledge, and the common law of the land in the

matter of mortgage and pledge does not give place to the English law when the mortgagee or pledgee is a bank." Ordinance 22 of 1866 was considered in this connection.

Findings (*c*), (*d*), (*e*) and (*f*) of the District Judge may be considered together.

As long ago as 1863, in *Tatham vs Andree* (1 Moore's P.C. Cases (N.S.) 386 at p. 409; 15 English Reports 747 at page 755) — this has also been referred to as *Ledward's Case* — it was held by the Privy Council in the case of the mortgage or lien of movables in Ceylon, that "if the goods left in the possession of the mortgagor are sold or mortgaged by him to another person, they cannot be followed into the hands of such transferee for value but the contract is binding on the debtor and the goods themselves may be taken if they remain in his hands."

Voet in his Commentary on the Pandects (20.1.12 and 13 — Berwick's Translations, Revised Edition pp. 285 *et seq.*) deals with this matter.

In the case of movables, Voet said neither formal registration nor payment of the fortieth is required in order that they may be specially pledged, provided that they are actually delivered to the creditor in security of the debt. Voet deals with the question of the possession being left with the debtor and of the debtor parting with the goods, and adds — "therefore a creditor must have actual possession of a movable to enable him to assert any right in it for himself, for, as already said, this kind of agreement" (*viz.* that the debtor should continue in possession on behalf of the mortgagee) "is now considered as only made in fraud of the custom which requires delivery to create a pledge of movables, and as a (fraudulent) circumvention of the other creditors." Voet added that "a bare convention without delivery" does not affect the movable goods of a debtor, although the debtor has purported to bind them by public instrument before a notary and witnesses. Voet cited in support of this the maxim *mobilia non habent sequelam*. (Section 12).

In section 13 Voet reverts at the beginning to the mortgage of immovables and holds that they pass to any possessor subject to the incumbrances, and he adds this passage:

> "Unless creditors are silent when the subject of an hypothec is sold by the Fiscal and refrain from asserting their rights, in which case they are considered to have lost their rights of action *in rem*, for the trust reposed in a Fiscal's sale should not be lightly upset.....in which case, however, the price succeeds in the place of the thing, and it is lawful for a hypothecary creditor to contest with other creditors the right of preference in the price (realized by the sale) of the pledge."

Voet adds that under the civil law the same rule applied to movables, but that under "modern law" the principle *mobilia non habent sequelam* was introduced:

> "Hence a creditor's security in movables specially bound and delivered to him only remains to him while he himself retains the possession delivered to him and holds the thing (pledged); and therefore if there be an alienation or a new mortgage of it by the same debtor to another person accompanied by delivery, the creditor loses his right of pledge and preference, and the thing if alienated passes to the alienee free of the incumbrance; or if it has again been given in pledge to another, that other has the right of preference."

In Van Leeuwen's Commentaries (4.13.19 — Kotze's Translation II Edition Volume 2 p. 105) it is stated that:

> "With respect to movable property there is no doubt so soon as it comes by proper title into the possession of a third party, according to the custom of these countries, it passes completely to him by virtue of the maxim *mobilia non habent sequelam*, that is, movables cannot be followed up."

In Grotius' Introduction (2.48.29 — Maasdorp's Translation II Edition p. 190) this passage occurs:

> "If the movable property has lawfully passed into the hands of a third party, such property will be free and unencumbered."

An exception recognized in Rhineland is however mentioned.

See also Van Der Keesel's Select Theses 2.48.29 (ccccxxxii) Lorenz's Translation p. 140:

> "Movable property which has been pledged either generally or specially without delivery, if alienated by the debtor, are discharged from the pledge, and this holds true also of securities even when they have been mortgaged, but not as regards those instruments called Kusting Brieren."

In a long series of cases decided in Ceylon it has been held that if the mortgaged goods left in the possession of the mortgagor are sold or mortgaged by him to another person, they cannot be followed into the hands of such transferee for value, but the contract is binding on the debtor and the goods themselves may be taken if they remain in his hands. But where the mortgagee has lost his right *in rem* to the goods, he was still entitled to claim preference with respect to the proceeds of sale realized in execution under an unsecured creditor's writ: *vide Miller vs Young* (Ramanathan 1872; '75 p. 23); *Ramen Chetty vs Campbell* (2 N.L.R. 94); *Casy Lebbe Marikar vs Aydroos Lebbe Marikar ex parte M. M. Abdul Rahman* (1 C.L.R. 1); *Meera Saibo vs Muttu Chetty* (3 C.L.R. 37); *Vellaiappa Chetty vs Pitche Maula* (4 N.L.R. 311); *Mohideen vs Aboubacker* (8 C.W.R. 118); *Adicappa Chetty vs Perera* (30 N.L.R. 27).

In all these cases corporeal movables were involved and all these movables were capable of delivery, but in point of fact they had not been delivered to the mortgagee, and were afterwards transferred by the debtor to a third party who obtained possession.

In the present case we are dealing with incorporeal movables. The first argument addressed to us was that there had been delivery of possession in consequence of the fact that the share certificates had been delivered to the mortgagee at the time of the mortgage and that this amounted to a symbolical delivery of possession of the thing mortgaged. I must confess that this is an attractive proposition but it is necessary to consider whether it is correct. The share certificate in question is P17, and it is a certificate that H. Bastian Fernando is the holder of the shares in question. It contains this note: "A transfer of the above shares can be effected only by a transfer duly executed and registered in the books of the Company, and the name of the proposed transferee must be approved by the Board of Directors before the transfer can be made. Forms of the Deed of Transfer can be had at the Company's office." Two conditions were necessary for the transfer, *viz.* (1) approval of the transfer by the Board of Directors, and (2) a transfer duly executed and registered in the books of the Company. Neither of these two conditions has been satisfied in the case of the plaintiff. The mere handing over to him of the share certificates did not appear to carry any legal consequences. The pencil notes made by the company in the register had also no significance. In what way can it be contended that possession had been delivered to the plaintiff? The share certificates were not the same as the right which was mortgaged. They were "the proper (and indeed the only) documentary evidence of title in the possession of the shareholder" — *vide Societe Generale de Paris vs Walker* (L.R. 11 A.C. 20 at 29). The right mortgaged being incorporeal was in its very nature incapable of physical delivery, and I do not think the physical delivery of "the documentary evidence of title" can be said to constitute delivery of the right mortgaged.

In South Africa it has been held in *Smith vs Farelly's Trustee* (1904 T.S. at 954) that delivery of an incorporeal right can only be effected by the cession of the right, but the later cases have modified this and laid down that the general practice in South Africa is to require in such cases a formal cession in favour of the person whom it intended to secure with a necessarily implied obligation on his part under certain circumstances to return and account. See *Rothschild vs Lowndes* (1908 T.S. at p. 498); *National Bank vs Cohen's Trustee* (1911 A.D. at p. 246).

I do not in the circumstances lay it down that the formal cession of the shares is the only form of delivery that is possible under the Roman-Dutch law, although delivery of possession is in fact made effective by cession. It is sufficient in this case to hold that the delivery of the share certificates, which were hedged round by restrictions, was not sufficient evidence of effective delivery of the shares mortgaged. The possession of the share certificates in this case did not give to the plaintiff such control and direction of the shares mortgaged as to be equivalent to possession in law of the shares mortgaged.

In the present case it is also necessary to consider the position of the 3rd defendant. For it is not every alienation to a third party which defeats the right *in rem* of the mortgagee without possession. Voet lays it down (20.1.13) that the alienation to the third party must be "accompanied by delivery" in order to deprive the mortgagee of his right of pledge and preference. In my opinion the mere purchase at a Fiscal's sale by the 3rd defendant of the shares mortgaged was ineffective to defeat the plaintiff's right as mortgagee. But in this case the 3rd defendant has gone one step further. She has shortly prior to the action succeeded in having her name registered in the company's register as the owner of the shares and, in my opinion, she must now be regarded as having obtained delivery of possession of the shares in question.

I may add one word on the argument that as regards delivery of possession the mortgagee of an incorporeal right stands on the same footing as that of a corporeal right. It is true that an incorporeal right is incapable of physical delivery, but it is also clear that possession may be given by cession of the right, if not in other ways. Further Voet, and in fact the other Roman-Dutch commentators too, do not put the mortgages of incorporeal rights on any different footing in this respect. The necessity for delivery of possession arises from the fact that in the case of all movables the maxim *mobilia non habent sequelam* applies, and this applies equally to corporeal and incorporeal movables.

One further point — *viz.* finding (*h*) of the District Judge — remains to be considered, and that is a matter of importance. The matter may best be put in the language of De Villiers, C.J. in *Coaton vs Alexander* (1879–9 Buchanan 17):

> "It is clear according to the law of Holland that a pledge, unless accompanied or followed by delivery of the goods to the creditor, creates no obligation

by which the latter can resort to them in the hands of a third person. This is clearly laid down in Burge (Vol. III p. 572) who gives the different authorities, and one of them is from the Dutch Consultations (Vol. III Consultations 174) in which an elaborate opinion is given by the greatest lawyer of the time, Hugo Grotius · and it seemed that all the other authorities, in laying down this rule, simply took the authority of Grotius for the opinion which they gave. On looking into the Consultations itself, I find that Grotius there qualifies this doctrine by stating that where a purchaser obtains articles with a knowledge that they have been pledged, he has no greater right to the pledged articles than the pledger himself; he stands in exactly the same position. All the authorities who follow Grotius lay down the general rule and omit this qualification which has such an important bearing upon this case."

The substance of this has now been embodied in the text of Maasdorp's Institutes of South African Law (V Edition Volume II—329).

Kotze's Van Leeuwen (II Edition Volume II p. 105) contains this note :

"Grotius likewise says that where the purchaser or third party obtains property *with a knowledge* that they had been pledged, he has no greater right in regard to them than the pledger himself. This opinion has frequently been approved and acted on in South Africa."

Wille in his book, Mortgage and Pledge in South Africa (p. 259) states that the same rule applied where a judgment-creditor of the pledger attaches the pledged property in execution. But he adds that by knowledge or notice of a notarial bond is meant actual and not merely constructive notice thereof. This opinion is based on decided cases.

It has been argued before us that an execution-purchaser stands in this respect in a different position from a mere purchaser from the mortgagor. It has been contended that the execution-creditor buys against the mortgagor and not from him, and that he cannot be affected by knowledge of the mortgage. The District Judge inclined to this opinion. I do not think, however, that the argument can be sustained. Grotius in his opinion emphasized the *knowledge* of the purchaser at the time of the purchase and of the obtaining of the goods, and this would be applicable to all kinds of purchasers, including purchasers in execution. In principle, I think, it is equitable that any purchaser with knowledge of an existing mortgage should take subject to that mortgage.

In this case it has been established that the 3rd defendant had knowledge of the mortgage before the purchase. It is a point, though not perhaps a very weighty point, that the Fiscal's transfer conveyed to her "the right title and interest" of the executors in the shares. The interest of the executors was certainly subject to the mortgage. In all the circumstances of the case I hold that the 3rd defendant did not stand in any other better position in respect to the shares than the mortgagor himself, and that in consequence the plaintiff is entitled to resort to the shares themselves in the hands of the 3rd defendant, and is not merely restricted to claim on the amount realized at the execution sale. The decisions in South Africa are, in my opinion, equally applicable in Ceylon. It is true that no previous case on this point appears to have been decided in Ceylon. But, after all, the question we have to investigate is — What is the Roman-Dutch law applicable to the matter, and in the determination of that question the opinion of Hugo Grotius should, I think, be followed. There is nothing in Voet or the other commentators which is antagonistic to that opinion.

In the circumstances the appeal is allowed with costs in both courts, as prayed for in the petition of appeal.

HOWARD, C.J.

I agree.

*Appeal allowed.*

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*Present:* HOWARD, C.J. & KEUNEMAN, J.

## COOMARASAMY vs CHELLAM & OTHERS

*S. C. No.* 191-*M*—*D. C.* (*Final*) *Point Pedro No.* 15691.
Argued on 22nd & 23rd May, 1945.
Decided on 13th June, 1945.

*Breach of trust—Sale of trust property by trustee*—Bona fide *purchaser for value having no notice of equitable title—Legal title of purchaser—Prescription—Trusts Ordinance* (*Chapter* 72) *section* 111.

The 1st to 4th defendants purchased a schooner in 1925. The vessel was registered and the documents were executed in the name of the 5th defendant who, in breach of trust, sold the schooner by bill of sale (P5) on 11th August, 1928 to the 6th defendant. By further bills of sale 6th defendant sold the schooner to 7th defendant, who sold it to 8th defendant, who sold it by P2 on 25th August, 1937 to the plaintiff. The plaintiff claimed the schooner as a *bona fide* purchaser for value. It was established that he had been in possession of the vessel since the date of purchase.

The 1st and 2nd defendants prayed that the bills of sale be set aside. They denied that the plaintiff was the owner of the vessel and maintained—

(*a*) that P2 was effected secretly, fraudulently and collusively with intent to defraud them of certain moneys due to them in respect of the vessel under another action instituted by them against the 3rd and 4th defendants ; and

(*b*) that the 5th defendant was holding the vessel in trust for the 3rd and 4th defendants and that the latter fraudulently and collusively obtained the execution of the various bills of sale and by reason of these bills rendered themselves insolvent.

The transfer to the plaintiff was not secret, being registered. It was not proved that the 3rd and 4th defendants were left without any property when the vessel was transferred by P5.

**Held :** (i) That the plaintiff was not bound by the trust in breach of which the schooner was sold by the 5th defendant, as the plaintiff—

(*a*) had obtained the legal title;

(*b*) was a *bona fide* purchaser for valuable consideration; and

(*c*) had received no notice that the transaction was a breach of trust before the transfer was completed.

(ii) That the 1st and 2nd defendants had failed to establish fraud against the plaintiff.

(iii) That, even if fraud had been established, the claim of the 1st and 2nd defendants was prescribed as 1st defendant had notice of P5 on 28th October, 1929 and that the case did not come within the ambit of section 111 (1) of the Trusts Ordinance.

**Cases referred to :** *Narayanan Chettyar vs Official Assignee* (High Court Rangoon A.I.R. (1941) P.C. 93)
*Muttiah Chetty vs Mohamood Hadjiar* (25 N.L.R. 185)
*Saravanai Arumugam vs Kanthar Ponnambalam* (2 Leader L.R. 11)
*Dodwell & Co. vs E. John & Co.* (20 N.L.R. 206)
*Punchi Hamine vs Ukku Menika* (28 N.L.R. 113)
*Fernando vs Peiris* (33 N.L.R. 1)
*Pilcher vs Rawlins* (1872–7 Chancery Appeals at pages 268-269)
*Joseph vs Lyons* (15 Q.B.D. 280)
*Lord Strathcona Steamship Co. vs Dominion Coal Co.* (1926 A.C. 108)
*De Mattos vs Gibson* (4 De G. & J. 276)

*H. V. Perera, K.C.*, with *N. Kumarasingham*, for the plaintiff-appellant.

*N. Nadarajah, K.C.*, with *P. Navaratnarajah*, for the 2nd, 9th and 11th defendants-respondents.

*S. Mahadeva*, for the 6th defendant-respondent.

*A. C. Nadarajah* with *C. J. Ranatunga*, for the 8th defendant-respondent.

HOWARD, C.J.

This is an appeal from a judgment of the Additional District Judge of Jaffna upholding the claim of the 1st and 2nd defendants-respondents and dismissing the claim of the plaintiff with costs.

The action was concerned with the rights in a schooner named "Kadiresan" which were claimed by the plaintiff by virtue of a Bill of Sale, P2, dated the 25th August, 1937, in his favour made by the 8th defendant. The schooner had been transferred to the 8th defendant by Bill of Sale, P3, dated the 19th September, 1936, made in his favour by the 7th defendant who in his turn had obtained title in the same by virtue of Bill of Sale P4, dated the 22nd October, 1931, made in his favour by the 6th defendant. The 6th defendant was the holder of a Bill of Sale, P5, dated 11th August, 1928, made by the 5th defendant in his favour. It was established that the 1st, 2nd, 3rd and 4th defendants were the purchasers of the schooner in 1925. The vessel was registered and the documents were executed in the name of the 5th defendant. In 1936 disputes arose between the partners in this seafaring adventure. The matter was settled by the 1st and 2nd defendants agreeing to renounce their shares in the schooner on payment of Rs. 1,800 and a share in the profits for six months. This money not being paid the 1st and 2nd defendants instituted D.C. No. 23897 on the 20th January, 1928, against defendants 3, 4 and 5 for the recovery of Rs. 4,882/92 due to them on account of the schooner. The 5th defendant was made a party to this action as the legal ownership of the schooner was vested in him. Judgment in favour of the 1st and 2nd defendants was entered by default on the 1st February 1933 and the decree was made absolute on the 12th May, 1933. From the record of the proceedings (2D6) in D.C. No. 23897 it is clear that from the time of the decree absolute in favour of the 1st and 2nd defendants the latter made attempts to enforce their claim. On the 28th May 1940, they claimed the schooner which was seized by the Fiscal under a writ, sale being fixed for the 29th July 1940. On the 11th July 1940, the appellant in this action who had moved for summons on 25th June 1940, prayed under section 247 of the Civil Procedure Code that the sale of the schooner

fixed for the 29th July 1940, be stayed until the final determination of the action. On the 23rd July, 1940, it was ordered that the sale be stayed unless the judgment-creditor was prepared to give security. The present action, therefore, proceeded. On the 19th October, 1943, the 3rd defendant in the course of proceedings under D.C. No. 23897 was examined for means under section 219 of the Civil Procedure Code. At this examination which is recorded in 2D7 the 3rd defendant stated that he was the tindal of the schooner and that neither he nor his wife, the 4th defendant, had been in possession of any property for the last 10 years. Since the institution of these proceedings by the appellant the 1st defendant has died and the 9th, 10th and 11th defendants as his heirs have been substituted in his place.

The plaintiff's claim was based on the title alleged to be vested in him under the various bills of sale referred to in this judgment and culminating in P2 made in his favour by the 8th defendant. The plaintiff maintained that he had been in possession and charge of the vessel since the 25th August, 1937, the date of P2. In these circumstances the seizure of the schooner by the Fiscal in May, 1940, was bad in law. The 1st and 2nd defendants in their answer deny that the plaintiff ever became the owner of the schooner and maintained that the bill of sale was effected secretly and fraudulently and collusively with the intent to defraud them of the money due to them. The 1st and 2nd defendants also contend that the vessel has always been in possession of the 3rd defendant and that the 5th defendant was never its owner and that he was holding it in trust for the 3rd and 4th defendants. The 1st and 2nd defendants also aver that the 3rd and 4th defendants fraudulently and collusively obtained the execution of the various bills of sale and by reason of the alienation by the said bills rendered themselves insolvent. The 3rd defendant in his answer denied the allegations of fraud and collusion made by the 1st and 2nd defendants.

The District Judge in dismissing the plaintiff's claim has held as follows :

(1) The plaintiff was not the owner of the vessel by virtue of P2.

(2) The vessel was liable to seizure by the 1st and 2nd defendants in execution of the decree obtained by them in D.C. No. 23897.

(3) The 5th defendant was holding the vessel in trust for the 3rd and 4th defendants at the time of the institution of case No. 23897.

(4) The Bills of Sale were executed fraudulently and collusively in order to hinder the 1st and 2nd defendants in the execution of their decree.

(5) The alienation in favour of the 6th defendant rendered 3rd and 4th defendants insolvent.

(6) The claim of the 1st and 2nd defendants was not prescribed.

Mr. Perera, on behalf of the appellant, has contended that the defence of the 1st and 2nd defendants is based on the allegation of the fraudulent execution of the various bills of sale culminating in P2 in favour of the appellant. That it has been established the plaintiff gave consideration for the transfer of the schooner. That no evidence has been adduced to prove affirmatively not only the fraud of the plaintiff but also the participation of the 3rd and 4th defendants in these transactions. Without such proof the defence must fail.

Mr. Perera also contends that the claim of the 1st and 2nd defendants is prescribed. In this connection it would appear from 2D8 that action No. 14025 was instituted on the 5th May, 1937, in the District Court of Kalutara claiming a sum of Rs. 500 against the 1st defendant as owner and the 3rd defendant as Master of the schooner. On the 13th September, 1929, the vessel was claimed by the 6th defendant *vide* P7. This claim was upheld on the 28th October, 1929 (*vide* P8) by virtue of Bill of Sale of 11th August 1929 (P5). Neither the 1st nor 3rd defendants appear to have been present when this claim was upheld. Mr. Perera contends, however, that from this date the 1st and 2nd defendants had notice of the fraudulent alienation by means of which the 3rd defendant had rendered himself insolvent. The cause of action of the 1st and 2nd defendants therefore arose on the 28th October, 1929, and was prescribed in three years from that date.

The 1st and 2nd defendants in their answer have prayed that the bills of sale be set aside. In his judgment the District Judge dismisses the plaintiff's action with costs in terms of the prayer of the 1st and 2nd defendants. The judgment must, therefore, be taken to have set aside the bills of sale. The first question that arises for consideration is whether the learned judge was right in holding that those bills were executed fraudulently and collusively by the 5th defendant at the instigation of the 3rd and 4th defendants with the various assignees so as to put the property in the schooner beyond the reach of the 1st and 2nd defendants. In *Narayanan Chettyar vs Official Assignee* (High Court Rangoon A.I.R. (1941) P.C. 93) it was held by the Privy Council that fraud must be established beyond all reasonable doubt and cannot be based on suspicion and conjecture. Again in *Muttiah vs Mohamood Hadjiar* (25 N.L.R. 185) Ennis, J. at page 186 says that there is no presumption of fraud and when it is alleged it must be fully proved. He then cites with appro-

val a dictum of Hutchinson, C.J. in the case of *Saravanai Arumugam vs Kanthar Ponnambalam* (2 Leader L.R. 11) with regard to the question as to what was sufficient in a Paulian action to establish fraud. Hutchinson, C.J. laid down that the evidence from which a fraudulent intention can be inferred is usually some or all of the following circumstances :

(1) That there was no consideration.
(2) That the transfer was secret.
(3) That the transferor had continued in possession notwithstanding the transfer.
(4) That the transfer left him without any other property, and/or
(5) Without enough to pay the debts which he owed at the time or was about to incur.

The plaintiff claims the schooner as a *bona fide* purchaser for value from the 8th defendant by virtue of Bill of Sale P2. The 1st and 2nd defendants have not proved (1), (2) and (3). The plaintiff's attorney has proved that the plaintiff bought the schooner for Rs. 1,000, that is to say the same price that was paid for it in 1925. The transfer was not secret being registered (*vide* P6). The plaintiff's attorney stated in evidence that the plaintiff was in possession after his purchase and used the schooner to carry cargo to and fro and that the 3rd defendant at the time of the seizure of the schooner was the tindal in charge. Subsequently and before the date of the seizure the 7th defendant was the tindal. I do not think it can be said to be established that the 3rd defendant remained in possession. Moreover it was the 5th defendant who transferred the schooner and not the 3rd defendant. It has not been proved that the 3rd and 4th defendants were left without any property when the schooner was transferred to the 6th defendant in 1938. At his examination on the 19th October, 1943, the 3rd defendant stated he and his wife had alienated no property in the last 10 years.

This evidence does not prove what property he had in 1928 when P5 was executed. Moreover, it was not these defendants who gave the bill of sale, but the 5th defendant. The learned judge has found that the plaintiff has himself assisted defendants 7 and 8 in furtherance of the scheme to defraud 1st and 2nd defendants and therefore the fact that he gave consideration does not afford him a complete defence. The only evidence to prove that the plaintiff had participated in the fraud was the fact that he took a bill of sale from 8th defendant. In view of the fact that he gave consideration I am of opinion that although the transactions being made for the most part by persons who were related to each other may give rise to suspicion, fraud has not been established against the plaintiff. In this connection it must be borne in mind that the latter according to the 2nd defendant was not a relation.

I am also of opinion that even if fraud had been established the claim of the 1st and 2nd defendants was prescribed. Since the decision in *Dodwell & Co. vs E. John & Co.* (20 N.L.R. 206) the Trusts Ordinance (Chapter 72) has come into operation. Section 2 of this Ordinance is worded as follows :

> " All matters with reference to any trust, or with reference to any obligation in the nature of a trust arising or resulting by the implication or construction of law, for which no specific provision is made in this or any other Ordinance, shall be determined by the principles of equity for the time being in force in the High Court of Justice in England."

The 1st and 2nd defendants base their claim on the ground that the bill of sale being induced by fraud an obligation in the nature of a trust was created arising by implication or construction of law and the person who has obtained the property or persons claiming from him as volunteers must hold it on trust for the person defrauded. Section 111 of the Trusts Ordinance deals with the law of prescription in relation to trusts and it excludes from the operation of the Prescription Ordinance certain classes of cases. This case does not come within the ambit of sub-section 1 nor in my opinion for the reasons given by Jayawardene, A.J. in his judgment in *Punchi Hamine vs Ukku Menika* (28 N.L.R. at page 113) can the plaintiff be said to be holding the property under a constructive trust which by the law of England is treated as an express trust. The plaintiff is therefore entitled to rely on the Prescription Ordinance. The 1st defendant was a defendant in the action taken by F. H. Perera in the District Court of Kalutara on the 5th May 1927. On the 28th October 1929 the claim of the 6th defendant was upheld, bill of sale P5 in his favour by the 5th defendant having been produced in court. The 1st defendant, therefore, had notice of P5 from 28th October 1929. In her evidence the 2nd defendant stated that there was seizure of the schooner and that after such seizure she came to know of the transfer P5 from the 1st defendant. The cause of action arose when the fraudulent transfer was made on the 11th August, 1928. The 1st and 2nd defendants had knowledge of this fraud on or about the 28th October, 1929. Their claim was therefore barred in three years from this date *vide Fernando vs Peiris* (33 N.L.R. 1) and *Muttiah Chetty vs Mohamood Hadjiar* (*supra.*)

It has also been contended by counsel for the 1st and 2nd defendants that even if the allegations of fraud on the part of the plaintiff

have not been established, the plaintiff did not become the owner of the vessel by virtue of P2 because the title of the 8th defendant was derived from the 5th defendant who fraudulently and in breach of trust transferred the schooner to the 6th defendant in 1928. The 5th defendant being only a trustee for the 3rd and 4th defendants could not transfer the beneficial interest in the schooner and hence the 6th defendant, 7th defendant, 8th defendant and the plaintiff in turn held the schooner in trust for the 3rd and 4th defendants. In *Dodwell & Co. vs E. John & Co.* (*supra*) Ennis, C.J. applied the equitable principle laid down by the English Courts without qualification, and Pereira, J. said, "this court has often pointed out that our courts (in Ceylon) are Courts of Law and Equity, and it would be quite in order to give here the same relief as given in England in cases of fraud." The judgment of Lord Haldane when *Dodwell & Co. vs E. John & Co.* (*supra*) came in appeal to the Privy Council (1918 A.C. 563) showed that the Privy Council upheld the applicability of the equitable principle referred to in the judgment of Pereira, J. but held that the matter was subject to the Prescription Ordinance of Ceylon. The limitations on the right of a beneficiary to follow trust property with which the trustee has parted in breach of trust is referred to by James, L.J. in *Pilcher vs Rawlins* (1872–7 Chancery Appeals at pages 268–269) in the following passage :

> "I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage ; and, according to my view of the established law of this court, such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this court. Such a purchaser, when he has once put in that plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the *bona fides* or *mala fides* of his purchase, and also the presence or the absence of notice ; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him."

In the present case the 5th defendant was the trustee of the schooner and in breach of trust transferred it to the 6th defendant in 1928. The plaintiff who by a series of transactions has become the recipient of the schooner will be bound by the trust unless he can show (1) that he has obtained the legal title (2) that he was a *bona fide* purchaser for valuable consideration and (3) that he received no notice that the transaction was a breach of trust before the transfer was complete. In my opinion the plaintiff has obtained the legal estate. By virtue of rule 1 of schedule 19 of the Sale of Goods Ordinance the property in the schooner passed to the plaintiff when the bill of sale P2 was executed. Moreover there is evidence that the plaintiff took possession. The plaintiff has therefore satisfied (1). (2) has also been satisfied. With regard to (3), it is true that the plaintiff failed to give evidence at the trial. It was, however, held in *Joseph vs Lyons* (15 Q.B.D. 280) that corporeal chattels are outside the realm of constructive notice. In his judgment Lindley, L.J. said that as the plaintiff claimed the goods in order to succeed, either he must have a legal title, or if he had only an equitable title he must show that the defendant had notice of that title. The judgment of Cotton, L.J. was to the same effect as will be seen from the following passage at page 286 :

> "Then reliance was placed upon a contract that the after-acquired property should belong to the plaintiff ; it was the rule at common law that the property in future-acquired goods should not pass, except, perhaps, where there was a contract that the property in them should pass ; that rule still remains in force ; and it follows that the legal title remains as it stood at law ; only an interest at equity passed to the plaintiff. Then the defendant had the legal title : he had no notice of the equitable title existing in the plaintiff ; at least nothing has been proved showing that he had notice ; here the defendant was a pawnbroker, and he was not bound to search the register of bills of sale ; he was not bound to inquire as to goods pledged with him in the course of his business. Of course, if he had been informed of the existence of the bill of sale, he would have been bound to search the register in order to inform himself of its contents ; but I think that the doctrine as to constructive notice has gone too far, and I shall not extend it."

Again in *Lord Strathcona Steamship Co. vs Dominion Coal Co.* (1926–A.C. 108) the following dictum from the judgment of Knight Bruce, L.J. in *De Mattos vs Gibson* (4 De G. & J. 276) was cited with approval at page 117 in the judgment of Lord Shaw :

> "Reason and justice seem to prescribe that, at least as a general rule, when a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specific manner, the acquirer shall not to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not available to the giver or seller."

In the present case neither the 1st and 2nd defendants nor the 3rd and 4th defendants have

the legal title in the schooner. The 1st and 2nd defendants must prove that the plaintiff when he purchased by P2 had notice of the 3rd and 4th defendants' equitable title. This they have not done, and in the circumstances I am of opinion that the plaintiff, as expressed by James, L.J. in *Pilcher vs Rawlins (supra)* is entitled to depart in possession of the legal estate.

For the reasons I have given the judgment of the District Judge is set aside and judgment must be entered for the plaintiff as claimed together with costs in this court and the court below.

KEUNEMAN, J.

I agree.

*Appeal allowed.*

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SOERTSZ, A.C.J.

## DE ZOYSA vs THE G. A., KANDY & ANOTHER

*Application for a Writ of Certiorari on the Government Agent, Kandy* (561)
Argued on 20th July, 1945.
Decided on 24th July, 1945.

*Mandamus—Certiorari—Courts Ordinance section 42—Does Certiorari lie in the case of a wrong decision—Does Mandamus lie where a duty has been done erroneously.*

**Held :** (i) That the Writ of Certiorari never runs to give relief from wrong decisions.
(ii) That a mandamus is not issued on the ground that a duty has been done erroneously.

**Cases referred to :** *H. Nath Roy vs R. C. Barna Sarma* (A.I.R. 1921 Cal. p. 34)
*Rex vs London County Council* (1931-2 K.B. 215)
*The Queen vs St. Olave's District Board* (8 Ellis & Blackburn at 531)

*N. E. Weerasooriya, K.C.*, with *C. E. S. Perera* and *S. P. C. Fernando*, for the petitioner.
*T. S. Fernando, Crown Counsel*, with *J. G. T. Weeraratne*, for the 1st respondent.
*H. V. Perera, K.C.*, with *S. P. Wijeyewickreme*, for the 2nd respondent.

SOERTSZ, A.C J.

This application although it is described as one for the writs of Certiorari and Mandamus, must, I think, be supposed to be an application for the writ of Certiorari or Mandamus whichever, if either of them, is found to be appropriate to the facts relied upon. Those facts are few and are not in dispute. The first respondent who is the Government Agent of the Central Province, and, as such, the proper authority under the Urban Councils Ordinance, gave notice, by due publication in the Government Gazette, that he would accept nomination papers for the Hatton-Dickoya Urban Council area on the 8th November, 1944, between 10.30 and 11.30 a.m. Section 8 of that Ordinance provides for a duly qualified voter objecting to any nomination paper on any of the specified grounds, and empowers the Government Agent to consider and decide upon any such objection.

On the day fixed, the petitioner tendered his nomination paper in respect of Ward No. 2 and the 2nd respondent, a duly qualified voter, himself seeking to be returned for that Ward, objected to the petitioner's nomination on the ground that the petitioner held a public office under the Crown, in that he was a Registrar of Marriages. There was a time when the holding of *any* public office under the Crown was a disqualification. The petitioner, however, appears to have relied on an amendment of the Ordinance to the effect that only holders of public *pensionable* offices under the Crown were disqualified. But when attention was invited to this amendment the 2nd respondent pointed out that that particular amendment was not in force, but due to come into force from the 1st of January, 1945. Thereupon the 1st respondent made order saying that he was obliged to uphold the objection and to reject the petitioner's nomination paper. The result was that, there being only the 2nd respondent's nomination paper left, he was returned member for Ward No. 2. All the parties concerned appear to have been unaware of the fact that, at the time this objection was taken, there was in force an intermediate amendment which was to the same effect as the proposed amendment and disqualified only holders of *pensionable* public offices, and so it came to pass that the petitioner was held disqualified when, in fact, he was fully qualified — a most unfortunate and deplorable event indeed.

But the question is whether the petitioner, although he labours under a substantial grievance, is entitled to relief under one or the other of the writs he has invoked.

Section 11 (3) of the Urban Councils Ordinance enacts (*a*) that the Government Agent " shall have the power to decide " any objection taken under section 8, and (*b*) " his decision shall be final." Now, as observed by Mookerjee, A.C.J. in the case of *H. Nath Roy vs R. C. Barna Sarma* (A.I.R. 1921 Cal. p. 34) " the power to decide necessarily carries with it the power to decide wrongly as well as rightly," and if the legislature is content to make the decision final, the only question is whether the decision has been given within or in excess of the authority conferred on the person, body, or tribunal (see *Rex vs London County Council* (1931–2 K.B. p. 215). The rightness or the wrongness of the decision, so to speak, does not arise. A remark made in the course of the argument in the old case of *The Queen vs St. Olave's District Board* (8 Ellis & Blackburn at p. 531) is to the point and, if I may say so, states the law correctly — the test is whether there was jurisdiction, not whether the decision is right or wrong. It is well established that the Writ of Certiorari never runs to give relief from wrong decisions. It is confined to decisions given or things done judicially or quasi-judicially and in excess of jurisdiction.

In regard to the alternative remedy sought by way of Mandamus, the petitioner is in no better case for Mandamus is not issued on the ground that a duty has been done erroneously; it is issued to compel the performance of a neglected or disregarded public duty imposed by law. The application must be refused with costs.

*Application refused.*

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SOERTSZ, J.

## KING vs KITCHILAN & OTHERS

56 *M.C. Matara No.* 43107 (*Transferred to 4th Western Circuit* 1943.)
Decided on 2nd November, 1943.

*Criminal Procedure Code sections* 181 *and* 182—*Applicability of—Nature of the doubt referred to—Indictment—Alternative counts for murder and abetment of murder—Can accused be tried at one trial on same indictment.*

**Held :** (i) That alternative counts for murder and abetment of murder are properly laid in one and the same indictment when on the evidence in the possession of the prosecution at the time when the indictment is framed, it is impracticable of which of such offences the accused may be said to be guilty.

(ii) That the doubt referred to in section 181 of the Criminal Procedure Code must arise from the equivocal nature of the acts of the accused, as alleged by the prosecution and disclosed during the non-summary proceedings, and cannot be affected by questions such as whether the prosecution will be able to produce this evidence at the trial, or whether the jury will believe it.

Per SOERTSZ, J. : "Section 181 does not apply when the doubt arises from the nature of the evidence, but it applies only in cases in which a doubt arises from the nature of the acts. Where the acts are unambiguous and indicate a definite offence, but in consequence of a failure to appreciate the legal value of the facts, a different offence is charged and that charge fails, it would not be possible to invoke the aid of section 182 of the Criminal Procedure Code in order to substitute a conviction of the accused on the charge that should have been but was not preferred."

**Cases referred to :** *Khondkar vs Emperor* (I.R. 1936 Cal. 796)
*King vs Piyasena* (44 N.L.R. 58)
*Ganesh Krishna vs Emperor* (12 Cr. Law Jnl. 224)
*Bowanath Singh vs Emperor* (19 Cr. Law Jnl. 202)
*Sheoratni vs Emperor* (21 Cr. Law Jnl. 44)
*Mohamed Rafiq vs Emperor* (33 Cr. Law Jnl. 41)

*M. T. de S. Ameresekera, K.C.*, with *George Samarawickrema*, for the 1st accused.
*C. S. Barr-Kumarakulasingham* with *Vernon Wijetunge*, for the 2nd accused.
*H. Sri Nissanka* with *J. Fernandopulle*, for the 3rd accused.
*H. Sri Nissanka* with *S. N. Rajah*, for the 4th accused.
*Siri Perera* with *P. S. W. Abeywardene*, for the 5th accused.
*E. H. T. Gunasekera, Crown Counsel*, with *J. A. P. Cherubim, Crown Counsel*, for the Crown.

SOERTSZ, J.

The indictment presented in this case has been challenged on the ground that it is not in conformity with the provisions of the Criminal Procedure Code relating to the joinder of charges. The indictment contains two counts. The first makes a charge of murder against all the accused. The second which is framed as an alternative count alleges that all the accused are guilty under sections 296, 102 and 106 of the Penal Code of the offence of abetment of the murder referred to in the first count.

Shortly stated, the objection taken to this indictment is that the applicability of section 178 of the Criminal Procedure Code which requires that "for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately" has not been counteracted in this instance by any of the conditions which would dislodge the general rule and bring the case within any of the exceptions created by sections 179, 180, 181, 182 and 184 of the Criminal Procedure Code.

For the Crown, it is not disputed that the offences charged in the two counts are distinct offences, but it is contended that in virtue of sections 181 and 184 both the charges are properly laid in one and the same indictment and may be tried at one trial. Section 181 says that —

> "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences and any number of such charges may be tried at one trial and in a trial before the Supreme Court or a District Court may be included in one and the same indictment; or he may be charged with having committed one of the said offences without specifying which one,"

and section 184 which provides for a case involving several accused enacts that —

> "When more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately as the court thinks fit; and the provisions contained in the former part of this Chapter shall apply to all such charges."

The question then is whether this is a case in which we have "acts of such a nature that it is doubtful which of several offences the facts that can be proved will constitute." As observed by Jack, J. in the case of *Khondkar vs Emperor* (I.R. 1936 Cal. 796 at 801), "the confusion which has arisen about the interpretation of this section is due to the way in which it is worded," and I would respectfully adopt his paraphrase of it as meaning that "if a single act or series of acts is of such a nature that it is doubtful which of several offences has been committed if the facts as alleged by the prosecution are established, the accused may be charged with the commission of all or any one or more of such offences." Whether there is such a doubt as is contemplated by section 181 must be considered with reference to the evidence in the possession of the prosecution as disclosed in the depositions taken in the Magistrate's Court, and cannot be affected by questions such as whether the prosecution will be able to produce this evidence at the trial, or whether the jury will believe it. In other words, the doubt must arise from the equivocal nature of the acts spoken to or from the fact that different inferences are reasonably deducible from those acts in regard to such matters as the intention or knowledge underlying those acts in cases in which intention or knowledge is an essential element of the offence. Section 181 does not apply when the doubt arises from the nature of the evidence but it applies only in cases in which a doubt arises from the nature of the acts. Where the acts are unambiguous and indicate a definite offence, but in consequence of a failure to appreciate the legal value of the facts, a different offence is charged and that charge fails, it would not be possible to invoke the aid of section 182 of the Criminal Procedure Code in order to substitute a conviction of the accused on the charge that should have been but was not preferred. There is local as well as Indian authority for these propositions, and to refer to some of them, I would invite attention to *King vs Piyasena* (44 N.L.R. 58), *Ganesh Krishna vs Emperor* (12 Cr. Law Jnl. 224), *Bowanath Singh vs Emperor* (19 Cr. Law Jnl. 202) *Sheoratni vs Emperor* (21 Cr. Law Jnl. 44) and *Mohamed Rafiq vs Emperor* (33 Cr. Law Jnl. 41). The comment made by the authors of the Indian Penal Code on section 72 of that Code which corresponds to our section 67 throws much light on the meaning of section 181. That comment is as follows: I am reading from Ratanlal "The Law of Crimes" 1936 Edition, page 128:

> "Where the doubt is merely between an aggravated and mitigated form of the same offence, the difficulty will not be great. In such cases the offender ought always to be convicted of the minor offence. But the doubt may be between two offences, neither of which is a mitigated form of the other. The doubt, for example, may lie between murder and the aiding of murder. It may be certain, for example, that either A or B murdered Z, and that whichever was the murderer was aided by the other in the commission of the murder; but which committed the murder, and which aided the commission, it may be impossible to ascertain. To suffer both to

go unpunished, though it is certain that both are guilty of capital crimes, merely because it is doubtful under what clause each of them is punishable, would be most unreasonable. It appears to us that a conviction in the alternative has this recommendation, that it is altogether free from fiction, that it is exactly consonant to the truth of the facts. If the court find both A and B guilty of murder, or of aiding murder, the court affirms that which is not literally true, and on all occasions, but especially in judicial proceedings, there is a strong presumption in favour of literal truth. If the court finds that A has either murdered Z or aided B to murder Z, and that B has either murdered Z or aided A to murder Z the court finds that which is the literal truth; nor will there, under the rule which we have laid down, be the smallest difficulty in prescribing the punishment."

Now the case for the Crown here is that all these accused before me joined, at one time and in one place, in an attack upon the deceased with their hands and feet, and that he died under that attack. The evidence available to the Crown at the time the indictment was drawn up was to that effect and that evidence has now been led and if it is accepted by the jury, the general presumption of innocence is rebutted. But in regard to the offence or offences of which the accused may be said to be guilty, that is unpredictable at the time the indictment is framed and indeed till the end of the trial, and will depend on the inference drawn by the jury in view of all the matters before them as to the intention or knowledge imputable to the accused as a body or individually. If, for instance, the jury find that they shared a common intention to cause bodily injury and inflicted injuries sufficient in the ordinary course of nature to cause death, their verdict will be "murder," unless, of course, they find a plea of justification or mitigation established. If, on the other hand, they do not find such an intention beyond reasonable doubt, but find that the accused knew that their acts were likely to cause death, the verdict will be "culpable homicide not amounting to murder." Or they may not be able to say that the accused even had such knowledge and, in that case, the verdict will be "grievous hurt" or "simple hurt." Or, they may even reach the view that although the accused had no common intention to cause death or bodily injury sufficient to cause death, they abetted one another in an attack which they knew was likely to cause death either in consequence of the combined force of the attack or in consequence of one or other of them intentionally inflicting an injury sufficient to cause death, and for that reason are liable to be dealt with as abettors of the offence of murder. In other words, different verdicts are reasonably possible and that is only another way of saying that "the acts are of such a nature that it is doubtful which of several offences the facts which can be proved will constitute." That is precisely the condition on which section 181 operates to sanction a charge on all or any one or more of the possible offences. The result is that even if the Crown had presented an indictment containing only the charge of murder alleged in the first count, it would have been open to me to direct, and to the jury to find, one or other of the other offences indicated. That being so, I fail to see how the accused can be heard to complain that one of the offences of which they may be convicted if the evidence is accepted has been specifically brought to their notice in the alternative count of the indictment.

I overrule the objection.

*Objection overruled.*

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*Present:* CANEKERATNE, J.

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JOHARAN (Sub-Inspector of Police) vs WILBERT PERERA

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*S. C. No. 72—M. C. Panadura No. 34759.*
Argued on 6th July, 1945.
Decided on 26th July, 1945.

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*Repeal of a statute—Effect of upon conviction under repealed statute—When can such conviction stand.*

The accused was charged and convicted with having sold on 8th December, 1944, Nettali (dried fish) over and above the controlled price fixed by the order published in Gazette No. 9166 of 3rd September, 1943. This order was revoked by section 1 (*a*) of order No. C 31 of 1944, published in Gazette No. 9274 of 26th May, 1944 which contained a new order in place of the repealed one.

**Held:** (i) That the conviction could not stand inasmuch as the offence was not committed while the regulation, under which the accused was convicted, was in force.

(ii) That the conviction could not be altered to one under the new regulation under section 345 (*b*) of the Criminal Procedure Code.

**Cases referred to :** *Kay vs Gordon* (1830–6 Bing. 576)
*Brereter vs Ratranhamy* (1940–19 C.L.W. 11)

*H. V. Perera, K.C.*, with *G. P. J. Kurukulasuriya* and *V. Arulambalam*, for the accused-appellant.

*T. K. Curtis, Crown Counsel*, for the Attorney-General.

CANEKERATNE, J.

The accused was charged on 12th December, 1944 for committing an offence under the regulation published in Government Gazette No. 9166 on 3rd September, 1943 : this regulation was repealed on 26th May, 1944. The effect of repealing a statute is to obliterate it as completely from the records of the legislature as if it had never been passed and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law : *Kay vs Gordon* (1830–6 Bing. 576).

It is contended that as a new provision has been substituted for the repealed regulation the conviction can be altered to one under the new regulation under section 347 (*b*) of the Criminal Procedure Code (Chapter 16) and the case of *Brereter vs Ratranhamy* (1940–19 C.L.W. 11) is quoted as an authority. The accused in that case did an act on 22nd July, 1933, which was an offence under section 36 (1)*d* of Ordinance No. 11 of 1933; the accused was charged about 1940 with committing an offence under section 35 (1)*d* of the new Tea Control Ordinance (Ordinance No. 12 of 1938, Chapter 299) and was convicted.

The Ordinance of 1933 was a temporary statute which was to expire on a given date : it imposed a penalty and provision was therein made that offences committed before the day appointed for its expiration may be punished after that day.* In appeal the conviction was altered to one under the Ordinance of 1933. The facts of that case are entirely different from what happened in this case. The accused, Perera, has not been properly charged and the proceedings are a nullity.

I quash the conviction and leave it to the authorities, if so advised, to take any action against the accused.

*Conviction quashed.*

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*Present:* CANNON, J.

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VAN SANDEN (Inspector of Police) vs PERERA

*S. C. No. 578—M. C. Panadura No. 36025.*
Argued & Decided on 13th July, 1945.

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*Confiscation—Power of—Criminal Procedure Code section 413—Defence (Miscellaneous) Regulations para 52.*

**Held :** That the word " disposal " in section 413 of the Criminal Procedure Code does not include confiscation and that such a power cannot be implied where the Legislature has not expressly conferred it.

*M. M. Kumarakulasingham*, with *K. C. Nadarajah*, for the accused-appellant.

*J. A. P. Cherubim, Crown Counsel*, for the Attorney-General.

CANNON, J.

The appellant was convicted of buying cement without a permit. The Magistrate treated it as more or less a technical offence because the cement purchased was damaged and the appellant's case was that he did not apprehend that a permit was necessary for cement of that nature which was merely so-called cement. The Magistrate, therefore, imposed a nominal fine of Rs. 50/- and ordered the confiscation of the cement which was bought for some Rs. 90/-. Mr. Kumarakulasingham for the appellant submits that the Magistrate had no power to order confiscation and points out that in the penalties paragraph No. 52 of the Defence Miscellaneous Regulations, 1939, no reference is made to forfeiture. Sub-section 3 states that a convicted defendant "is liable to imprisonment of either description for a term not exceeding six months, or to a fine not exceeding Rs. 1,500/-, or to both such imprisonment and such fine." Mr. Cherubim for the Crown referred me to section 413 of the Criminal Procedure Code by which the court is empowered to make such order as it thinks fit "for the disposal of" property



*Proviso to section 42 of Ordinance No. 11 of 1933.

produced before it regarding which an offence has been committed, and the question arises whether the words "for the disposal of" embrace confiscation. No authority has been cited for that proposition, but Ennis, J. in 20 N.L.R. 115 and 28 N.L.R. 350, was inclined to think that the words "for the disposal of" were not sufficiently wide to include confiscation. In the Defence (Control of Prices) Regulations, section 2, sub-section 7, the court is expressly given power of forfeiture. I think if the Legislature had intended to give that power it would have clearly said so, such an order being capable of serious consequences to the person affected by it.

The appeal is therefore allowed as regards the order for forfeiture which is cancelled. The fine of Rs. 50/- remains.

*Appeal allowed.*

*Present:* SOERTSZ, A.C.J., KEUNEMAN, S.P.J. & WIJEYEWARDENE, J.

## IN RE RAGUPATHY

*In the matter of a Rule issued under section 47 of the Courts Ordinance on P. Ragupathy.*

Argued on 12th July, 1945.
Decided on 23rd July, 1945.

*Contempt of Court—"Scandalizing a judge"—Statement contained in petition of appeal to the Court of Criminal Appeal—Courts Ordinance section 47.*

A petition of appeal to the Court of Criminal Appeal contained the following statement :

"His Lordship suggested to witnesses for the prosecution answers which enabled them to shape the evidence in a manner which made the case for the prosecution more convincing than on the evidence as it otherwise stood."

The petition was drafted by an advocate of the Supreme Court.

**Held :** That the statement was calculated to bring the judge into contempt or to lower his authority and that the advocate was guilty of a contempt of court.

**Cases referred to :** *Rex vs Gray* (1900–2 Q.B. 36)
*In the matter of Armand de Souza* (18 N.L.R. 33)

*H. V. Perera, K.C.*, with *N. E. Weerasooriya, K.C., E. B. Wickramanayake, H. W. Thambiah, A. H. C. de Silva, G. E. Chitty* and *H. W. Jayawardene*, for the party noticed.

*C. Nagalingam, Acting Attorney-General* with *H. A. Wijemanne, Crown Counsel*, as *amicus curiae*.

KEUNEMAN, S.P.J.

The Rule in this case was issued in respect of a statement contained in a petition of appeal to the Court of Criminal Appeal in connection with Appeals 13 and 14 of 1945 and Applications 20 and 21 of 1945, S.C. No. 4 — M. C. Kayts No. 5640.

The passage is as follows :

"His Lordship suggested to witnesses for the prosecution answers which enabled them to shape the evidence in a manner which made the case for the prosecution more convincing than on the evidence as it otherwise stood."

It is admitted that the party noticed drafted the petitions of appeal including this sentence, and presented them for signature to the prisoners concerned in the jail.

The nature of the contempt alleged has been described as "scandalizing a court or judge." This would consist of "any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority." *Rex vs Gray* (1900–2 Q.B. 36). It has been well established that in Ceylon this species of contempt is punishable. The next question that arises relates to the interpretation of the passage. In spite of the subtile arguments advanced by Mr. H. V. Perera I am satisfied that to the ordinary man the passage in question would convey a meaning so sinister, or at least so derogatory, that it would bring the judge into contempt or lower his authority.

In his affidavit the party noticed has averred that he had no intention to convey a sinister or derogatory meaning. That, however, even if true, does not conclude the matter. As Wood Renton, C. J. said *In the matter of Armand de Souza* (18 N.L.R. 33) "it is by no means exhaustive of the situation. The court has itself to interpret the meaning of the language used, and in doing so to consider how it will be understood by the majority of those whom it reached..... It is clear that the readers of such an article as this would not stop to subject it to a minut

analysis which it has received at the Bar, or to consider how far the character of the warp of one line of criticism was modified by woof of a different texture. They would read the article as such articles are read every day by ordinary people, who have no time, even where they have the capacity, to carry out such a policy of balancing, and who would be guided in the long run by the general impression which the articles left on their mind." (See also *Hulugalle's Case* 7 C.L.W. 137). This was written in respect of an article published in a newspaper. But even a petition of appeal of the kind we are dealing with passes through many hands, *viz.* the persons who prepare and type it, officials at the jail, officials of the Supreme Court Registry, and others who have access to it.

In my opinion the party noticed has failed to show why he should not be committed for contempt of court. There is nothing in the record to support or even to suggest that the learned trial judge acted in the manner imputed to him, and as I have already observed the words used are offensive.

The only matter that remains is what punishment should be imposed. On the face of it the contempt is a serious contempt but the suggestion contained in it is of such a character that it is difficult to understand how it could have been made by an advocate of this court. It is very likely that the party noticed did not intend to convey the full meaning which the words would ordinarily bear. What is difficult to understand is how the party noticed can continue to hold the opinion that these words are not and cannot be offensive and derogatory to the judge. That is, however, the effect of the affidavit tendered. The party noticed has maintained that the words used did not amount to contempt and has added that in view of the fact that the Rule issued showed that it appeared to this court that the statement was an unwarranted and offensive statement made in disrespect of the authority of the court, he humbly expresses his regret for having made the statement. This is not a sufficient or satisfactory apology nor can it be taken into consideration in mitigation of sentence.

In all the circumstances, the order of the court is that you P. Ragupathy, Advocate, be imprisoned till the rising of the court and that you do pay a fine of Rs. 250/– or suffer simple imprisonment for one month in default of payment.

SOERTSZ, A.C.J.

I agree.

WIJEYEWARDENE, J.

I agree. *Rule made absolute.*

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*Present:* SOERTSZ, A.C.J. & KEUNEMAN, S.P.J.

## SAIYA NONA vs KARTHELIS APPUHAMY

*S. C. No.* 17—*D. C. (F) Kurunegala No.* 1348.
Argued on 12th July, 1945.
Decided on 18th July, 1945.

*Transfer of land by notarial deed—Contemporaneous non-notarial agreement by vendee to retransfer land to vendor—Trust—Enforceability of non-notarial document.*

A vendor transferred certain lands by deed. At the time of the execution of the deed, the vendee signed a non-notarial document agreeing to retransfer the lands to the vendor within four years on payment of a certain sum of money. No mention was made, in the deed, of the agreement to retransfer. On payment of the agreed sum within four years, the vendee refused to retransfer the lands. No condition was established to show that the whole beneficial interest of the vendor had not been transferred by the deed. No circumstances were proved which could bring the case within the provisions of the Trusts Ordinance relating to constructive trusts.

**Held :** That the non-notarial document was of no force or avail at law.

**Cases referred to :** *Carthelis vs Perera* (32 N.L.R. 19)
*Jonga vs Nanduwa* (45 N.L.R. 128)*

*H. V. Perera, K.C.*, with *S. W. Jayasuriya*, for the 1st defendant-appellant.
*N. E. Weerasooriya, K.C.*, with *C. E. A. Samarakkody*, for the plaintiffs-respondents.

KEUNEMAN, S.P.J.

In this case the plaintiffs and the 2nd and 4th defendants who were owners of the lands described in the schedule of the plaint had mortgaged them to Ramanathan Chettiyar, who put the bond in suit in D.C. Kurunegala No. 475, obtained judgment and was about to cause the lands to be sold. The owners of the lands then approached the 1st defendant, a distant relation, and asked him to pay the Chetty's claim, promising (in the words of the 3rd plaintiff) "to transfer the property to him to be held on trust for us. We agreed to transfer the lands to the 1st defendant on condition that he would retransfer the lands to us within four years" on payment of the amount paid to the Chetty. As a result of this, on the 30th April 1941, document P3, a notarial deed, was executed, by which the owners conveyed the lands to the 1st defendant—in that deed there was no mention of the agreement to retransfer. On the same day a non-notarial document was signed by the 1st defendant which embodied the agreement to retransfer. The 1st defendant was put into immediate possession of the lands, and the mortgage of the Chetty was paid off with the sum of Rs. 925 consideration paid by the 1st defendant on the deed P3. The plaintiffs within the period of four years tendered the sum of Rs. 925 to the 1st defendant who refused to accept it. The plaintiffs now sue for the enforcement of the condition to retransfer, and have joined as parties the 2nd and 4th defendants who were unwilling to be plaintiffs.

The learned District Judge held that a trust had been established and entered judgment for the plaintiffs. He stated that "this was clearly a case where the 1st defendant had not the whole beneficial interest in the property dealt with by P3." I do not agree with this argument. It was incumbent on the plaintiffs to establish the circumstances which proved that a trust had been created. The deed P3 on the face of it conveyed the full interest of the owners, without the reservation of any condition or equitable right. The 1st defendant was, thereafter, placed in possession of the lands. There was no evidence of any gross disparity between the value of the land at the time and the price paid under P3, or of any other circumstance which may tend to show that the transfer was to be in trust.

The case of *Carthelis vs Perera* (32 N.L.R. 19) on which the District Judge relied dealt with entirely different circumstances to those disclosed in the present case. The only circumstance disclosed in the present case is the existence of the non-notarial agreement (P4) made on the same day as P3. I do not think that the statement of the 3rd plaintiff that P3 was a transfer on trust is worthy of any consideration. At the highest it is an opinion expressed by the witness as regards a point of law the District Judge had to decide.

The District Judge relied on the case of *Jonga vs Nanduwa* (45 N.L.R. 128)*. But there is a material difference between that case and the present one. In that case the deed of transfer itself contained a reservation of the right to pay the vendee the amount of the consideration set out and so to redeem the transfer. In the application of section 96 of the Trust Ordinance, the Bench of three judges came to the conclusion that the deed of transfer did not convey the whole beneficial interest in the property to the vendee, but conveyed the property subject to the condition set out in the transfer deed, and that the vendee was accordingly bound to have the property available for the condition to be carried into effect.

In the present case the notarial deed P3 does not set out any conditions, and on the face of it conveys the whole beneficial interest. The informal writing P4 is in form a mere agreement to retransfer, and it is of no force or avail at law as it is not contained in a notarial document. In other words no condition has been established in this case which shows that the whole beneficial interest has not been transferred under P3. Further there are no circumstances proved which can bring the present case within the sections of the Trust Ordinance relating to constructive trusts.

The appeal is allowed and the plaintiffs' action is dismissed with costs of this court and the court below.

SOERTSZ, A.C.J.

I agree. *Appeal allowed.*

*Present:* CANNON, J. & CANEKERATNE, J.

## WICKRAMASINGHE vs DIAS

*S. C. No.* 105—*D. C. Ratnapura No.* 7237.
Argued on 16th July, 1945.
Decided on 27th July, 1945.

*Waste Lands Ordinance No.* 1 *of* 1897—*Section* 4—*Effect of order under—Claim for compensation by bona fide improver—Is it wiped out by an order under section* 4—*Can fruits of the improvements be set off against compensation—Is bona fide improver liable to account for fruits he has taken.*

**Held** (i) That the effect of an order under section 4 of Ordinance No. 1 of 1897 is that the title to lands is finally decided and that the lands became vested in the persons mentioned in the order.
(ii) That a claim for compensation by a *bona fide* improver is not wiped out by the section.
(iii) That the fruits of improvement received by a possessor cannot be set off against a claim for compensation in respect of the improvements which produced them.
(iv) The possessor is bound to restore to the owner all fruits actually gathered by him after the *litis contestatio*, as after this date he can no longer be regarded as a *bona fide* possessor and is liable to account for the profits he has taken since.

**Cases referred to :** *Hetuhamy vs Boteju* (1941–43 N.L.R. 83)
*Siyadoris vs Hendrick* (1896–6 N.L.R. 275)
*Silva vs Silva* (1903–6 N.L.R. 225)
*Newnman vs Mendis* (1900–1 Browne 77)
*Appuhamy et al vs The Doloswala Tea & Rubber Co.* (1921–23 N.L.R. 129)
*Carimjee et al vs Abeywickreme* (1920–22 N.L.R. 286)
*Silva et al vs Silva et al* (1911–15 N.L.R. 82)
*Fernando vs Rodrigo* (1919–21 N.L.R. 415)
*Nicholas de Silva vs Shaik Ali* (1895–1 N.L.R. 228)
*Fernando vs Fernando* (1919–21 N.L.R. 415)
*Beebee vs Majid* (1929–30 N.L.R. 361)

*N. Nadarajah, K.C.*, with *E. B. Wickramanayake* and *H. Wanigatunga*, for the defendant-appellant.

*H. V. Perera, K.C.*, with *U. A. Jayasundera*, for the plaintiff-respondent.

CANEKERATNE, J.

One G. K. Jayasinghe Bandara appears to have been entitled to two-fifths shares of certain lands appertaining to Handukande Nindagama : in August 1907, he made a gift of the same to his six daughters, Ratnayake Menike, Hamumahatmaya, Tikiri Menike, Punchi Menike, Dhanasekere Menike and Keerthi Menike.

In December, 1921, a special officer appointed under the Waste Lands Ordinance of 1897, (amended by Ordinances of 1899, 1900 and 1903), published a notice under section 1 of the Ordinance calling upon persons claiming any rights in the lands commonly called and known as Batalawattehena, Kekunagahahena etc., situate in the village of Kiriella ( in extent 429 acres 1 rood 19 perches and shown as lots 95, 107, 121 and 131 in B.S.P.P. No. 182 ) to make claim to them or any of them within three months from the date mentioned therein and stating that if no claim was made he would declare the same to be the property of the Crown. Robert Aron Goonetileke (later referred to as Robert), husband of Ratnayake Menike, on behalf of the six donees made claims to the Settlement Officer. The Settlement Officer inquired into the claims to the lands : he apparently did not admit these but instead he, on the 24th April, 1923, entered into an agreement with Ratnayake Menike as authorized by section 4 (1) of the Ordinance. This agreement (P7) was to the effect that Ratnayake Menike in consideration of her sisters and her daughter, Amelia Goonetileke, being declared in equal shares, *i.e.* one-sixth share each, the owners of 80 acres more or less of lots 95, 107, 121 and 131 in B.S.P.P. 182 Kiriella, as shown roughly at 144 A on the sketch, thereby withdrew all claims to the remainder of lots 95, 107, 131 and the whole of lots 9, 16, 41, 64, 71 and 251 in the said land and thereby also acknowledged that she had no further claim to the lands appearing in the notice.

Agreements in similar terms were entered into by Punchi Menike on 16th March, Keerthi Menike on 21st March, Dhanasekere Menike on 31st March, Hamumahatmaya on the 23rd April and Tikiri Menike on 16th May.

The order made under section 4 (1) on 15th November, 1928, was published on 21st December,

1928: it sets out the agreements entered into with the six claimants and declares the 2nd, 3rd, 4th, 5th and 6th claimants along with Amelia Goonetileke ( the plaintiff who is now married ) to be owners in equal shares *i.e.* one-sixth share of portions of the land more fully described therein : ( lot 95 K Handukandewatte, Batalawattehena, 950 Handukandewatte, 107 AO Wedagewattahenyaya, 107 AP Handukandehenyaya, 107 AQ Kirigahatulehena, 121 Horamandiya, 131 Galagederawattehena ) in extent 81 acres 2 roods 13 perches less the extent of 2 acres 3 roods 10 perches.

Robert appears to have taken a portion of the land referred to in the deed of gift in extent about 30 acres and planted it with rubber. It can be gathered from the evidence that the rubber portion was yielding an income in 1928, if not earlier ; this portion was registered under the Rubber Control Ordinance of 1933. In October 1927, Keerthi Menike by deed D1 sold to Ratnayake Menike all the soil, trees and plantations belonging to an undivided one-sixth share of land remaining after excluding a portion in extent 9 acres and also excluding the rubber plantation, planted by Robert, on the remaining portion of land in extent 80 acres standing on the land called Handukande Nindagama. By deed D2, Ratnayake Menike and her husband in October, 1928, sold to the defendant all the undivided one-sixth share of the soil, trees and plantations standing on the remaining 80 acres together with the whole rubber plantation standing on the land called Handukande Nindagama : actual possession of the rubber portion came to her hands in June, 1933. The plaintiff instituted this action in April, 1943, for declaration of title to an undivided one-sixth share of the land known as Batalawattehena, Kekunagahahena etc. in extent 81 acres 2 roods 13 perches and for the recovery of one-sixth share of mesne profits which she assessed at Rs. 3,000/– for 3 years preceding the action and at the rate of Rs. 100/– a month thereafter. The defendant filed answer claiming the entirety of the rubber plantation on the strength of D2 : she further claimed alternatively compensation for improvements and a *jus retentionis* in respect of the share claimed by plaintiff. The trial judge gave judgment for plaintiff for the one-sixth claimed : he ordered defendant to pay plaintiff Rs. 400/– per annum for three years prior to date of institution of the action and thereafter at the rate of Rs. 40/– per mensem as damages until plaintiff is restored to possession.

One of the contentions of the plaintiff is that she is not liable to pay any compensation as she became entitled to the share claimed by virtue of the final order. The Ordinance cannot take away from an improver of property any right to compensation in respect of improvements he might otherwise have had. To alter any clearly established principle of law a distinct and positive legislative enactment is necessary. The language of the Ordinance is fully satisfied by interpreting it to mean, what indeed is the plain and natural meaning of the words used, that the title to the lands is finally decided and that the land becomes vested in the persons mentioned in the order. (*cf: Herahamy vs Boteju* 1941-43 N.L.R. 83 a decision under the new Ordinance Chapter 319).

Robert planted a portion in extent 30 acres with rubber long before the time the plaintiff became entitled to a share therein. She had never been to the land ; neither she nor her co-grantees on P1 had possession of it save Punchi Menike who apparently got possession about October, 1937 : she does not know the circumstances under which the plantation was made by her father ; no reliable evidence has been given by plaintiff on this point, the only explanation ventured is, what her mother is alleged to have told her, that her father was possessing the plantation. She said that she came to know there was a land like this, presumably the rubber land, about 1927 when she was 20 years old : she does not say that her father could have planted the portion on her behalf, she could hardly make a statement to this effect as she became entitled to a share only in December, 1928. The father is alive, the mother presumably is not dead ; neither of them was called by the plaintiff as a witness. The onus is on the party who says that the planter effected the improvement on behalf of all the co-owners. That onus was not in this case discharged.

The right of a common owner extended over the whole property, though it was cut down by the existence of the others. Each had the right of enjoyment subject to the concurrent right of the others : a co-owner could do no act of administration affecting the others against the will of the others : is it without the consent of the others or rather against their prohibition ? Roman law allowed acts to be done by one if they are clearly to the benefit of the group as a whole. The common law does not prohibit one co-owner from the use and enjoyment of the property in such manner as is natural and necessary under the circumstances. *Siyadoris vs Hendrick* (1896 – 6 N.L.R. 275) so a land fit for paddy cultivation may be used for that purpose, *Silva vs Silva* ( 1903 – 6 N.L.R. 225 (*obiter*) a chena land or waste land of a similar description may be planted with tea *Newnman vs Mendis* (1900 – 1

Browne 77) or rubber *Appuhamy et al vs The Doloswala Tea & Rubber Co.* (1921 – 23 N.L.R. 129).

Robert's wife was entitled to an undivided share of the land. She had a right to make reasonable use of the common property proportionate to her share therein: she could have got a portion planted with rubber herself or allowed her husband to plant it on her behalf. The husband and wife may have chosen to devote the money in their hands to open up this portion and to improve it. How did they treat the money they spent on the improvements? Did they regard this as an advance to the quasi-partnership or as money due from them to it or was it regarded by them in some other way? Her attitude in October, 1927, when she purchased the rights of her sister was that her husband had made a rubber plantation on the land and that the plantation belonged to her or her husband. It became necessary in October, 1928, for the husband and wife to deal with the interests they had in the land: when they came to dispose of the same, she treated the whole rubber plantation planted by them on the land as belonging to them. The improvements were, in her view, effected by her husband for her. One must think that she and her husband were making a correct statement at this time: it would be unfair to presume tortuous conduct on their part.

The presumption is always in favour of the *bona fides* of the possessor. *Carimjee et al vs Abeywickreme* (1920 – 22 N.L.R. 286); she would know that this land was joint property but there is no evidence to show that Robert effected the improvements contrary to express wishes of his wife's co-owners. About 1919 three of the co-owners came to live with the plaintiff's mother, presumably they continued to live with their sister for some time. The youngest of them was Keerthi Menike. When she came to deal with the property she disposed only of her interests to the soil. She acknowledged that there was a rubber plantation on the land made by Robert and that he was entitled to it. She may of course have been ignorant of her right but if there was any doubt as to her knowledge her conduct after the agreement with the Settlement Officer cannot be entirely ignored. These circumstances fairly lead to the inference that Robert carved out a portion of the land gifted to his wife and planted it with rubber for the exclusive use of his wife: some of the other co-proprietors, those living in the house at any rate, allowed them to continue in this course without raising any objections, they thus tacitly acquiesced in its continuance; the fact that Punchi Menike brought an action in 1939 does not alter the position as regards the plantation made long before.

Trees of one person planted and taking root in the land of another are thereby entirely incorporated in the land, the land maintains its identity in spite of the union. The owner of the principal thing by which the accessory has been absorbed becomes the owner of the accessory; the former owner of the accessory is limited to a claim for compensation. Under the common law a co-owner could obtain compensation in a partition suit on the same footing as a *bona fide* improver — the same principles are applicable, *Silva et al vs Silva et al* (1911 – 15 N.L.R. 82). *Fernando vs Rodrigo* (1919 – 21 N.L.R. 415). The owner of a property is not bound to repay the amount actually expended by the possessor: either the improvement exceeds in value the sum expended (as is usually the case in a plantation), in which case the owner may free himself by merely repaying the outlay: or on the other hand, the amount expended is greater than the value of the improvements (which is usually the case in buildings) in which case the amount expended is to be refunded only insofar as the property has really been improved thereby, Schorer note 92; *Nicholas de Silva vs Shaik Ali* (1895 – 1 N.L.R. 228). There remains the question whether the compensation payable should not be reduced by the amount realized by the sale of rubber and coupons. The possessor cannot be made to restore the fruits of the fruit or the advantage derived from his improvements. The income derived from the rubber plantation is a direct result of the work done by the planter: it is a fruit of the improvement itself and not of the property generally. With regard to fruits of improvement the correct principle seems to be that they cannot be set off against a claim for compensation in respect of the improvements which produced them: Voet 6-1-39; 3 Burge 34; *Fernando vs Fernando* (1919 – 21 N.L.R. 415); *Beebee vs Majid* (1929 – 30 N.L.R. 361).

The possessor is bound to restore to the owner all fruits actually gathered by him after the *litis contestatio*: after this date the possessor is no longer *bona fide* and is liable to account for the profits which he has taken since.

There has been a full inquiry into the matters in dispute between the parties *viz.* the question whether compensation is payable to the defendant and the amount of mesne profits or damages payable to the plaintiff. These matters can be finally decided now instead of relegating the question of compensation to be decided later in a partition action. The judgment will therefore

be for the plaintiff declaring her entitled to an undivided one-sixth share of the land referred to in P1, that she be placed in possession thereof and that the defendant do pay to the plaintiff damages at the rate of Rs. 40/– a month from the 17th August, 1943 until plaintiff is restored to possession. There will be a declaration that plaintiff is liable to pay compensation to the defendant in respect of improvements effected on the 1/6th share he gets and that the amount due as compensation in respect of same be determined in a partition action, unless this is settled by agreement between the parties.

The judgment of the learned judge is set aside. As success has been divided between the parties the fair order is that each party should bear its own costs in the District Court. The plaintiff is to pay defendant half the costs of hearing in this court.

CANNON, J.

I agree.

*Judgment set aside.*

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*Present:* SOERTSZ, A.C.J.

UDALAGAMA (Sub-Inspector of Police) vs GIRIGORIS APPUHAMY

*S. C. No.* 202—*M. C. Gampaha No.* 25187.

Argued on 6th July, 1945.

Decided on 18th July, 1945.

*Defence Miscellaneous Regulation* 17*B*—*Possession of service petroleum—Certificate of Government Analyst—Burden of proof as to service, on accused, of the certificate—Evidence Ordinance section* 114.

The accused was charged under Defence Miscellaneous Regulation 17B with having been in possession of service petroleum, which was defined to be petroleum containing certain specified compounds. The regulation enacted that a certificate by the Government Analyst to the effect that any petroleum contained the specified compounds shall be sufficient evidence of the facts stated therein and that before such a certificate is tendered as evidence, a copy thereof shall be served on the accused. At the trial the accused did not object to the reading of the certificate. The Magistrate acquitted the accused on the ground that there was no evidence to show that a copy of the certificate had been served on the accused.

**Held :** (i) That as the regulation enacted that a copy of the certificate " shall be served " on the accused—and not " shall be shewn to have been served "—the presumption of regularity arises in the absence of any objection by the accused ;

(ii) That it is not incumbent on the prosecution, as a condition precedent to the production of the certificate, to prove that a copy thereof has been served on the accused.

**Cases referred to :** *Batt vs Mattinson* (1900–82 L.T. 800)
*Smart & Son vs Watts* (1895–1Q.B.D. 219)
*Dixon vs Wells* (25 Q.B.D. 249)

*D. Jansze, Crown Counsel*, for the complainant-appellant.

*G. E. Chitty*, for the accused-respondent.

SOERTSZ. A.C.J.

This is an appeal, with the sanction of the Attorney-General, against the order made by the Magistrate acquitting the accused who had been charged with an offence in breach of regulation 17 B (1) published in the Government Gazette Extraordinary of the 16th May, 1944, or, in the alternative, with an offence in breach of regulation 17 B (3) *ibidem*.

In order to establish either of these charges, the Crown had to prove that the accused did possess the petroleum in respect of which the charges were laid, and also that that petroleum was service petroleum.

There is ample evidence establishing the possession by the accused of this petroleum and that fact was not seriously disputed on the hearing of the appeal. The question in regard to which there was much discussion was the question whether there was sufficient evidence to establish that the petroleum was service petroleum. A document P3 was read in evidence by the officer conducting the prosecution, without any objection being made to its reception by the pleader for the accused. This document was signed by the Government Analyst who declared that the sample of petroleum, taken from the can which was found in the accused man's possession was service petroleum.

At the conclusion of the case for the prosecution, the Magistrate called upon the accused for his defence. His pleader stated that he "does not call the defence." The next thing on the record is the order of the Magistrate acquitting the accused on the ground that "there is no evidence to show that a copy of the Analyst's Report had been served on the accused as required by the regulations." He, therefore, declined to act on the declaration in the document P3. Without that document, there was no evidence on the record to establish that the petroleum was service petroleum. The regulation which the Magistrate appears to have had in mind is 17B (3) which enacts that —

> "Any petroleum spirit containing the compounds specified in paragraph (1) of this regulation shall be deemed to be service petroleum."

The compounds mentioned in paragraph (1) are "benzene-azo-alpha-naphthylamine or benzene-azo-ortho-cresol, or any mixture of those compounds." Section 17B (3) also provides that "a certificate of the Government Analyst certifying that any sample of petroleum spirit specified in the certificate contains the compounds aforesaid shall, subject as hereinafter provided, be sufficient evidence of the facts therein stated, provided that before such a certificate is tendered as evidence in any proceedings a copy thereof shall, not less than seven days before the hearing, be served on the accused, and no such certificate shall be admitted in evidence, if the accused, not later than three days before the hearing.....give to the prosecution notice requiring the attendance of the Government Analyst."

In view of this provision and of the Magistrate's order of acquittal, it may be presumed although there is no note on the record to show it, that a submission was made to the Magistrate to the effect that it was incumbent on the prosecution to establish in every case, as a condition precedent to the production of the certificate that a copy of it had been served on the accused in the manner indicated in the proviso just referred to. It may also be presumed that the Magistrate accepted that as a valid submission and, for that reason, acquitted the accused.

I cannot agree with the view taken by the Magistrate. It will be observed that the proviso says that "before such certificate is tendered .....*a copy thereof shall be served* not less than seven days before" etc. and *not* that "before such certificate is tendered..... a copy thereof *shall be shown to have been* served." etc. In regard to the actual requirement of the proviso, the court may under section 114 of the Evidence Ordinance presume, in accordance with the principle *omnia praesumuntur rite esse acta* that it had been complied with, particularly because no objection for non-compliance with this requirement was taken at the time the document was produced and admitted. The cases relied on by Mr. Chitty, namely *Batt vs Mattinson* (1900 – 82 L.T. 800), *Smart & Son vs Watts* (1895 – 1 Q.B.D. 219), *Dixon vs Wells* (25 Q.B.D. 249) are easily distinguishable from this case for, in those cases, there was, admittedly, a non-compliance with a peremptory requirement under the Food & Drugs Act of 1875, whereas, in this case, there is not one word on the record to say or to suggest that a copy of the certificate had not been served on the accused. In the absence of such an objection, the presumption of regularity of procedure applies, for, as I have already observed, it has not been made incumbent on the prosecution to prove, in every case, that a copy had been served on the accused as a condition precedent to the production of the certificate. A provision such as this is not intended to be used as some sort of secret weapon with which to surprise a prosecution after it had closed its case having read in evidence the Analyst's Certificate without any objection to its reception. It is disappointing to find that the Magistrate tolerated the attempt. It was, obviously, his duty, if he thought this was a case in which it was fit and proper for the accused to have an opportunity of examining the Analyst to give him an opportunity to do so. He certainly had that power at least under section 406 of the Criminal Procedure Code.

I set aside the order of acquittal. The guilt of the accused has been established beyond reasonable doubt. I convict him under the alternative charge and sentence him to two months' rigorous imprisonment.

*Order of acquittal set aside and accused convicted.*

*Present:* SOERTSZ, A.C.J. & KEUNEMAN, S.P.J.

## KING vs FERNANDO

*S. C. No. 42—D. C. (Crim.) Colombo No. 679.*
Argued on 5th & 6th July, 1945.
Decided on 18th July, 1945.

*Price-controlled goods—Dealer bound to sell on tender of controlled price—Attempt to obtain price-controlled goods by means of a forged document—Meaning of "fraudulently" and "dishonestly"—Control of Prices Ordinance, No. 39 of 1939—Penal Code sections 22, 23, 403, 459, and 490.*

The price of Sanatogen was controlled under the Control of Prices Ordinance, No. 39 of 1939. A dealer is bound by law to sell a price-controlled article on tender of the price. As Messrs. Cargills, Ltd. sold Sanatogen only on production of a doctor's prescription, the accused attempted to obtain a bottle from them on production of a forged prescription. He was charged and convicted under sections 403, 459 and 490 of the Penal Code. It was argued in appeal that the conviction was bad as, if the attempt had succeeded, there would have been no wrongful gain or wrongful loss to either party.

**Held :** (i) That the accused acted both dishonestly and fraudulently and was therefore rightly convicted.

(ii) That "fraudulently" is wider than "dishonestly" and is not confined to the acquisition of wrongful gain or to the infliction of wrongful loss measurable in money's worth.

**Cases referred to :** *Rex vs Periyatamby* (5 N.L.R. 338)

*L. A. Rajapakse, K.C.*, with *L. E. J. Fernando* and *B. S. R. Jayawickreme*, for the accused-appellant.

*M. F. S. Pulle, Crown Counsel*, for the Crown-respondent.

SOERTSZ, A.C.J.

This is an appeal against convictions entered against the appellant under sections 459/490, and 403/490 of the Penal Code. The facts are these : Certain events on the 11th of March, 1944, satisfied the staff of the Drugs Department of Messrs. Cargills, Ltd. that prescriptions bearing the forged signature of Dr. K. J. de Silva were being used in order to obtain certain articles which it was the custom of Cargills, Ltd. to supply only on doctors' prescriptions. The salesmen were, therefore, warned in regard to prescriptions purporting to bear the signature of Dr. K. J. de Silva. On the 18th of March, 1944, the appellant presented document P2 to W. S. de Silva, a salesman of the Drugs Department. It purported to be a prescription signed by Dr. K. J. de Silva for a bottle of Sanatogen for the use of a patient named M. R. Fernando. The salesman, apprehensive with suspicions created by recent events, handed the appellant over to the Manager, and this case was launched. It has been established beyond all manner of doubt that P2 is a forged document and that it was presented by the appellant. The appellant's defence, that he, in good faith, presented P2 which had been entrusted to him by one Nichol Peiris has been rejected by the trial judge. In view of these facts, one would have thought that the convictions entered against the appellant were inevitable, but on appeal, Mr. Rajapakse contended that Sanatogen being a price-controlled article, any person who refuses to sell it, except on the condition that a medical prescription is produced in respect of it, contravenes section 5 of the Defence (Control of Prices) (Supplementary Provisions) Regulations (Gazette No. 9019 of 8-10-1943) and is guilty of an offence, and that, therefore, the appellant did no more than resort to a trick or device for procuring what the seller in question here was bound to but would not sell. He contended that if the attempt had succeeded, there would have been no wrongful gain or wrongful loss to one side or the other and that, therefore, the appellant was not guilty either of an attempt to use as genuine a forged document or of an attempt to cheat and dishonestly induce a delivery of property. In short, his argument was that there was no element of dishonesty or fraud in the meaning those words bear in the Penal Code, in the acts and deeds and words of the appellant. Section 22 of the Penal Code defines "dishonestly" thus : "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly." Section 23 less helpfully defines "fraudulently" as follows: "A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise." The view that "dishonestly" in section 22 is equivalent to "fraudulently" in section 23 is, as Gour points out, quite untenable. If they are synonymous, there was no occasion whatever to use both words in juxtaposition as they are used in section 453 for instance. To quote from Gour

(Vol. 1 1925 Ed.) page 245: "Three essential ingredients must be present to constitute dishonesty in law, namely (*a*) intention, (*b*) employment of unlawful means, (*c*) acquisition of property to which one has no right, whereas according to Sir James Stephen (2 History of Criminal Law page 121) "whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime, two elements, at least, are essential to the commission of a crime, namely, (*a*) deceit or an intention to deceive or, in some case, mere secrecy, and (*b*) either actual injury or possible injury, or a risk of possible injury by means of that deceit or secrecy." Thus, it will be observed that "fraudulently" is wider than "dishonestly" for it is not confined to the acquisition of wrongful gain or to the infliction of wrongful loss measurable in money's worth, but embraces injury to mind or reputation to take two instances. The cases relied on by Mr. Rajapakse, *Rex vs Periyatamby* (5 N.L.R. 338) and similar cases, are distinguishable on the ground that, in those cases, the false documents and the false representations were used to recover the accuseds' own property. In this case, it cannot be pretended that the appellant was entitled to the bottle of Sanatogen. The most that can be said in regard to it is that Cargills, Ltd. would, at the date of this case, have incurred a penalty by refusing to sell it except on a prescription. The fact that Cargills, Ltd. rendered themselves liable to a penalty did not, in any way, invest the appellant with a right to sue for the article they refused to sell unconditionally. The Sanatogen was the property of Messrs. Cargills, Ltd. and it was open to them to deal with it in the manner they adopted as the course of business they would follow even if by following it they exposed themselves to a penalty. In my opinion, the appellant acted both dishonestly and fraudulently in doing what he did. I dismiss the appeal.

KEUNEMAN, J.

I agree.

*Appeal dismissed.*

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*Present:* SOERTSZ, A.C.J.

## MEYAPPA CHETTIAR vs SENEVIRATNE

*S. C. Nos. 276-77—C. R. Colombo No. 90738.*
Argued on 9th July, 1945.
Decided on 20th July, 1945.

*Money Lending Ordinance—"Harsh, unconscionable or substantially unfair" transaction—Finding of trial judge.*

**Held:** That the question whether a money lending transaction is "harsh, unconscionable or substantially unfair" is one of fact and a finding by a trial court of such a fact will not be disturbed unless it is clearly wrong.

*N. Nadarajah, K.C.*, with *V. Thillainathan* and *H. W. Thambiah*, for the defendant-appellant.

*C. Renganathan*, for the plaintiff-respondent.

SOERTSZ, A.C.J.

The question, whether a money-lending transaction such as this transaction was found to be, is "harsh, unconscionable, or substantially unfair" is obviously a question of fact, and a finding by a trial court on such a question ought not, I think, to be disturbed unless it is clearly wrong. The appellant contends it is wrong because the order made by the trial judge results in the lender getting more than 18% per annum on the loan. But section 4 of the Money Lending Ordinance (Chapter 67) makes the "reasonableness of the rate of interest" *one* of the things to be considered. The learned trial judge had considered all the important matters connected with this loan before reaching his conclusion. He points out that this is not the usual money lending transaction pure and simple; he observes on the unfairness of the defendant's contention that there should have been progressive deductions from the capital according to the amounts received by the plaintiff by the sale of coupens; he takes into account that the process of recoupment throws upon the plaintiff duties not usually undertaken by a lender. In all the circumstances, I should not be justified in disturbing that finding.

I dismiss the appeal with costs.

*Appeal dismissed.*

*Present:* SOERTSZ, A.C.J. & CANEKERATNE, J.

## DE SILVA vs EDWARD

*S. C. No. 42—D. C. (Inty) Matara No. 15119.*
Argued on 27th July, 1945.
Decided on 21st August, 1945.

*Execution of decree—Application for execution pending appeal by judgment-debtor—Judgment-debtor not made respondent to the application—Jurisdiction of court—Civil Procedure Code, section 763.*

**Held :** That the omission of a judgment-creditor, who applies for the execution of a decree which is appealed against, to make the judgment-debtor a respondent to the application, results in a failure of jurisdiction and is not merely an irregular or an erroneous exercise of jurisdiction.

**Cases referred to :** *Attorney-General vs Sillem* (11 E.R. 1208)
*Keel & Others vs Asirwathan & Another* (4 C.L.W. 128)
*Ragunath Das vs Sunder Das Khetri* (A.I.R. 1914 Cal. P.C. 129)
*Malkar Jun vs Narkari* (I.L.R. 25 Bom. 338)
*Gopal Chunder Chatterjee vs Gunamoni Dasi* (1892–I.L.R. 20 Cal. 370)

*H. V. Perera, K.C.*, with *Vernon Wijetunga*, for the defendant-appellant.
*N. E. Weerasooriya, K.C.*, with *H. W. Jayawardene*, for the plaintiff-respondent.

SOERTSZ, A.C.J.

The respondent to this appeal obtained judgment against the appellant for a certain sum of money. The appellant lodged an appeal on the 7th of September, 1943. Thereafter, the respondent applied for and obtained a writ of execution returnable on the 18th of March, 1944. He did not make the appellant a party-respondent to that application. On the 16th of September, 1943 the appellant's proctor moved to have the writ recalled on the ground that the application for it had been made in contravention of the requirement of section 763 of the Civil Procedure Code in that, although his client had taken an appeal at the time the writ was applied for, he had not been made a respondent to the application. This motion was fixed for inquiry on the 29th of September, 1943 but on that date a settlement was reached, the respondent undertaking to give security in the amount of the Fiscal's valuation of such property as came to be seized on the writ, before proceeding further with its execution. However, on the 12th of October, 1943, the respondent's proctor informed the court that " his client was not tendering security" and, thereupon, the court made this order:

> " Recall writ unexecuted. Forward appeal in due course."

On the same day, the appellant's proctor brought to the notice of the court that the Fiscal had already seized property on the writ that had issued on the 9th of September, 1943 and he asked that the Fiscal be directed to release that property from seizure. This was allowed and the Fiscal was directed accordingly. Four months later, namely on the 28th of February, 1944, the respondent's proctor filed a fresh application for writ and asked that writ be issued, on the respondent tendering the necessary security. The judge made order "Call on Bench." On the following day, the 29th of February, 1944, the case was so called, and the following order was made :

> " I allow application for writ on security based on the Fiscal's valuation of the property seized."

This application and the order upon it were made *ex parte*. The appellant had not been made respondent or given notice and he was not present before the court. But he appears to have heard of what had happened, for two days later, on the 2nd of March, 1944, his proctor moved that the writ be recalled unexecuted. This motion was fixed for inquiry on the 9th of March, 1944, and on that day, the court heard both parties and made order on the following day refusing to recall the writ. Hence this appeal.

The question now is whether the orders made on the 29th of February and 10th March, 1944, are well founded. The answer to that question must depend on the correct interpretation of Chapter 59 and, particularly on the correct interpretation of section 763 for, in this instance, the application for execution was made by the judgment-creditor and was made after an appeal had been filed. Section 763 enacts that :

> " In the case of an application being made by the judgment-creditor for execution of a decree which is appealed against, the judgment-debtor shall be made respondent.

> If, on any such application, an order is made for the execution of a decree against which an appeal is pending, the court which framed the decree shall, on sufficient cause being shown by the appellant, require security to be given for the restitution of any property which may be taken in execution of the decree, or for the payment of the value of such property, and for the due performance of the decree or order of the Supreme Court.
>
> And when an order has been passed for the sale of immovable property in execution of a decree for money, and an appeal is pending against such decree, the sale shall, on the application of the judgment-debtor, be stayed until the appeal is disposed of, on such terms as to giving security or otherwise as the court which passed the decree thinks fit."

Now the ordinary rule is that once an appeal is taken from the judgment and decree of an inferior court, the jurisdiction of that court in respect of that case is suspended except, of course, in regard to matters to be done and directions to be given for the perfecting of the appeal and its transmission to the Court of Appeal. As Lord Westbury, Lord Chancellor (1864) observed in *Attorney-General vs Sillem* (11 English Reports at p. 1208), "the effect of a right of appeal is the limitation of the jurisdiction of one court and the extension of the jurisdiction to another." It follows as a corollary that on that right being exercised the case should be maintained *in statu quo* till the appellate court has dealt with it and given its decision. It is hardly necessary to labour the point since the language of Chapter 59 of the Code makes it sufficiently clear that the Legislature in enacting, as it did, was creating an exception to the ordinary rule, but in a qualified and limited way. In other words, the legislature continued the jurisdiction, that is to say, the competency of the court as the court appointed to try and determine the case, beyond the ordinary limits, but it took care to see, as it almost invariably does, that its jurisdiction, in the sense of its power to act, and of its correct action, are made dependent on the observance of rules of procedure. Some of those rules are so vital, being of the spirit of the law, of the very essence of judicial action, that a failure to comply with them would result in a failure of jurisdiction or power to act, and that would render anything done or any order made thereafter devoid of legal consequence. The failure to observe other rules, less fundamental, as pertaining to the letter of the law and to matters of form would not prevent the acquisition of jurisdiction or power to act, but would involve the exercise of it an irregularity. Or, it may happen that the court having acquired jurisdiction, thereafter acts irregularly or erroneously and thereby prejudice is caused to some party. In these latter cases, it would be for the party concerned to resort to appropriate action to repair the wrong or to obtain relief, and subject to that, the thing done or the order made would be binding upon the parties.

The question then is which of these categories the failure to comply with the requirement of section 763 that the judgment-debtor shall be made a party respondent should be ascribed.

In regard to that question, I find myself assisted today more confidently to the answer I ventured to give, in the case of *Keel & Others vs Asirwathan & Another* (4 C.L.W. 128), in view of the two opinions delivered in the Privy Council in the case of *Ragunath Das vs Sunder Das Khetri* (A.I.R. 1914 Cal. P.C. 129) and in the case of *Malkar Jun vs Narkari* (I.L.R. 25 Bombay 338) of which I was not then aware.

In the former case, section 248 of the Indian Code of Civil Procedure, then in force, required that a certain party should be brought before the court by serving him with the notice indicated in that section, calling upon him to shew cause why the decree should not be executed against him, and by obtaining an order binding upon him. This the judgment-creditor had failed to do. Their Lordships held that the party concerned was not bound by anything that was done. Lord Parker observed, "a notice under section 248 (that was the section of the Indian Code that arose there. Here it would be under section 763 of our Code) is necessary in order that the court should obtain jurisdiction." Referring to the latter case cited above and to another case Their Lordships observed as follows: "Attention was called to the case of *Malkar Jun vs Narkari & Another (supra)* but in their opinion there is nothing in that case that has a bearing upon the present appeal. As laid down in *Gopal Chunder Chatterjee vs Gunamoni Dasi* (1892 I.L.R. 20 Cal. at 370) a notice under section 248 of the Code is necessary *in order that the court should obtain jurisdiction to sell property* by way of execution as against the legal representatives of a deceased judgment-debtor. In the case in 27 Indian Appeals (*i.e.* Malkar Jun's case (*supra*)) such a notice had been served, and the court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative. It had, therefore, jurisdiction to sell though the decision as to who was the legal representative was erroneous..... The present case is wholly of a different character. No proper notice was served under the section and the respondents had full notice of and indeed

were responsible for the procedure adopted." In Malkar Jun's case (*supra*) Lord Hobhouse in the course of delivering the opinion of the Judicial Committee said :

> "The Code goes on to say that the court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramalingappa. He contended that he was not the right person but the court, having received the protest, decided that he was the right person and so proceeded with the execution. In so doing the court was exercising its jurisdiction. It made a sad mistake it is true, but a court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken, the decision however wrong, cannot be disturbed."

To apply those principles, the case before me falls unequivocally within the rule in *Ragunath Das vs Sunder Das Khetri* (*supra*). Section 763 of our Code enacts that "in the case of an application being made by the judgment-creditor for execution of a decree which is appealed against, the judgment-debtor shall be made respondent" that is to say, that he shall be brought before the court or shall be given the opportunity of coming before the court by being served with a notice calling upon him to show cause, if he had any cause to show, against the application for execution. This is precisely what the party concerned in the Indian case and the judgment-creditor in this case failed to do. This failure in respect of the original application for execution in this case proved immaterial because the parties reached a settlement on that occasion and agreed that the writ should go on the judgment-creditor giving security. But later the judgment-creditor resiled from that agreement. His proctor informed the court that "his client was not tendering security," and the court made order, "Recall writ unexecuted. Forward appeal in due course." That order put an end to the application for execution. It was tantamount to an order refusing to allow execution of the decree and in my view—*primae impressionis*—it was not open to the judgment-creditor to make another application for execution. But let us assume that it was. Such an application would nevertheless have to conform to the requirement of section 763 that the judgment-debtor shall be made respondent. But on this new application for execution made by the judgment-creditor several months later, once again the judgment-debtor was ignored. He was not made respondent. That omission was the omission of the party in the Indian case too and it follows inevitably that the result must be the same—a failure of jurisdiction, not merely an irregular or an erroneous exercise of it as happened in the second Indian case cited, that of *Malkar Jun vs Narkari* (*supra*).

Counsel for the respondent sought to escape from this result by relying on the fact that, in this case, the judgment-debtor had ultimately the opportunity of being heard when he came before the court to ask that the order made without notice to him be rescinded. But that was too late. The law gave him the right to be heard before the order was made. It did not impose upon him the burden of contending against an order that had been made, by no means a light burden for, after all, a man convinced against his will is of the same opinion still. If the judgment-debtor had been given an opportunity of showing cause at the proper time he might have succeeded to the extent of securing the refusal of the application altogether for it was open to the court under section 763 to refuse the application, or at least to the extent of securing better terms. At any rate, he was entitled to try. The words of Lord Parker in Ragunath Das's case apply exactly on the facts of this case :

> "No proper notice was served under the section and the respondent had full notice of and indeed was responsible for the irregularities of the procedure adopted."

For these reasons, I would hold that the orders of the 10th of March, 1944, and of the 29th of February, 1944, were made without the court equipping itself with the power to make them and I would, *pro forma*, set them aside, although *ex hypothesi* it is not necessary to do so. The respondent will pay the appellant the costs of both courts in respect of this matter.

CANEKERATNE, J.

I agree.

*Appeal allowed.*

*Present:* SOERTSZ, A.C.J. & KEUNEMAN, S.P.J.

## SIMAN NAIDE vs JANE NONA

*S. C. No.* 336—*D. C.* (*F*) *Kegalle No.* 2844.
Argued on 5th & 6th July, 1945.
Decided on 24th July, 1945.

*Action* rei vindicatio *and for* restitutio in integrum—*Transfer of land by a married Kandyan woman—Woman under* 21 *years of age at date of transfer—Circumstances in which transfer will be set aside—Burden of proof.*

This was an action *rei vindicatio* and for *restitutio in integrum* by a married Kandyan woman who was under 21 years of age at the date on which she transferred the land in question to the defendant. The questions for decision were—

(1) whether the burden of proof was on the minor to show that she suffered damage or detriment or on the defendant to show that the minor derived benefit from the transfer; and

(2) whether the minor should restore the defendant to his original position as a condition precedent to the grant of the relief claimed.

The defendant did not show that the minor derived any substantial benefit from the transfer.

**Held:** (i) That the minor must prove that she has suffered loss, damage or prejudice.

(ii) That in the absence of any proof by the defendant that the minor has been benefited, the minor must be taken to have suffered the kind of loss or damage sufficient to enable her to obtain relief.

(iii) That the minor must indemnify the defendant and put him back where he stood before he entered into the contract.

**Cases referred to:** *Muttiah Chetty vs Dingiriya* (10 N.L.R. 371)
*Silva vs Mohamadu* (19 N.L.R. 426)
*Wijesooriya vs Ibrahimsa* (13 N.L.R. 195)
*Breytenbach vs Frankel* (S.A.L.R. 1913 A.D. 390)
*Nel vs Divine Hall Co.* (8 S.C. 16)
*Manuel Naide vs Adrian Hamy* (12 N.L.R. 259)
*Majeeda vs Paramanayagam* (36 N.L.R. 196)

*H. V. Perera, K.C.*, with *S. R. Wijayatilake*, for the defendant-appellant.
*L. A. Rajapakse, K.C.*, with *C. R. Gunaratne*, for the plaintiff-respondent.

SOERTSZ, A.C.J.

The plaintiff-respondent, a married Kandyan woman, purported to transfer to the defendant-appellant, on deed of transfer No. 2420 of the 1st of August, 1943, the land in dispute in this case. At the date of the transfer she was under 21 years of age. Her father and her husband were present at the sale. She now sues to have the said deed set aside and declared void, for the defendant to be ejected therefrom and for her to be declared entitled thereto and placed in possession thereof, on the ground that she was a minor at the time of the sale, that she did not receive the consideration for which she gave the transfer, or any other benefit. The appellant's case was that she had sold the land for Rs. 500 to the defendant, and had received Rs. 350 in cash, the balance having been applied by the defendant to pay off a mortgage to which the land was subject at that time.

In the course of her evidence at the trial plaintiff found herself compelled to repudiate the averment in her plaint and to admit that she had received Rs. 350 and had utilized that sum in buying clothes for herself and her child and in medical treatment to the child. She also admitted the discharge of the mortgage. The evidence shows that at the date of the transfer she had been twice married. She had divorced her first husband, and had married the husband who, along with her father, was present at the Notary's office when she executed this deed. From the evidence one also gathers the fact that Rs. 500 was quite a fair price for the land at the time of the sale.

The learned judge basing himself upon the Divisional Bench case of *Muttiah Chetty vs Dingiriya* (10 N.L.R. 371) which ruled that a Kandyan woman does not become a major by marriage, held that although he found that she had the assistance of her husband and of her father, in and about the execution of the deed of transfer, she was entitled, nevertheless, to repudiate that deed for the simple reason that she was a minor at the date of its execution. He accordingly directed that decree be entered "declaring deed No. 2420 of 1/8/43 cancelled and void on plaintiff paying defendant the sum of Rs. 470, and ejectment. Defendant will pay plaintiff half costs of this action." From this decree the defendant has appealed and the principal submission made to us in appeal was

that the deed was not liable to be set aside for the reason that the plaintiff was benefited by her contract of sale. No point was made, nor could any point have well been made, of the fact of the assistance the plaintiff had received from her husband and her father. The sale had not been sanctioned by court.

An examination of our law reports reveals the thoroughly unsatisfactory and illogical position in which many matters relating to the so-called contracts of minors stand. Justice de Sampayo invited attention to some of them in the case of *Silva vs Mohamadu* (19 N.L.R. 426 at p. 430), and it appears clearly from a perusal of the cases he refers to that the uncertainty of the law is mainly due to the fact that it has been stretched or contracted to suit the merits or demerits of particular cases. *Wijesooriya vs Ibrahimsa* (13 N.L.R. 195) is a striking illustration as the criticism by Wessels of the rule there laid down clearly demonstrates (see Wessels' Law of Contracts p. 279 *et seq.*). What appeared to be hard cases have served to make bad or, at any rate, uncertain law and this tendency has derived support from the conflicting views of the Dutch jurists themselves.

In regard to the present case, however, certain points must be taken to have been finally settled so far as our courts are concerned. In regard to the question whether a minor attains the contractual capacity of majors by marriage, whatever the position may be under the Roman-Dutch law (see Walter Pereira pp. 191-192), it is now definitely laid down that a *Kandyan* woman does not attain majority by marriage. It must also be regarded as settled law, ever since *Silva vs Mohamadu* (*supra*) which followed the well-known South African case of *Breytenbach vs Frankel* (S.A.L.R. 1913 A.D. p. 390), that a sale of immovable property by a minor without the sanction of a competent court is voidable, not void, and that a minor may relieve himself or herself by *restitutio in integrum* or "some equivalent legal proceeding" (see *Silva vs Mohamadu (supra)* at p. 432).

The sole questions remaining for consideration in this case are firstly, whether a minor seeking such a remedy must show that she suffered damage or detriment, or whether she may be defeated by proof by the other party that she derived a benefit from the sale of this land, and secondly, whether she should restore the other party to his original position as a condition precedent to her obtaining the relief she claims. The first of these questions would have depended for its answer, to a large extent, under the Roman-Dutch law system on the way in which she sought relief. If she sought it by way of *restitutio in integrum* it would appear from the very impressive reasoning in the judgment of Solomon, J. in *Breytenbach vs Frankel (supra)* at page 400, that the onus lies on her to prove damage, whereas if she brought a vindicatory action, she is entitled to succeed on mere proof that her property was alienated by the guardian — that was the case there — without the sanction of the court. But, in this case a differentiating fact is that the alienation was not by a guardian but by the minor herself. What is the position in such a case? It is, in my opinion, reasonable to hold that in the case of a sale by the minor herself *restitutio* is the proper course, for, as pointed out by Solomon, J., "the authorities lay down explicitly that an alienation by *a guardian* of the immovable property of his minor without the sanction of the court has no effect to transfer the dominium in such property. And the reason of the doctrine is clear, namely, that no one has the power to alienate property that does not belong to him. Consequently, when such an alienation has taken place, the dominium still remains in the minor, so that in order to recover his property it is not necessary for him to apply to the court for a *restitutio in integrum* but he can bring a vindicatory action as the *dominus* of the property."

It would follow from this that in a case like the present where the minor herself has alienated immovable property, her remedy ought to be by *restitutio* for she has purported to divest herself of her title, and she ought not to be allowed to be the judge in her own case as to the validity or invalidity of her alienation, and to sue *rei vindicatione* assuming that the dominium is still in her, for, as observed by Villiers, C.J., although that might be logically sound "whether an act was void or voidable, *the universal practice* appears to have been for the minor who repudiated the transaction to bring an action for *restitutio in integrum*....." (*Breytenbach vs Frankel*) *(supra)*.

In our courts, as far as I have been able to discover, applications for *restitutio in integrum* have always been made to the Supreme Court by minors as well as by persons of full capacity and have been confined to cases in which the application is based on the discovery of fresh evidence or on allegation that the applicant has been surprised into a position of prejudice and disadvantage in the course of a judicial proceeding. Minors seeking to be relieved from the consequences of contracts alienating land have always proceeded by regular action in which

the prayer generally is that the deed be declared void and that the plaintiff be declared entitled to the land or to be placed in possession of it. This was pointed out by Ennis, J. when he observed in *Silva vs Mohamadu (supra)* at p. 428, " in Ceylon there is no distinction between the two actions ( *i.e. rei vindicatio* and *restitutio in integrum* ), the prayer generally combining both, by asking that the deed be set aside or declared null and void, and by asking for a declaration of title and recovery of possession."

A certain confusion of thought in some of our reported cases in regard to the burden of proof is evidently due to the position adopted by the Roman-Dutch law in that respect. If the minor proceeds by way of *restitutio in integrum* the onus lies on the minor to prove damage ; if however he is in a safe position to proceed by way of *rei vindicatio*, all he need prove is minority and the party seeking to enforce the contract would have to prove that it was to the minor's benefit, that is to say, very clear and singular benefit ( see *Nel vs Divine Hall Co.* ( 8 S. C. p.16 ) ). That certainly appears to be the position in regard to ordinary contracts and not to contracts involving alienation of land as one would infer from the observation of Solomon, J. at page 400 of *Breytenbach vs Frankel (supra)*. Contracts of minors involving the alienation of land appears to be on a special footing. Lee ( Introduction to Roman-Dutch Law p. 47) says: " In the sphere of property law there is nothing to prevent a minor from acquiring ownership but he cannot alienate or change his property without his parent's or tutor's authority, which in the case of the alienation or hypothecation of immovables is not sufficient without an order of court." He quotes extensively from the jurists in support of this. That is the law in Ceylon too (*e.g. Manuel Naide vs Adrian Hamy* (12 N.L.R. 259 ) ). If alienation of immovables has taken place without the sanction of the court, the better opinion appears to be that the property is recoverable, benefit or no benefit, provided that, in most cases, the other party is put back in his original position. Be that as it may, in this case, the defendant has not shown that the minor derived any substantial benefit other than that she received, what, in the market then prevailing, may be regarded as a fair price. That would hardly do, for the writers contemplate benefit described as *singulare emolumentum*. But, it is reasonable to suppose that, in a hybrid proceeding of this kind partaking both of the character of *restitutio in integrum* and of *rei vindicatio*, theoretically, at least, a certain onus lies on the minor as well as a certain obligation. In the words of Drieberg, J. in *Majeeda vs Paramanayagam* (36 N.L.R. 196) " it is necessary for the minor to prove that he has suffered serious loss, damage, or prejudice, and the other party to the contract is entitled to be indemnified and placed in his original position ." It seems to me that these apparently conflicting burdens placed on the other party and the minor respectively, can, in a case like the present involving alienation of land, be reconciled by holding that where it has not been shown that the minor has been benefited, in the manner indicated, he must be taken to have suffered the kind of loss or damage sufficient to enable him to obtain relief. There is evidence in this case that in the market, at the date of the institution of the action, this land was worth Rs. 1,500. The other principle referred to by Drieberg, J. however, holds good. The minor must indemnify the defendant and put him back where he stood before he entered into this contract.

I would, therefore, vary the decree entered by the trial judge by directing that the plaintiff will be declared entitled to the land, the defendant ejected and the plaintiff restored to possession on her bringing into court Rs. 500, the amount of consideration she received, and an additional sum of Rs. 350 value of the house built by the defendant on the land. Costs in the court below as directed in the judgment of the trial judge. Costs of appeal divided.

KEUNEMAN, S.P.J.

I agree.

*Decree varied.*

*Present:* SOERTSZ, A.C.J.

## ATTORNEY-GENERAL vs KUNCHINAMBU

*Application for Revision in M.C. Mannar No. 4139.*
Argued & Decided on 24th July, 1945.

*Revision—Penalty prescribed by law—Inadequacy of sentence passed—Right of appeal—Application for revision by Attorney-General—Delay—Criminal Procedure Code sections 338 and 357.*

**Held :** (i) That where a magistrate imposed a sentence less than the minimum prescribed by law, it is an error in law, and is appealable under section 338 of the Criminal Procedure Code.

(ii) That where an application to revise such a sentence was made nearly four months after it was passed, the Supreme Court ought not to exercise its powers under section 357 (1) of the Criminal Procedure Code in view of the delay that had occurred.

**Cases referred to :** *The Queen vs Daniel* (1 N.L.R. 87)

*T. K. Curtis, Crown Counsel*, for the Attorney-General.

*H. V. Perera, K.C.*, with *G. E. Chitty* and *H. Wanigatunga*, for the 2nd accused-respondent.

SOERTSZ, A.C.J.

This is an application by the Attorney-General seeking to have the sentence passed by the Magistrate on the second accused revised on the ground that the Magistrate in convicting him and sentencing him as he did overlooked a provision of the Control of Prices Regulations, 1942, which made the imposition of a term of imprisonment imperative because this accused had a previous conviction. The sentence passed by the Magistrate was one of fine. It is perfectly clear that the sentence passed by the Magistrate was in contravention of the requirement in the Control of Prices Regulations to which I have just referred. The question is whether this is a proper case for the exercise of our revisionary power.

Mr. H. V. Perera, appearing on behalf of the second accused-respondent, takes the preliminary objection that this is not a matter in which this court will entertain an application for revision because, he submits, by section 338 of the Criminal Procedure Code, a right of appeal lies in such a case and the Attorney-General ought to have resorted to that right. He submits that the error complained of, in this instance, is an error in law and he invites attention to sub-section 1 of section 338 which confers a right of appeal to the Supreme Court against any judgment for any error in law. That this error is an error in law is clear apart from authority, but if authority were required there is the case of *The Queen vs Daniel* (1 N.L.R. 87), in which Browne, J. observed that insufficiency of punishment would be an error in law when a minimum amount of penalty has been prescribed and has not been imposed. This is such a case. I cannot accede to the ingenious argument of Mr. Curtis, on behalf of the Attorney-General, that the right of appeal given by section 338 (1) of the Criminal Procedure Code is a right of appeal against a judgment only and not against a sentence. In my view a sentence is a part of the judgment and the error in this case was an error in the course of the judgment.

Mr. Curtis next relied upon section 357 of the Criminal Procedure Code and pointed out that by sub-section 1 of that section the Supreme Court " may in any case the record of the proceedings of which has been called for by itself or which otherwise comes to its knowledge in its discretion exercise any of the powers conferred by sections 346, 347 and 348." There is no doubt, and indeed it is not disputed on behalf of the second accused-respondent, that this court has a discretion and that it is open to this court to deal with a sentence which appears on the face of it to be illegal. But a discretion such as that must be exercised in regard to the attendant circumstances of a particular case and, looking at the facts of this case, I find that when the Magistrate imposed the sentence he did on the second accused the Price Control Inspector who was present in court invited the Magistrate's attention to the fact that this accused was already labouring under a previous conviction but the Magistrate does not appear to have taken any action upon the statement made by the Price Control Inspector. The sentence was passed in February, 1945, and this application was made on the 25th of May, 1945, and now it is the end of July. In view of the delay that has occurred I do not think that I ought to exercise the discretion vested in me by section 357 (1) of the Criminal Procedure Code.

Mr. Curtis asks in tones of rhetorical indignation if this court is going to be a party to an illegal sentence remaining upon the record of a case. It is a very disturbing question to have to answer but the answer I would venture is that however much it may offend one's aesthetic sense to have an illegal sentence left upon the record, there are cases in which one must put up with that grievance lest one inflicts a great hardship on a man who had had every reason to think that he had been dealt with and punished for the offence with which he had been charged and of which he had been convicted and that his troubles were over. In matters of this kind, too, *interest reipublicae ut finis sit litium.*

For these reasons I refuse to exercise my discretion and I reject the application for an alteration of the sentence.

*Application rejected.*

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*Present:* SOERTSZ, A.C.J.

## KANDIAH & ANOTHER vs PONNIAH

*Application for Restitutio in Integrum in C.R. Jaffna No. 6637.*
Argued on 20th July, 1945.
Decided on 30th July, 1945.

Restitutio in integrum—*Minute of consent entered in erroneous terms.*

The terms of settlement arrived at between the parties to a case were minuted in erroneous terms in the journal. One of the parties, on discovering the error moved the Supreme Court for *restitutio in integrum*. The court having been satisfied on the affidavits, that there was a *prima facie* case, the application was allowed.

**Cases referred to :** *Rahim Bhai vs Weerasinghe* (11 C.W.R. 152)
*Abeysekera vs Haramanis Appu* (14 N.L.R. 353)
*Sinnathamby vs Nallatamby* (7 N.L.R. 139)

*N. Nadarajah, K.C.*, with *H. W. Thambiah*, for the petitioner.
*N. Kumarasingham*, for the respondent.

SOERTSZ, A.C.J.

This is an application for *restitutio in integrum* by the plaintiffs in case No. 6637A C.R. Jaffna. Their plea is that the land in suit belonged to the 2nd plaintiff, the wife of the 1st plaintiff and that they instituted the action just mentioned to be declared entitled to that land and to have the defendant, the nephew of the 2nd plaintiff, who was disputing their title, ejected from the land. Before the trial date, some of the relations and friends of both parties brought about a settlement, and on the trial date this settlement was minuted in the journal of the 26th of August, 1942, in these terms :

> " Defendant is willing to take a transfer of the land from plaintiff for Rs. 170. Plaintiff present and admits having received Rs. 170 from defendant on this account. Of consent action is dismissed. No costs."

The plaintiffs say that the true settlement was that the defendant should buy the land for Rs. 450 and that he paid Rs. 170 and undertook to pay the balance at the execution of the transfer. The plaintiffs then saw their proctor and informed him that the case had been settled and that the defendant had agreed to buy the land and had paid Rs 170. The proctor assumed that Rs. 170 was the full consideration and so it came about that the settlement was minuted as it was. Thereafter the defendant put off the fulfilment of his obligation from time to time and the plaintiffs were compelled to institute case No. 453 D.C. Jaffna to compel the defendant to carry out the settlement. Thereupon, the defendant filed answer and relied on the terms of settlement minuted in the journal of the 26th of August, 1942, and then, for the first time, the plaintiffs became aware of the mistake that had occurred. Hence this application.

The plea of the plaintiffs is supported by the affidavit of two men who had interested themselves in effecting the settlement, one of them a retired Registrar of Lands, and a neighbour of both parties, the other a relation. On these affidavits, there is a *prima facie* case. I would, therefore, follow the procedure adopted in *Rahim*

*Bhai vs Weerasinghe* (11 C.W.R. p. 152), *Abeysekera vs Haramanis Appu* (14 N.L.R. 353) and *Sinnathamby vs Nallatamby* (7 N.L.R. 139) and remit the case to the Court of Requests, Jaffna for the Commissioner officiating there to inquire into this matter, giving both parties opportunity to put their cases before him, and for him to make such order as, in his opinion, the evidence justifies. The costs of this application will be in his discretion when he makes his order.

*Application allowed.*

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*Present:* SOERTSZ, A.C.J.

BANDARANAYAKE (D.R.O.) vs SILVA

*S. C. No.* 609—*M. C. Nuwara Eliya No.* 8881 (*D.R.*)
Argued on 25th July, 1945.
Decided on 27th July, 1945.

*Order requisitioning paddy—Failure to deliver quantity requisitioned—Conviction—Validity of—Defence (Miscellaneous) Regulation* 37.

By an order made by the Governor on 15th September, 1942 under Defence (Miscellaneous) Regulation 3, all Government Agents, Assistant Government Agents and Assistant Government Agents (Emergency) were appointed to be competent authorities for the purpose of requisitioning under D.R. 37 any article of food or drink. The accused was required by order of one of the competent authorities to deliver a certain quantity of paddy which had been requisitioned. He was charged and convicted with having failed to deliver this quantity. The evidence disclosed that, on a certain calculation, the accused ought to have had the quantity of paddy requisitioned. There was also no satisfactory evidence to show that a requisition order had been served on the accused.

**Held :** That in these circumstances the conviction cannot stand.

*S. P. Wijeyewickreme*, for the accused-appellant.
*T. K. Curtis, Crown Counsel*, for the Attorney-General.

SOERTSZ, A.C.J.

I do not think this conviction can stand. It was a conviction on a charge that alleged that the accused "being served on the 30-10-44 with an order for requisitioning.....in respect of 5 bushels and 10 measures of paddy in his possession or under his control, did in contravention of the said order fail when thereto demanded to place the said quantity of paddy at the disposal of the Village Headman, the person authorized by the said order....."

In order to establish such a charge the prosecution must prove (*a*) that an accused had the paddy mentioned in the requisitioning order in his possession or under his control, (*b*) that the requisitioning order was served at time alleged.

In this case, all there is on point (*a*) is that, on a certain calculation the accused ought to have had this quantity of paddy. In the preceding month of August the accused had questioned the accuracy of the calculation and, in my opinion, there should have been better evidence led to establish that fact. A greater difficulty is that on point (*b*) there is no evidence to show satisfactorily that a requisition order was served.

I set aside the conviction and acquit the accused.

*Appeal allowed.*

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*Present:* KEUNEMAN, S.P.J. & ROSE, J.

## NAVARATNAM vs NAVARATNAM

*S. C. No.* 356—*D. C.* (*F*) *Jaffna No.* 72.
Argued on 21st & 22nd August, 1945.
Decided on 31st August, 1945.

*Marriage—Action for nullity of—Husband having Ceylon domicile—Wife having Indian domicile before marriage—Jurisdiction—Application of Prescription Ordinance—Prescription Ordinance sections* 10 *and* 15—*Civil Procedure Code sections* 597, 602, 604, 607 *and* 756.

The parties to this action were married on 12th March, 1936. About three months after the marriage the wife gave birth to a child. The husband who had a Ceylon domicile brought this action for a declaration of nullity of marriage against the wife, who until her marriage had an Indian domicile, on the ground that he was unaware that the wife was pregnant and that before the marriage he never had access to the wife. The action was not instituted until more than seven years after the birth of the child. The trial judge entered a decree absolute for the husband and the wife appealed and moved that security for costs be dispensed with.

A preliminary objection to the appeal was taken on the ground that the appellant (wife) had not given notice in accordance with section 756 of the Civil Procedure Code that she would tender security.

This was overruled.

It was argued in appeal —

(i) that the Ceylon courts had no jurisdiction as, the action being one for a declaration of nullity of marriage, the wife cannot be regarded as having acquired the domicile of the husband.

(ii) that the action was prescribed under section 10 of the Prescription Ordinance.

(iii) that as the husband had been guilty of unreasonable delay in presenting his plaint, judgment should not have been pronounced in his favour—Civil Procedure Code section 602.

**Held :** (i) That the claim in the present action for a decree of nullity was akin to a claim for nullity on the ground of impotence and not to a claim for nullity on the ground of bigamy, that the marriage must be regarded as good until the decree for nullity was entered, that the wife must be regarded as having the domicile of the husband up to the date of the decree and that, therefore, the Ceylon courts had jurisdiction in the action.

(ii) That the term "divorce" in section 15 of the Prescription Ordinance applied to cases where a decree for nullity of marriage was prayed for and that the action was not prescribed.

(iii) That in all the circumstances of the case the husband's delay in filing his plaint could not be said to be unreasonable.

(iv) That section 604 of the Civil Procedure Code applied to the present action and that a decree *nisi* should have been entered in the first instance.

**Cases referred to :** *Silva vs Silva* (8 N.L.R. 280)
*Abeygunasekera vs Abeygunasekera* (12 N.L.R. 95)
*Joseph vs Alexander Elizabeth* (28 N.L.R. 411)
*Sivacolunthu vs Rasamma* (24 N.L.R. 89)
*Inverclyde vs Inverclyde* (L.R. 1931 Probate Div. 29)
*Salvesen vs Administrator of Austrian Property* (L.T. 1927 A.C. 641)
*White otherwise Bennett vs White* (1937 Probate Div. 111)

*N. Nadarajah, K.C.*, with *N. Kumarasingham*, for the defendant-appellant.

*H. V. Perera, K.C.*, with *H. W. Thambiah* and *V. Arulambalam*, for the plaintiff-respondent.

KEUNEMAN, S.P.J.

The plaintiff brought this action against the defendant for a declaration that the marriage solemnized between them on the 12th March, 1936 was null and void, on the grounds that the defendant gave birth to a child about three months after the marriage and that the plaintiff was unaware that the defendant was pregnant and that the plaintiff before the marriage never had access to the defendant. After trial the District Judge entered judgment for the plaintiff, and the defendant appeals.

A preliminary objection was raised against the appeal, to the effect that the defendant had failed to give notice forthwith after the appeal that she would tender security for the appeal. What actually happened is as follows :

In the proceedings before trial the defendant moved that the plaintiff be ordered to deposit a sum of money as costs to enable the defendant to conduct her case. On the 28th March, 1944

the District Judge ordered plaintiff to pay Rs. 150 as costs to the defendant, and this sum was duly deposited in court on the 3rd April, 1944. After the trial judgment was entered on the 26th September, 1944. The petition of appeal was filed on the 9th October, 1944, and on the same date the defendant by her written notice moved that security for costs be dispensed with as the defendant-appellant was the wife of the plaintiff-respondent. As regards this latter application the District Judge ordered notice for the 17th October, 1944. On that date parties were represented and a settlement was arrived at. Of consent it was ordered that the appellant should give security in Rs. 50 for costs.

Mr. Perera for the respondent argued that in the motion the defendant-appellant did not give notice that she would tender security but merely moved that security be dispensed with. He contended that there had been a failure to comply with a positive requirement of section 756 of the Civil Procedure Code and that the appeal must accordingly be dismissed.

Mr. Nadarajah for the appellant depended on the principles enunciated in the case of *Silva vs Silva* (8 N.L.R. 280), *Abeygunasekera vs Abeygunasekera* (12 N.L.R. 95) and *Joseph vs Alexander Elizabeth* (28 N.L.R. 411). In the first of these cases it was held that "the English rule must be followed.....The rule is that the husband, besides being generally liable to pay his own costs, is also as a general rule, whether the wife be successful or not and whether she be petitioner or respondent, liable to pay his wife's costs.....and he is also liable to pay into court or give security for an amount fixed by the registrar as sufficient in his judgment to cover the wife's costs in connection with the hearing of the case." The reason for the liability was stated to be that under the old law "the marriage gave all the property to the husband and the wife had no other means of obtaining justice."

The second of the cases mentioned adopted this same view, in spite of the fact that there was no statutory authority to this effect in Ceylon. In the third of these cases the matter was carried one stage further and it was held that "a court in these proceedings could not insist upon the wife giving security for the husband's costs in appeal." An objection taken to the appeal on the ground that the wife had not given security for the husband's costs in appeal was dismissed.

Mr. Nadarajah further argued that the previous order made in the present case, that the husband should deposit the wife's costs of the trial, showed that the wife was qualified to claim exemption from giving security in appeal.

Mr. Perera did not dispute the authority of these cases, but he insisted that in any event the wife was required by section 756 to give notice that she will tender security, and that she was not permitted to omit that notice although she could at the same time claim exemption from giving security in appeal. Such a construction, to my mind, appears artificial and unreasonable, and I do not think the requirement in section 756 that the appellant must give notice that he will tender security precludes him from giving notice that security should be dispensed with under some rule of law or established practice. In this case the notice to dispense with security was given forthwith, and I do not agree that the appellant has contravened the provisions of section 756 of the Civil Procedure Code. The case of *Joseph vs Alexander Elizabeth* (*supra*) is in my opinion an authority to the contrary. The preliminary objection is accordingly dismissed.

As regards the merits of the appeal, it has not been argued that the plaintiff was not entitled to obtain a decree on the grounds set out in his plaint. The case of *Sivacolunthu vs Rasamma* (24 N.L.R. 89) has been accepted as laying down the correct law applicable to Ceylon. The facts are also not in dispute in this appeal.

Mr. Nadarajah for the appellant, however, raised three matters before us.

(1) The plaintiff in this case admittedly has a Ceylon domicile. The defendant, at any rate until her marriage, had an Indian domicile. The marriage took place in India. On the facts it has been held that the plaintiff had reason to suspect the pregnancy of the defendant on the wedding night, and almost immediately after plaintiff left the defendant and returned to Ceylon while the defendant remained in India ever since and never came to Ceylon. Mr. Nadarajah argued that as this is an action for nullity of marriage, the defendant cannot be regarded as having acquired the domicile of her husband, *viz.* a Ceylon domicile. He contended that no action for nullity can be maintained in the Ceylon courts.

In my opinion the answer to this argument is to be found in the case of *Inverclyde vs Inverclyde* (L.R. 1931 Probate Div. 29) which was based upon dicta of the House of Lords in *Salvesen vs Administrator of Austrian Property* (L.T. 1927 A.C. 641). The case had reference to a decree annulling a marriage on the ground of impotence. It was held that such a decree dealt with a marriage which till the date of the decree

was voidable only and not void. In substance it was a decree for the dissolution of the marriage, and was thus to be distinguished from decrees annulling marriages for illegality or informality. In his judgment Bateson, J. said :

> "The argument for the respondent was this :
>
> 'A suit for nullity on the ground of impotence is quite different from other suits for nullity, *e.g.* on the ground of informality or illegality such as bigamy, absence of parental consent, or some requirement in the ceremony. Nullity on the ground of impotence is a suit to avoid a marriage and is in essence a suit to dissolve it. The marriage is voidable and not void, as in other cases of nullity. The marriage remains a marriage until one of the spouses seeks to get rid of the tie. In other cases such as bigamy there has never been a marriage at all. Domicile of the parties, at any rate since 1895, has been an essential of jurisdiction in a suit to dissolve a marriage in divorce and must equally be so in a nullity suit to dissolve a marriage on the ground of impotence.... The court of the domicile is the only competent court to grant a decree affecting status.....Again the marriage cannot be impeached after the death of one of the spouses. Nullity for impotence is a matter in which the spouses alone are concerned.....This is the argument for the respondent and in my judgment it is sound'."

Bateson, J. was of opinion that the House of Lords in *Salvesen vs Administrator of Austrian Property* (*supra*) has put the matter beyond doubt, and the dicta quoted by him support his conclusion that the court of the domicile has at least a competent, if not an exclusive, jurisdiction.

There can, I think, be no doubt that the claim in the present action for a decree of nullity is in its nature akin to the claim for nullity on the ground of impotence, and not to a claim for nullity on the ground of bigamy. In my opinion the marriage must be regarded as good until the decree for nullity is entered, and the domicile of the wife must be regarded as the domicile of the husband up to the date of the decree. The Ceylon court therefore had jurisdiction in the action. Mr. Nadarajah's argument on this point fails. He further argued that the evidence does not establish that the plaintiff was resident within the jurisdiction of the District Court of Jaffna was not persisted in. There is sufficient evidence to establish that fact, and whether section 597 or 607 of the Civil Procedure Code applies the Jaffna court had jurisdiction in the matter.

(2) Mr. Nadarajah next argued that the plaintiff's action was prescribed under the Prescription Ordinance, Chapter 55 section 10. At the latest the plaintiff was aware in July 1936 of the birth of the child to the defendant. The present action was not instituted till the 17th August, 1943, more than 7 years after, and if prescription runs there is no question that the action is prescribed. Under section 15, however, it is laid down that nothing contained in the Ordinance "shall be taken to apply to any proceedings in any action for divorce." The question, therefore, arises as to whether the present action can be regarded as an action for "divorce." In this connection it has to be remembered that the Prescription Ordinance was enacted in 1871 and section 16 of that Ordinance is in the same terms as section 15 of the present Ordinance. In my judgment we must investigate the meaning of the word "divorce" as it was understood in 1871. In interpreting the term "divorce" I think we may consider the meaning of that term in England in 1871. I quote from Stephen's Commentaries, Bk. 3 p. 296: "We are next to consider the manner in which a marriage may be dissolved or declared to be a nullity. Dissolution may be either by death or divorce. Prior to the Divorce Act (20 & 21 Vict. c. 85) passed in the year 1857 there were two kinds of divorce obtainable by suit in the Ecclesiastical Courts; the one *a mensa et thoro*, the other *a vinculo matrimonii*. The first species, or separation from bed and board, was pronounced in cases where there was no illegality in the union in the commencement but where from some supervenient cause it has become improper for the parties to live together, as for the cause of intolerable cruelty in the husband, adultery in either of the parties, and in some other cases mentioned in the books.....The sentence for this divorce though it effected a judicial separation did not bastardize the issue of the marriage, or enable either of the parties to contract a fresh union.....As for divorce *a vinculo*, this was a declaration by the Ecclesiastical Court that the marriage was a nullity, as having been absolutely unlawful from the beginning. It consequently bastardized the issue and enabled the parties severally to contract another marriage at their pleasure. It was always founded on some *canonical* disability and it could never be pronounced for any cause whatever supervenient to the marriage, not even for adultery itself."

But though divorce *a vinculo* for adultery could not be obtained in the regular course of law either in the Ecclesiastical or the secular courts, yet it was very frequently granted by a Private Act of Parliament to a husband but not to a wife.

Prior to 1857 then the term "divorce" was applicable to suits for separation *a mensa et thoro* and also to suits for nullity of marriage.

The Act of 1857 made several changes. The jurisdiction of the Ecclesiastical Court was removed and the jurisdiction formerly exercised

by that court was vested in the Court of Divorce & Matrimonial Purposes. Under section 7 no decree thereafter could be entered for divorce *a mensa et thoro* but that was replaced by a decree for judicial separation. Under section 27 it was open to a husband to present a petition praying that his marriage be dissolved on the ground that his wife has been guilty of adultery. It was open to a wife to bring a similar action where the adultery of the husband had been accompanied by certain other matters.

In my opinion the term "divorce" was after 1857 still applicable to actions for nullity of marriage as well as to the new type of action based on causes which arose after the marriage. It may be (I do not say it is) a matter of doubt whether the term "divorce" applied to suits for judicial separation after 1857. But in my opinion the term "divorce" in section 15 of the Prescription Ordinance applied to cases where a decree of nullity of marriage was prayed for. The side note to that section, " This Ordinance not to affect Crown or causes matrimonial," appears to support this view. It is interesting to note that the phrase "causes suits and matters matrimonial" appears to apply to the jurisdiction of the Ecclesiastical Court before 1857. (See section 6 of the Act of 1857).

Our attention has been directed to section 596 of our Civil Procedure Code where a distinction appears to be drawn between actions for divorce *a vinculo matrimonii* and actions for separation *a mensa et thoro* or declaration of nullity of marriage. But the Civil Procedure Code was first enacted in 1889, and I do not think we can take it into account in interpreting the Prescription Ordinance of 1871 of Chapter 55. For these reasons I hold that the Prescription Ordinance does not apply to the present action.

(3) Mr. Nadarajah next argued that the plaintiff had been guilty of unreasonable delay in presenting his plaint and that the court should not have pronounced judgment in his favour. He depended on section 602 of the Code. Unfortunately in this case the only issue framed in respect of this matter runs as follows :

" 5. Is the plaintiff's delay in bringing the action a fatal bar to this suit ? " The District Judge has correctly answered that issue in the negative but has not considered the question whether in his discretion he should refuse to pronounce judgment in favour of the plaintiff because of unreasonable delay in presenting the plaint. The defendant cannot avoid blame for having left the issue in this form.

Mr. Perera for the respondent argued that section 602 has no application to an action for a declaration of nullity of marriage. He pointed out that under section 597 of the Code of Civil Procedure a husband or wife may present a plaint " praying that his or her marriage be dissolved on any ground for which marriage may, by the law applicable in this Island to his or her case, be dissolved." There follows immediately after several sections including section 602 which are applicable to that type of action. Thereafter follows section 607 which relates to a plaint praying that the marriage may be declared null and void: and there is nothing specific in the Code which makes section 602 applicable to actions for nullity of marriage under section 607. Mr. Perera argues that section 597 relates only to actions for dissolution on the ground of adultery or other causes which supervene after the marriage, and that the section does not apply where it is claimed that the marriage was bad *ab initio*. At first sight this argument appears convincing, but I do not think upon examination it can be sustained. Section 597 uses very wide language, *viz.* " any ground for which the marriage.... may be dissolved." Can this action be regarded as an action for the dissolution of the marriage ? I think it can. The decision in the case of *Inverclyde vs Inverclyde* (*supra*) indicates that this type of action is in substance an action for dissolution, and that the marriage will be regarded as subsisting until a declaration of nullity is entered. There are no doubt other actions *e.g.*, those based on bigamy, where it may be taken that the marriage never subsisted. and different considerations may apply to those actions for nullity : see *White otherwise Bennett vs White* (1937 Probate Div. 111). I hold that the present action may be regarded as coming within the terms of section 597 of the Code, and that section 602 applies to this action.

I may add in this connection that section 602 is the section which gives statutory authority to the court to deny a decree to the plaintiff when it has been found that the plaintiff had been an accessory to or has connived at the conduct of the defendant, or has condoned the same, or where the plaint has been presented in collusion with the defendant. The proviso to the section goes further and gives the court a discretion to refuse a decree on various grounds, including the ground of unreasonable delay in presenting or prosecuting the plaint. In an action of the kind we are dealing with here, I think a finding of connivance or condonation or collusion is essentially a ground on which the decree should be denied to the plaintiff, and the grounds stated in the proviso are grounds on which the court may well exercise its discretion

against the plaintiff. I think this supports the contention that the present action falls within the scope of section 597 of the Code and that the following sections are applicable to this kind of action.

I do not think it is necessary in this case to consider the argument that in any event section 602 and the subsequent sections may impliedly be made applicable to actions falling under section 607 only and not under section 597.

It follows from this holding that section 604 also applies to this action and that the decree entered should have been a decree *nisi* not to be made absolute till after the expiration of not less than three months from the pronouncing thereof. The District Judge has however entered decree absolute in the first instance. This in my opinion is incorrect.

The facts which relate to this matter are as follows :

The plaintiff in July 1936 when he knew of the birth of the child had no employment. He secured employment for the first time in September, 1937 and was till then unable to take steps. He wrote to the Bangalore Church for a certificate of marriage but received a reply that no such marriage was registered. Till 1941 he could not get the marriage certificate. Later, on the advice of a firm of lawyers in Madras, he applied to the Registrar-General of Births and Marriages, Madras, and after a long delay he obtained the marriage certificate on the 5th of March, 1943.

It is true that this explanation is not very satisfactory and shows a surprising lack of initiative on the part of the plaintiff. But at the same time the District Judge was not invited to regard this delay as unreasonable, and has in fact not done so, and I do not think it is possible for us to hold that the delay was in fact unreasonable and, further, that the District Judge was bound to exercise his discretion against the granting of the decree. I do not think any useful purpose will be served by sending the case back to the District Judge in respect of this matter. In the circumstances I hold that the defendant has failed to show that the decree should be refused to the plaintiff on the ground of unreasonable delay.

The appeal accordingly fails. I, however, alter the decree entered into a decree *nisi* not to be made absolute until the expiration of not less than three months after the date of this judgment. In all the circumstances I do not think there should be any order for costs in this action. I delete the order that the defendant should pay the plaintiff the costs of the action. There will be no order in respect of the costs of appeal.

ROSE, J.

I agree.

*Appeal dismissed.*
*Decree varied.*

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*Present:* CANNON, J.

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CASSIERE (Sub-Inspector of Police) vs EDIRISINGHE

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*S. C. No.* 583—*M. C. Colombo No.* 190.
Argued on 17th July, 1945.
Decided on 25th July, 1945.

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*The Defence (Control of Textiles) (No.* 1*) Regulations* 1943—*Judicial notice of date on which regulation* 25 *came into force.*

Where a charge was laid under regulation 25 of the Defence (Control of Textiles) (No. 1) Regulations which was brought into operation by a notification of the Governor published in the Gazette, but no reference to this notification was made in the charge,

**Held :** That the court will take judicial notice of this date on which the regulation was brought into operation.

**Cases referred to :** *Jayakodi vs Paul Silva* (44 N.L.R. 379)
*Sivasampo vs Juwan Appu* (38 N.L.R. 369)

*H. Wanigatunga*, for the accused-appellant.
*T. K. Curtis, Crown Counsel*, for the Attorney-General.

CANNON, J.

The appellant was charged with keeping for sale or supply on 21st December, 1944 regulated textiles, to wit, 181 shirts, 26 khaki shorts, 14 handkerchiefs and 4 banians without a permit from the Controller of Textiles in contravention of regulation 25 of the Defence (Control of Textiles) (No. 1) Regulations, 1943.

He was convicted and fined Rs. 500 or two weeks' imprisonment, in default of payment. Regulation 25 is in part 4, which by regulation 22 was not to come into force until such date as was fixed by the Governor and notified in the Gazette. In the Gazette of 18th December, 1944 the prescribed date was notified as 20th December, 1944. The appeal is against conviction and sentence, and is based on law and the facts.

Mr. Wanigatunga contends that there should have been at the trial either a reference in the charge to the Gazette of 18th December, 1944 or evidence given that the Regulation had come into force ; and that without this the conviction was bad. It is not suggested that any prejudice was caused to the appellant by these omissions. The same point arose in *Jayakodi vs Paul Silva* (44 N.L.R. 379), which was an appeal by the Attorney-General against an acquittal which had been ordered by the Magistrate on the ground that the prosecution had not proved that the Governor proclaimed such a prescribed date. Soertsz, J. in overruling the Magistrate's view said :

> "The charge is laid under an Ordinance enacted by the Governor as an Ordinance to come into operation on the Governor appointing a date for that purpose by proclamation in the Gazette. The moment that proclamation appeared, the Ordinance became law and the charge here is laid under section 11 (*b*) and 16 of that law.
>
> In virtue of section 57 of the Evidence Ordinance, the court was bound to take judicial notice of that law as part of our statute law. Similarly, the court is bound to take notice of 'rules having the force of law,' but in such cases it was held by a Divisional Bench in *Sivasampo vs Juwan Appu** (38 N.L.R. 369) that there must at least be some reference in the charge to the relevant Gazette for, in the absence of such a reference, there would not be compliance with section 167 (4) of the Criminal Procedure Code which requires that the charge shall state 'the law and section under which the offence said to have been committed is punishable.' In the days in which we had no compilation of subsidiary legislation, a reference to the Gazette was the only way in which the accused could be informed of the law under which he is charged. Today, in most cases, that can be done by reference to the chapter and section of the different volumes of subsidiary legislation."

*Mutatis mutandis* the language of Soertsz, J. is appropriate to this case. As regards Mr. Wanigatunga's contention that the Defence Regulations come within the finding of the Divisional Court in *Sivasampo vs Juwan Appu (supra)* I do not think that, though the Defence Regulations are not Ordinances, they could be classified as subsidiary legislation, for they are made by the Governor by virtue of powers vested in him by Acts of the Imperial Government and Orders-in-Council. However, the view expressed by Soertsz, J. disposes of the point, which has no substance, unless the subsidiary legislation be of the nature of, say, a local by-law which would not ordinarily be included in the official compilations of subsidiary legislation.

As regards the evidence and sentence no sufficient arguments have been adduced to justify any intervention in the Magistrate's decision, and on the question of sentence Mr. Curtis pointed out that the Magistrate did not order confiscation because he thought he had no power to do so. Such a power was, however, given in the amended Regulation No. 4 of 1944, published in the Gazette No. 9250 of 28th March, 1944.

The appeal is dismissed.

*Appeal dismissed.*

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*Present:* CANNON, J.

## DE SILVA vs AMARASEKERE & OTHERS

*Application in Revision in M.C. Hambantota No.* 10051 (206)
Argued & Decided on 12th July, 1945.

*Magistrate dismissing case without calling on the defence*—Prima facie *case made out by complainant—Criminal Procedure Code section* 191.

**Held :** That when a *prima facie* case has been made out by a complainant, the power vested in a Magistrate by section 191 of the Criminal Procedure Code should not be exercised until after the defence has been called upon.



* 8 C.L.W. 21 (Edd.)

*G. P. J. Kurukulasuriya*, for the petitioner.
*D. W. Fernando* with *G. T. Samarawickreme*, for the respondent.

CANNON, J.

In this case the Chairman and Vice-Chairman of a Village Committee and a third person who is a market trader were summoned for trespass and mischief. The evidence of the complainant and a boy named Daluwatte who was present, was to the effect that the three accused came to him at about 11 a.m. and asked him to vacate one of the three stalls of which he was the lessee. The complainant demurred, whereupon the 1st and 2nd accused told the 3rd accused to remove the complainant's goods from one of the three stalls. The complainant at once left to get help of the village headman and when he returned he found that his goods had been removed from one of the three stalls and damaged, a sales platform and some earthenware vessels, among other things, being broken. They had been removed by 2nd and 3rd accused at the instigation and in the presence of 1st accused. The Magistrate, without calling upon the defence, dismissed the case. Among the reasons he gave for doing so are: (1) That the 1st and 2nd accused were actually outside the market when they instigated the 3rd accused to evict the goods of the complainant. (2) That the complainant had broken the regulations by putting up a so-called partition of gunny bags around his stores. (3) That the only evidence against the accused was that of Daluwatte. (4) That it was clear from the nature of the damage that no wanton damage had been caused. (5) That all that had been done was to find room for 3rd accused. (6) That it seemed to him the 1st and 2nd accused had acted *bona fide;* and (7) That on the evidence of Daluwatte alone it was not sufficient to convict.

Mr. Kurukulasuriya is obviously justified in submitting that the Magistrate had not appreciated in this case either the facts or the law. This is not a case where corroborated evidence is required; and the Magistrate was not in fact, in the position of having to act on the evidence of Daluwatte alone, because the complainant himself gave evidence and he and Daluwatte were both eye-witnesses. As regards the breach of regulations, that was a matter for the market-keeper to deal with, by taking appropriate proceedings. The Magistrate's statement that all that had been done was to find room for the 3rd accused seems to imply that if one person wants the room of which another person is in lawful possession, he is entitled to evict him. The Magistrate's finding that the 1st and 2nd accused acted *bona fide* is made without any evidence being submitted to support it, and is in any event irrelevant to the issue. The evidence is that a sales platform and earthenware vessels were broken. It is difficult to reconcile this with the Magistrate's statement that no wanton damage was done.

This application is made in revision. Mr. Kurukulasuriya says this procedure became necessary because the Attorney-General's Department had refused leave to appeal. It occurred to me that this refusal was probably on some purely legal ground but Mr. Fernando for the respondent tells me that there is no legal point in issue.

This is by no means the only case coming up for appeal in which, although a *prima facie* case had been made out by the complainant, the Magistrate has dismissed the case without calling upon the defence, purporting to act under section 191 of the Criminal Procedure Code. That is a power which is given to all tribunals. It is not however intended to be exercised when a *prima facie* case has been made out, until after the defence has been called upon. What the Magistrate has to decide at the close of the case of the complainant is whether he has made a *prima facie* case *i.e.* whether there is a case to answer. He will decide whether the case is proved or not only after he has heard what the defence has to say about it. In this case there seems to have been a denial of justice to the complainant. It must be retried before another Magistrate.

*Set aside and sent back.*

## *IN THE PRIVY COUNCIL*

*Present:* LORD MACMILLAN, LORD GODDARD & SIR MADHAVAN NAIR.

# PARASHURAM DETARAM SHAMDASANI vs EMPEROR

*Privy Council Appeal No.* 23 *of* 1944.
Decided on 29th May, 1945.

*Contempt of Court—Definition of—Insult to counsel in court—Is it contempt—Summary powers of punishment—When should they be used—Costs in Privy Council—When Crown should be ordered to pay.*

The appellant, while appearing in person in support of certain objections and in reply to a remark by the opposing counsel that the appellant was misleading the court, said "*I do not keep anything back at all. My fault is that I disclose everything, unlike members of the Bar, who are in the habit of not doing so and misleading the court.*"

**Held :** That the words used by the appellant respecting the Bar, and which must be taken to have been intended by him to refer to the opposing counsel in particular, did not amount to a contempt of Court.

Per LORD GODDARD : (*a*) "For words or action used in face of the Court, or in the course of proceedings, for they may be used outside the court, to be a contempt, they must be such as would interfere or tend to interfere with the course of justice. No further definition can be attempted. It must be rare indeed for words used in the course of argument, however irrelevant, to amount to a contempt when they relate to an opponent, whether counsel or litigant. If in the course of a case a person persists in a line of conduct or use of language in spite of the ruling of the presiding judge he may very properly be adjudged guilty of contempt of court, but then the offence is the disregard of the ruling and setting the court at defiance. So also if a litigant or an advocate threatened or attempted violence on his opponent, or conceivably if he used language so outrageous and provocative as to be likely to lead to a brawl in court, the offence could be said to have been committed. An insult to counsel or to the opposing litigant is very different from an insult to the court itself or to members of a jury who form part of the tribunal.

(*b*) "Their Lordships would once again emphasize what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended. The Bar can surely maintain its dignity and prestige without having to invoke this jurisdiction.

(*c*) "Where the Crown appears to uphold a conviction in a criminal case it is not the practice to award costs to the appellant in the event of the appeal succeeding. Although this matter is one which is known as a criminal contempt it obviously is in a different category from an ordinary criminal case. It is a matter of some surprise to their Lordships that in spite of the emphatic opinion of the Chief Justice and another judge of the court of which the appellant was alleged to be in contempt that no contempt had been committed, the executive should have deemed it necessary not only to appear but to have endeavoured to uphold this order. In these circumstances their Lordships are of opinion that the appellant should have the costs of this appeal."

**Cases referred to :** *Ex Parte Pater* (1864 – 5 B. & S. 299)
*Rex vs Dairson* (1821 – 4 B. & Ald. 329)
*French vs French* (1 Hogan 138.)

*W. W. K. Page*, for the appellant.
*J. Millard Tucker*, and *B. J. Mackenna*, for the Crown.

LORD GODDARD

This is an appeal from an order of the High Court of Bombay made by Kania, J. adjudging that the appellant was guilty of a contempt of court, committing him to prison for three months, and ordering him to pay a fine of Rs. 1,000. On the day after the order was made, the appellant applied to the learned judge for a modification of the sentence expressing sincere and unreserved regret for having used the expressions which were held to be a contempt, and the sentence was then reduced to one of eight days' imprisonment but no alteration was made in the fine. The sentence of imprisonment was served and the appellant then applied to the High Court in its appellate criminal jurisdiction for a certificate that the case was one fit for appeal to His Majesty in Council under clause 41 of the Amended Letters Patent of 1865. This application was opposed by the Advocate-General, who submitted there was no jurisdiction to grant it, as it was said that the clause in question did not apply to a committal for contempt of court. The

High Court (Beaumont, C.J. and Sen, J.) held that there was jurisdiction to grant a certificate and that it was a proper case in which to do so, and this was accepted as right by counsel for the respondent before this Board, and their Lordships accordingly do not think it necessary to express any opinion upon this matter. The appellant had been an unsuccessful plaintiff in a suit in the High Court and had been ordered to pay costs. They were taxed and the appellant then took out a summons to review the taxation, and though a layman, appeared in person to support his objections. In the course of the hearing, counsel opposing stated that the appellant was misleading the court as to the nature of the issues raised in the action and insisted that he should read out a paragraph in the plaint. The appellant then said: "I do not keep anything back at all. My fault is that I disclose everything, unlike members of the Bar, who are in the habit of not doing so and misleading the court." This caused a protest from the opposing counsel, Mr. Desai, whereupon the appellant immediately apologised and expressed his regret for having used an unfortunate expression in the heat of argument. Later in dealing with the Taxing Master's statement, with regard to the allowance of discretionary items, that he had taken into consideration all the matters mentioned in Rule 563, the appellant said: "It is customary for the Taxing Masters to write what is written at the end of the paragraph, but is it considered at all?" No protest or observation on this statement was made either by Bench or Bar at the time when it was uttered, nor when judgment was given, and it appears to their Lordships that it must have been regarded as no more than the sort of tactless and intemperate statement that is not infrequently made in the heat of argument and not only by litigants in person. On 13th October, 1942, the appellant concluded his argument and the court proceeded to give judgment but had not finished doing so at the end of the day. At the rising of the court Mr. Desai stated that he would draw the attention of the court to the statement made by the appellant with reference to the Bar and would apply that appropriate action be taken. On the next day both Mr. Desai and the Advocate-General of Bombay appeared, and, though the appellant again apologised and expressed regret for what he had said, moved the court to punish the appellant for a contempt in using the language he did regarding the Bar. In the course of the argument the learned judge himself then raised the question as to the words the appellant had used relating to the Taxing Masters. On the following day the learned judge delivered a lengthy judgment, reviewing some authorities, and coming to the conclusion that the appellant had been guilty of a contempt both in his reflections on the Bar and on the Taxing Masters, made the order against which this appeal is brought.

Dealing first with the appellant's reference to the conduct of the Bar, their Lordships share the surprise expressed by the Chief Justice when granting the certificate for appeal as to what he described as the somewhat undue degree of sensitiveness displayed in taking so serious a view of what had been said. Their Lordships would indeed go further and say that it would have been more consonant with the dignity of the Bar to have ignored a foolish remark which has been made over and over again not only by the ignorant, but by people who ought to know better, and no doubt will continue to be made so long as there is a profession of advocacy. To treat such words as requiring the exercise by the court of its summary powers of punishment is not only to make a mountain out of a molehill but to give a wholly undeserved advertisement to what had far better have been treated as unworthy of either answer or even notice.

But apart from the question of whether the motion was wise or expedient, it has to be decided whether these words could be properly regarded as a contempt of court. The principle to be applied is clear enough. For words or action used in face of the court, or in the course of proceedings, for they may be used outside the court, to be a contempt, they must be such as would interfere or tend to interfere with the course of justice. No further definition can be attempted. It must be rare indeed for words used in the course of argument, however irrelevant, to amount to a contempt when they relate to an opponent, whether counsel or litigant. If in the course of a case a person persists in a line of conduct or use of language in spite of the ruling of the presiding judge he may very properly be adjudged guilty of contempt of court, but then the offence is the disregard of the ruling and setting the court at defiance. So also if a litigant or an advocate threatened or attempted violence on his opponent, or conceivably if he used language so outrageous and provocative as to be likely to lead to a brawl in court, the offence could be said to have been committed. An insult to counsel or to the opposing litigant is very different from an insult to the court itself or to members of a jury who form part of the tribunal. Their Lordships mention this matter because their attention was

drawn to the case in (1864) 5 B. & S. 299 * where a member of the Bar was adjudged guilty of contempt by the Middlesex Quarter Sessions and fined for insulting a juryman and persisting in his conduct when reproved by the Deputy Assistant Judge. The Court of Queen's Bench refused to interfere and would not grant a *certiorari* to quash the order saying they could not act as a Court of Appeal from the Sessions. But it is quite clear that the court's refusal was based on the fact that there was evidence of conduct which amount to contempt, and the court held itself free to inquire whether the inferior court had reasonable grounds for adjudging that a contempt had been committed. Their Lordships think it unnecessary for them to deal with the cases in (1821) 4 B. & Ald. 329 † and 1 Hogan 138 ‡ on which Kania, J. relied, as the judgment of Beaumont, C.J. has already shown that they do not support the propositions that the learned judge thought they did, and the Board entirely agree with the Chief Justice. In their Lordships' opinion, the words used by the appellant respecting the Bar, and which must be taken to have been intended by him to refer to Mr. Desai in particular, did not and could not amount to a contempt of court, and, consequently, there was no jurisdiction in the learned judge to exercise his summary powers in respect of them.

With regard to the words relating to the Taxing Masters, no doubt, if a litigant were to suggest in court that its officers were corrupt or habitually failed to carry out their duties, the court might consider it a contempt, though if it were only the latter that was suggested it would be unwise to do so. But when all the circumstances here are considered, and especially that when the words were uttered there was no reproof or even comment from the Bench, it is impossible to suppose that they were treated or indeed intended as more than a tactless way of suggesting that Taxing Masters were apt to deal somewhat summarily with such matters as were then in question. It was not till the Advocate-General was moving for punishment on the appellant in respect of the other words that any notice seems to have been taken of the matter and then by the judge himself, somewhat late in the day as it seems to their Lordships. In their opinion they afford no reasonable grounds for adjudging the appellant guilty of so grave an offence as contempt of court, and on this point also their Lordships are glad to find that their opinion and that of the Chief Justice and Sen, J. coincide. Their Lordships would once again emphasize what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended. The Bar can surely maintain its dignity and prestige without having to invoke this jurisdiction.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the order of the learned judge set aside. It should have been said that originally the Chief Justice and other judges of the High Court were made respondents to this appeal. It was afterwards realized that this was incorrect, and by an Order-in-Council dated 27th October, 1944, the Crown was substituted as respondent. Where the Crown appears to uphold a conviction in a criminal case it is not the practice to award costs to the appellant in the event of the appeal succeeding. Although this matter is one which is known as a criminal contempt it obviously is in a different category from an ordinary criminal case. It is a matter of some surprise to their Lordships that in spite of the emphatic opinion of the Chief Justice and another judge of the court of which the appellant was alleged to be in contempt that no contempt had been committed, the executive should have deemed it necessary not only to appear but to have endeavoured to uphold this order. In these circumstances their Lordships are of opinion that the appellant should have the costs of this appeal.

*Appeal allowed.*



**Ex Parte Pater* †*Rex vs Dairson* ‡*French vs French*

*Present:* WIJEYEWARDENE, J. & ROSE, J.

## SOYSA vs MISKIN

*S. C. No.* 222—*D. C.* (*F*) *Kalutara No.* 23585.
Argued on 28th to 30th August, 1945.
Decided on 13th September, 1945.

Fidei commissum *property—Partition decree allotting defined lot—Subsequent sale—Effect of partition decree on rights of* fidei commissarii—*Section* 9 *of the Partition Ordinance* (*Chapter* 56).

**Held :** That where a *fidei commissum* property is partitioned and a defined lot is allotted under the decree either to a *fiduciarius* or a person deriving title from a *fiduciarius* by way of a gift, sale etc., the *fidei commissarii*, could in a subsequent action set up their claim against—

(*a*) such *fiduciarius* or such person to whom the lot was decreed, or

(*b*) any one deriving title from either of them after the decree, if, neither he nor his predecessors in title, if any, is a purchaser for value without notice of the *fidei commissum*.

**Cases referred to :** *Weerasekera vs Peries* (1932–34 N.L.R. 281)
*Aliya Marikar Authahir vs Aliya Marikar Mohamed Sally* (1942 – 43 N.L.R. 193)
*Sathianaden et al vs Mathes Pulle et al* (1897 – 3 N.L.R. 200)
*Abeysundere vs Abeysundere* (1909 – 12 N.L.R. 373)
*Baby Nona et al vs Silva* (1906 – 9 N.L.R. 251)
*Weerasekera vs Carlina et al* (1912 – 16 N.L.R. 1)
*Fernando vs Shewakram* (1917 – 20 N.L.R. 27)
*Kusumawathie et al vs Weerasinghe* (1932 – 33 N.L.R. 265)
*Anees vs Bank of Chettinad* (1941 – 42 N.L.R. 436)
*Tillekeratne vs Abeysekera et al* (1897 – 2 N.L.R. 313).

*H. V. Perera, K. C.*, with *Kingsley Herat* and *Dodwell Goonewardene*, for the defendants-appellants.

*N. Nadarajah, K.C.*, with *C. Renganathan*, for the plaintiffs-respondents.

WIJEYEWARDENE, J.

This is an action for declaration of title.

One Uduman Lebbe Marikar was admittedly the original owner of the entire land comprised of Katuwekurunduwatte and Osellawatte. He gifted the northern half of it to Natchia and the southern half to Packeer. By P2 of 1887 Natchia gifted the northern half to her adopted daughter, Hadji Umma, and Omer on the occasion of their marriage. Omer died in 1902 leaving a daughter Hamidu Umma. His widow, Hadji Umma, married Amala Marikar, and died in 1933 leaving three children by her second marriage, namely, the 1st and the 2nd plaintiffs and a daughter who died without issue. Hamidu Umma married Rahiman and died about 1913 leaving one son, Abdeen, the 3rd plaintiff. Hadji Umma, Amala Marikar and Rahiman mortgaged 79/128 shares of the northern half in 1913. These 79/128 shares were sold in satisfaction of a hypothecary decree entered on that bond and purchased by one Peries who conveyed those interests to Fonseka. An action was filed in 1918 by Fonseka for the partition of the entire land. Abdeen, the 3rd plaintiff in the present case, and one Peer Mohamadu were two of the defendants in the partition action. The defendants in that case sought to get the action dismissed on the ground that Fonseka's title based on P2 failed, as the deed P2 was void in consequence of the reservation of the life interest. The District Judge upheld that view following the then binding decisions of this court which were subsequently overruled by the decision given by the Privy Council in *Weerasekera vs Peries* (1932 – 34 N.L.R. 281). The District Judge proceeded, however, to adjudicate on the prescriptive rights of the parties and entered interlocutory decree declaring Fonseka and Abdeen entitled to undivided 79/256 and 49/256 shares of the entire land. Abdeen's rights under that decree were bought at a Fiscal's sale by Peer Mohamadu. The final decree entered in the partition action in 1925 allotted lot A to Fonseka for his 79/256 shares and lot B to Peer Mohamadu for the 49/256 shares to which Abdeen was declared entitled. Fonseka and Abdeen sold their lots A and B to David Peries by D1 and D5. David Peries sold the two lots to the 1st defendant in the present action by D6 of 1936. The plaintiffs claim lots A and B as *fidei commissarii* under P2.

The points in dispute between the parties may be stated briefly as follows :

(*a*) Is the deed P2 a valid deed ?
(*b*) Does P2 create one *fidei commissum* in favour of the issue of Hadji Umma by Omer or two separate *fidei commissa* in favour of the issue of Hadji Umma and the issue of Omer ?
(*c*) What is the effect of the partition decree on the rights of the plaintiffs ?

By deed P2 the donor, Natchia, reserved a life interest in her favour and gifted the northern half to the *two donees* " in equal undivided shares" subject to the condition that they shall not sell, mortgage or otherwise alienate the property and that the property shall " after their death devolve on their lawful issues." Though the parties to that deed were Muslims it was a valid gift ( *vide Aliya Marikar Authahir vs Aliya Marikar Mohamed Sally* (1942-43 N.L.R. 193) ). I hold that it created separate *fidei commissa*, one in favour of the lawful issue of Hadji Umma and the other in favour of the lawful issue of Omer. The first *fidei commissum* was to take effect on the death of Hadji Umma and the other, on the death of Omer.

There remains for decision the important question as to the effect of the decree in the partition case on the rights of the plaintiffs under P2.

It was more than 30 years after the passing of the Ordinance No. 10 of 1863 that this court held that *fidei commissum* property could be the subject of proceedings under that Ordinance ( *vide Sathianaden et al vs Mathes Pulle et al* (1897–3 N.L.R. 200) ). That case was followed in *Abeysundere vs Abeysundere* (1909 – 12 N.L.R. 373 ). In the former case one of the judges said : " In view of the antiquity of the alleged creation of the *fidei commissum* I would suggest it may be a question whether its restrictions have not now expired." In the later case this court doubted whether the will in question created a *fidei commissum*. In neither of these cases, moreover, the court appears to have considered the effect of section 9 of the Ordinance before reaching the decision that the Ordinance permitted a partition action to be filed in respect of *fidei commissum* property. However, the view expressed in these and similar decisions was regarded as settling the law, and actions came to be filed for the partition of *fidei commissum* property and then arose the question, naturally, as to the effect of a decree in a partition action where the property was subject to a *fidei commissum* but the decree itself made no reference whatever to the instrument creating the *fidei commissum*. The difficulty experienced in answering that question today is not so much the difficulty of construing the relevant provisions of the Ordinance as the difficulty of determining whether we should extend the application of certain principles underlying some previous decisions of this court by affirming further principles which are said to be the logical corollaries to the earlier principles.

Section 9 of the Ordinance lays down that " the decree for partition.....given as hereinbefore provided shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property.....and shall be good and sufficient evidence of such partition.....and of the title of the parties to such shares or interests as have been thereby awarded in severalty." The Ordinance takes particular care in sections 12 and 13 to make express provision to safeguard the rights of mortgagees and lessees even though these rights are not mentioned in the decree. The Ordinance does not make a similar provision for preserving the rights of *fidei commissarii*. This appears to indicate that either the legislature did not intend the Ordinance to apply to *fidei commissum* property and thereby altered the Common Law which permitted the partition of *fidei commissum* property or intended, at least, that the decree for partition should wipe out any *fidei commissum* not expressly reserved by the decree. The earliest case dealing with this question is *Baby Nona et al vs Silva* ( 1906 – 9 N.L.R. 251 ). In that case the property was owned by three brothers Diyonis, Manuel and Bastian under a deed of gift creating a *fidei commissum* in favour of their descendants. These three brothers succeeded in getting the land partitioned without any reference to the *fidei commissum* and the decree gave a defined lot B to Diyonis. Manuel purchased lot B which was sold in execution against Diyonis. On the death of Diyonis, some of his children claimed lot B as *fidei commissarii* and it was held that Manuel could not defeat their title by pleading the partition decree. It will be noted that though Manuel might have been a purchaser for value he was well aware of the existence of the deed creating the *fidei commissum*. In the next case *Weerasekera vs Carlina et al* ( 1912 – 16 N.L.R.1 ) Christian, the *fiduciarius* under a last will, obtained under the decree in a partition case a defined lot absolutely. He gifted a share of that lot to Theadoris, a son of his. On the death of Christian it was held that Theadoris could not defeat the right of the *fidei commissarii*. Though the report does not show that Theadoris had notice of the *fidei commissum*, the fact remains

that he was not a purchaser for value. The opinion expressed in *Fernando vs Shewakram* (1917–20 N.L.R. 27) was in the nature of an *obiter dictum* as the partition decree which the court had to consider was a decree entered "upon mere consent of parties" and would not therefore be a decree as contemplated by section 9 of the Ordinance. In *Kusumawathie et al vs Weerasinghe* (1932–33 N.L.R. 265) one Gimara donated by a duly registered deed an undivided share of a property to Andris subject to the conditions (1) that the gift was to take effect after her death (2) that Andris was not to alienate the property (3) that on Andris' death the property should "descend" to the children of Andris. Gimara filed a partition action later making Andris a party and obtained a divided lot under the decree without any reference to the *fidei commissum*. On the death of Gimara and Andris the children of Andris claimed the lot as *fidei commissarii* against a purchaser for value from Gimara. In dismissing that claim, Macdonell, C.J. said :

> "*Baby Nona vs Silva* (*supra*) decides definitely enough that the *dominus* under a partition decree title being himself a *fiduciarius*, must hold the land acquired by that title for the *fidei commissarii*, but it does not decide that the *dominus* under such a title not being a *fiduciarius* must hold it for them, still less that the purchaser from him must do so..... As I understand the decision of *Baby Nona vs Silva* (*supra*) it does not decide that a *fidei commissum* attaches to a land sold by a *fiduciarius*. All it decides is that a purchaser from such a *fiduciarius* with knowledge of a *fidei commissum* cannot hold the land purchased as against a *fidei commissarius*. It affirms the principle that a man cannot hold what in conscience he knows he has no right to."

In the recent case of *Anees vs Bank of Chettinad* (1941–42 N.L.R. 436) the *fidei commissum* property had been the subject of a partition action and a *fiduciarius* had obtained a defined lot under the decree which did not mention the existence of the *fidei commissum*. It was held that a *bona fide* purchaser without notice from the *fiduciarius* held the lot free from the *fidei commissum*.

The effect of the decisions which I have examined is to confine within very narrow limits the doctrine which is generally assumed to have been established by *Baby Nona vs Silva* (*supra*) namely, that the decree under section 9 does not extinguish the rights of the *fidei commissarii* but merely sets apart a specific lot to which the rights of the *fidei commissarii* attach in place of the share which was originally burdened with the *fidei commissum*. I think that, in view of the clear words of section 9, the applicability of the above doctrine should be limited to the following cases : Where a *fidei commissum* property is partitioned and a defined lot is allotted under the decree either to a *fiduciarius* or a person deriving title from a *fiduciarius* by way of gift, sale, etc. the *fidei commissarii* could in a subsequent action set up their claims against (*a*) such *fiduciarius* or such person to whom the lot was decreed or (*b*) any one deriving title from either of them after the decree if neither he nor his predecessors in title, if any, is a purchaser for value without notice of the *fidei commissum*. I may observe that such a limitation would be consistent with the guarded observation made by the Privy Council in *Tillekeratne vs Abeysekere et al* (1897–2 N.L.R. 313) that the partition "would not necessarily destroy a *fidei commissum*."

The present case is clearly a case which is not governed by the above doctrine, as will be seen from the facts set out earlier in this judgment. It is sufficient to point out that the position of the defendant as a purchaser for value without notice of the *fidei commissum* was not questioned in the pleadings or at any subsequent stage of the proceedings.

For the reasons given by me I would allow the appeal with costs and direct decree to be entered dismissing the plaintiffs' action with costs.

ROSE, J.

I agree.

*Appeal allowed.*

## *IN THE COURT OF CRIMINAL APPEAL*

*Present:* WIJEYEWARDENE, J. (President), CANNON, J. & ROSE, J.

## REX vs DE ALWIS

*C. C. A. Appeal No.* 43/1945—*S. C. No.* 88—*M. C. Colombo No.* 35484
*Western Circuit* 1945—*Colombo Assizes—Appeal upon a Judge's Certificate.*
Argued & Decided on 18th September, 1945.

*Court of Criminal Appeal—Rejection by jury of evidence of prosecution witnesses against some accused—Conviction of another on same evidence although learned trial judge made it clear to jury that acquittal of all accused justified—Appeal on certificate of trial judge—Jury's verdict not supported by evidence—Misdirection—Trial judge disapproving of jury's verdict—Is it sufficient ground for setting aside verdict.*

Four accused were indicted for attempted murder. By a verdict of five to two the jury found the 1st accused guilty of an attempt to commit culpable homicide not amounting to murder. The other accused were acquitted by a unanimous verdict. In his charge the learned trial judge made it sufficiently clear that an acquittal of all the accused would be justified — The 1st accused appeal upon a certificate of the trial judge.

Upon an examination of the evidence their Lordships came to the conclusion —

(*a*) that in convicting the appellant the jury took the view that he exceeded the right of self-defence.

(*b*) that the prosecution had failed to prove that the appellant exceeded such right.

Their Lordships also found a passage towards the end of the learned trial judge's charge which was likely to have created in the minds of the jury the impression that the burden rested with the appellant to disprove that he did not exceed the right of self-defence.

**Held :** (i) That in the circumstances the verdict of the jury against the appellant is unreasonable and not supported by the evidence.

(ii) That the fact that the trial judge disapproved of the verdict of the jury or issued a certificate under section 4 (*b*) of the Court of Criminal Appeal Ordinance is not of itself a sufficient ground for upsetting the verdict of the jury.

**Cases referred to :** *Elizabeth Prefect's Case* (1917 – 12 Cr. A.R. 273)

*H. V. Perera, K.C.*, with *C. S. Barr-Kumarakulasingham* and *Vernon Wijetunge*, for the appellant.

*M. F. S. Pulle, Crown Counsel*, for the Crown.

WIJEYEWARDENE, J. (President)

The appeal comes before us upon the certificate of the trial judge under section 4 (*b*) of the Court of Criminal Appeal Ordinance No. 23 of 1938.

Four accused were indicted for the attempted murder of one David Rupesinghe on March 3, 1944, by striking him with a car pump P1 and clubs. By a majority verdict of five to two the jury found the first accused — the present appellant — guilty of an attempt to commit culpable homicide not amounting to murder. They returned a unanimous verdict in favour of the other accused.

The grounds set out in the certificate issued by the trial judge are :

"(*a*) The jury having disbelieved the three prosecution witnesses —.....David..... James.....and.....Marukku..... acquitted the second, third and fourth accused.

(*b*) They, nevertheless, on the evidence of the same three witnesses convicted the first accused-appellant whose testimony was corroborated by independent direct and circumstantial evidence."

The jury have returned their verdict in this case against the appellant, though the learned trial judge made it sufficiently clear to them that they would be quite justified in bringing a verdict of acquittal in favour of all the accused. The fact that the trial judge disapproved of the verdict of the jury or has issued a certificate under section 4 (*b*) is not of itself a sufficient ground for upsetting the verdict of the jury ( see *Elizabeth Prefect's case* ( 1917 – 12 Cr. A.R. 273) ). The duty is, therefore, cast on us to examine the evidence and ascertain whether the conviction should be set aside " on the ground that it is unreasonable or cannot be supported having regard to the evidence."

David, the injured man, said that he entered the Hendala Tavern that day at about 10 a.m. at the invitation of the appellant who was inside the tavern. The appellant questioned him why he gave some information to the Police and got them to raid a certain gambling club. David denied having given such information, though, in fact, he had induced a friend of his to give that

information about a month before this incident. The appellant did not accept David's denial and David asked him to satisfy himself by questioning the Police. David left the appellant then and was moving towards the door of the tavern when the appellant struck him from behind with P1. David fell and the appellant hit him again on his side and broke a rib. The other three accused came to the place shortly afterwards and beat him with clubs. In his dying declaration, however, David made no reference to the second accused.

The other material witnesses called for the prosecution were James, Marukku and Albert. James said that he was present when David was called by the appellant to the tavern. He saw David being attacked by the appellant and later by the second, third and fourth accused and Eusebius who died during the pendency of the proceedings. On his way to the Police Station he met Albert, a brother of David, and told him that Alo Sinno's ( appellant's ) " gang " had assaulted David. Thereupon, Albert went to the Police Station in place of James and made his complaint giving the names of the appellant, Eusebius and second and fourth accused as the assailants. He did not make any reference to the third accused. No satisfactory evidence has been given as to how he happened to give the names of the second and fourth accused to the Police. Marukku did not mention the second accused as an assailant in the Magistrate's Court. Moreover, he made his statement to the Police on March 6, and the Crown has failed to give a convincing reason for the failure to get his statement recorded by the Police earlier. The appellant who gave evidence stated that he went to the tavern that morning with Eusebius to get a hundred-rupee note changed by Devasiri, the Manager of the tavern. As he was holding out the note, David who was inside the tavern drinking toddy came upto him with a knife and tried to snatch the note. He struck David once with P1 which he was carrying. They both struggled and fell down. As he was falling, he received blows on the back and shoulders. He dropped P1 which was picked up by Eusebius who, then, gave one or two blows with it to David. In the course of the struggle the one hundred-rupee note got torn, one part remaining in his hands and the other part in David's hands. He went immediately afterwards towards the Police Station, when he met the Inspector of Police on the road. He made his statement to the Inspector promptly and produced the torn piece of the note. The Inspector came to the scene, and found there the other piece of the note and a knife identified by the appellant as the knife of David. The appellant said that he did not see the other accused at the tavern that morning. His evidence is corroborated in material particulars by Devasiri, a Cochin man.

The evidence led in the case leaves no doubt that David and James are men of bad character and are feared by many people in the village.

On a careful examination of the evidence we are of opinion that the jury reached a correct decision in acquitting the other accused and in indicating by their verdict against the appellant that the appellant assaulted David in circumstances which gave him the right of private defence. In finding the appellant guilty of attempt to commit culpable homicide not amounting to murder, the jury has, no doubt, taken the view that the appellant has acted in excess of the right of private defence. Is that an unreasonable view or a view that cannot be supported by the evidence?

As stated earlier, David's evidence was that he fell for the first blow given by the appellant, and that he was lying fallen when the appellant " hit " him on his side and "broke" a rib. On the other hand, the appellant said that he struck David only once. In view of the opinion of the jury with regard to the credibility of David, the jury should have had no difficulty in holding that the Crown has not proved that more than one blow was given by the appellant.

The charge of the learned judge, if we may say so with respect, was not only full but on the whole very favourable to the accused. But as it happens at times in the course of a long charge, the trial judge made a statement towards the end of his charge which may have created a wrong impression on the minds of the jury as to the party on whom the burden rested to prove the number of blows given to David. He said :

> " If he (the appellant) struck more than one blow it would be an excessive use of the right of private defence. That is a matter for you. So really gentlemen, the question then boils down to this: Has the first accused by a preponderance of probability satisfied you that he struck only one blow ? "

It is not unlikely that the jury was misdirected by that statement and thought that the burden rested on the appellant to prove that he did not give more than one blow to David.

If the jury held that only one blow was proved to have been given by the appellant, they could not have held that he acted in excess of the right of private defence in view of the evidence in the case and the clear direction given by the learned judge.

We are of opinion that the verdict of the jury against the appellant is unreasonable and not supported by the evidence and we, therefore, set aside his conviction and acquit him.

*Conviction set aside.*

*Present:* CANNON, J.

## FERNANDO & ANOTHER vs HEILER (S. I. Police)

*S. C. Nos.* 655–656—*M. C. Negombo No.* 44037.
Argued & Decided on 20th July, 1945.

*Dishonest retention of stolen property—Onus of proof—Penal Code section* 394.

**Held :** That a person, charged with dishonestly retaining stolen property, is entitled to be acquitted if, having regard to all the circumstances of the case, the explanation given by him might reasonably be true, even though the Court is not convinced of its truth.

**Cases referred to :** *Rex vs Abramavitch* (1914 – 84 L.J., K.B.D. 396).

*H. V. Perera, K.C.*, with *H. W. Jayawardene*, for the accused-appellants.
*E. L. W. de Zoysa, Crown Counsel*, for the Attorney-General.

CANNON, J.

The appellants were charged with dishonestly retaining stolen property, to wit, two sarees, one frock, one jacket, one night-dress and a sheet valued at Rs. 173 on 2nd February, 1945, knowing or having reason to believe them to be stolen property in contravention of section 394 of the Penal Code.

The evidence for the prosecution was that these articles, together with a number of others to the total value of some Rs. 1,400 were stolen from a dwelling house on 21st January and were found in a dwelling house occupied by the two appellants in the same town on 2nd February. Such evidence being that the goods were stolen, that they were in the possession of the appellants and that they had been recently stolen raised a presumption of guilty knowledge, in the absence of an acceptable explanation.

The defence was that the appellants lived together as husband and wife and had been doing so for several years in comfortable financial circumstances, the husband being a charcoal contractor. On 29th December, while the husband was away on a distant estate on business the wife bought the goods in question from a hawker for Rs. 73. Both the accused gave evidence and the husband said he was in fact away from home from the 20th to the 31st January. The superintendent of the estate in question confirmed that the husband was at the estate during that period and that on 22nd December he bought a large amount of coconut shells which he subsequently converted into charcoal. The Magistrate rejected the explanation of the accused and fined the husband Rs. 100 or 6 months' rigorous imprisonment and further sentenced him to 2 years' imprisonment and 2 years' police supervision. The wife was fined Rs. 100.

In his judgment the Magistrate gives some reasons for rejecting the explanation of the accused. *Inter alia* he says that the wife was not prepared to give any information regarding the hawker or his whereabouts and that she had not stated what amount she paid for each of the articles. What the wife is recorded as saying about the hawker is this : "I know him well. I have seen him going along the road often. I too have sold my old clothes to him. I do not know his name." It appears to be, therefore, not a case of her being unwilling to give further information ; what she says in effect is that she is unable to give further information. As to what she paid for each item she was never asked to give this information. In disbelieving the 2nd accused the Magistrate makes a point of a receipt dated 22nd January being produced from the estate, the receipt being for money paid by him for the coconut shells. The Magistrate says that this suggests that he left the estate on the 22nd January inasmuch as the husband said that he was not usually given a receipt for payments until the conclusion of his transactions when he left the estate. But the receipt says that the payment was made for coconut shells on the 22nd and it would be dated for the day when the payment was made. The accused says he remained after that till the 31st to convert the coconut shells into charcoal. The fact that the receipt was dated the 22nd does not justify a conclusive inference that the husband left the estate on that day. The Magistrate further says, "I am not satisfied that the accused went to Badalgama Estate on the 20th January and returned as stated by him." This would appear to be a misdirection in law with which I will deal in a moment.

Mr. Perera for the appellants submits that the Magistrate has misdirected himself on the facts and on the law as regards the onus of proving guilty knowledge. It is well established that in receiving cases if evidence is given that the goods are stolen and that they are in the

possession of the accused, then, having regard to the proximity of the date of the theft and the nature of the articles a presumption may arise that the accused knew that the goods were stolen when they got possession of them, unless some acceptable explanation be given. An acceptable explanation is one that may reasonably be true. This does not mean reasonably true *per se* but reasonably true having regard to all the circumstances of the case. The circumstances of this case do not appear to be inconsistent with the reasonableness of the story. The law as regards burden of proof of guilty knowledge in receiving cases is concisely stated in the headnote in *Rex vs Abramavitch* (1914 - 84 L.J., K.B.D. at p. 396) as follows:

> "If an explanation were given which the jury thought might reasonably be true, although they were not convinced of its truth, the prisoner was entitled to be acquitted inasmuch as the Crown would have failed to discharge the duty cast upon it to satisfy the jury beyond reasonable doubt of the guilt of the accused."

The burden of proof of guilty knowledge remains with the prosecution to the end of the case — it is finally for the prosecution to satisfy the court that the explanation given is one that cannot reasonably be true, having regard to all the circumstances of the case. It seems to me that the Magistrate has not quite appreciated this. For example he says, "the indications are that these articles were received into the house by both accused with the knowledge that they were questionable articles." This may be so, but that would suggest only a case of suspicion which this case undoubtedly is. But the Magistrate's judgment shows that in addition to forming certain misconceptions about the evidence of the appellants he did not correctly apply the principle governing the proof of guilty knowledge. For these reasons the appeal must be allowed and the conviction quashed.

*Appeal allowed.*

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*Present:* CANNON, J. & CANEKERATNE, J.

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## AHAMADU MUHEYADIN vs THAMBIAPPAH

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*S. C. No. 75—D. C. Batticaloa No. 153.*
Argued on 26th July, 1945.
Decided on 20th August, 1945.

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*Mortgage Ordinance (Chapter 74) section 7—Deceased mortgagor—Representation to estate not granted—Appointment by court of person to represent estate of deceased for purposes of hypothecary action—No evidence before court that value of mortgaged property did not exceed Rs. 2,500—Jurisdiction of court to make appointment—Validity of subsequent orders of court.*

After the death of a mortgagor and before representation to his estate was granted, the mortgagee put the bond in suit and moved, under section 7 of the Mortgage Ordinance, for the appointment of a person to represent the estate of the deceased for the purposes of the action. No evidence was led as to the value of the mortgaged property. The court appointed a representative under section 7 and subsequently ordered a sale of the mortgaged property which was then bought by the mortgagee. In an action of the administrator of the estate of the deceased mortgagor against the purchaser-mortgagee for a declaration of title to the mortgaged property,

**Held:** (i) That it was a condition precedent to the appointment of a representative under section 7 of the Mortgage Ordinance that evidence should be tendered that the value of the mortgaged property did not exceed Rs. 2,500.

(ii) That in the absence of such evidence, the court had no jurisdiction to make the appointment and that the subsequent sale of the mortgaged property and other proceedings were a nullity as against the estate of the deceased mortgagor.

**Cases referred to:** *The Queen vs The Commissioners for Special Purposes of Income Tax* (1888–21 Q.B.D. 313)
*Neelahutty vs Alver et al* (20 N.L.R. 372)

*H. V. Perera, K.C.*, with *E. B. Wickramanayake* and *G. Thomas*, for the plaintiff-appellant.

*N. Nadarajah, K.C.*, with *S. Nadesan*, for the defendant-respondent.

CANNON, J.

This appeal depends upon a question of jurisdiction. The parties are the administrator *cum testamento annexo* (who has been erroneously described in the proceedings as executor) of one Marikar, deceased, and the mortgagee of the land of the deceased who subsequently bought the mortgaged land under a decree of the court. The mortgage was for a loan of Rs. 3,000 to the deceased and his wife. The history of the transaction is that, after the mortgagor Marikar died, the mortgagee put the bond in suit and, before the action, made an application for the appointment of a legal representative of the deceased's estate for the purpose of the action, under the Mortgage Ordinance section 7. At that time representation had not been granted in respect of the estate. The court appointed as legal representatives the widow and children of the deceased, and in the subsequent action decreed a sale of the mortgaged property, which was bought by the mortgagee.

The action appealed from is one in which the administrator of the estate asked for a declaration of title to the lands of the deceased purchased by the mortgagee, his cause of action being an allegation that the mortgagee got the legal representative appointed without showing the court that the mortgaged property did not exceed Rs. 2,500 as required by the Mortgage Ordinance, section 7 (2). The District Judge held that the plaintiff had not proved his case and dismissed the action. In this appeal against such dismissal it is not seriously contested that the value of the property was more than Rs. 2,500. The argument has centred round the questions (1) whether there was such evidence before the District Judge as the Mortgage Ordinance requires, and (2) whether, if his decision was wrong, the District Judge nevertheless had jurisdiction to order the appointment of a legal representative for the purposes of the action. This point of jurisdiction is important, because, if the court had no jurisdiction, its order was void *ab initio* and the consequent sale and other proceedings a nullity as against the deceased's estate. The evidence of value tendered to support the application for a legal representative to be appointed to defend the action was to the effect that the net value of the deceased's estate was less than Rs. 2,500. There was no evidence before the judge as to what the value of the mortgaged property was. His order was, therefore, wrong, and the final question for consideration is whether it was made without jurisdiction. Mr. Perera for the appellant contends that the court could not by its wrong decision give itself jurisdiction. The question of jurisdiction arose in an English case. *The Queen vs The Commissioners for Special Purposes of Income Tax* (1888 – 21 Q.B.D. 313) and both sides rely upon what was said by the Master of the Rolls, Lord Esher. It was a case in which the Commissioners for Special Purposes refused to act on certificates for repayment of tax issued by the Commissioners for General Purposes, on the ground that the latter Commissioners had no jurisdiction to issue such certificates because certain facts had not been "proved to their satisfaction," as required by the English Statute. At page 319 Lord Esher says :

> "I have been laying down what in my opinion is the general rule of conduct for those charged with that inquiry, but the question arises, who are to make that inquiry ? In the first instance, obviously the Commissioners for General Purposes. They have to determine that question and they must determine it, as it seems to me, according to the rule I have laid down. But when they have determined it, can their decision be questioned afterwards ? It will be said on the one side that their jurisdiction depends on the decision of that question and, applying a well-known formula, that they cannot give themselves jurisdiction by a wrong decision on the facts. I have considered that formula with great care, and, though it is correct enough for certain purposes, I think its application is often misleading. When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things it shall have jurisdiction to do such things, but not otherwise. There, it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal, or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there shall be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends."

It will be seen that the Master of the Rolls divided the question of jurisdiction into two categories. Mr. Perera contends that this case comes within category (1), and Mr. Nadarajah for the respondent suggests that it comes under category (2). I think that it comes under category (1). By the Mortgage Ordinance it

was a condition precedent to such an application being entertained that evidence should be tendered that the value of the mortgaged property did not exceed Rs. 2,500. This state of facts was not shown to the court. It was a preliminary and essential application before the action on the mortgage bond could be formulated, as unless and until the court nominated someone to represent the deceased's estate, there would be no defendant to the action. It was a question of fact, and the judge's decision on it could not bind a stranger to the action which the present appellant was. (*Vide Neelakutty vs Alver et al* 20 N.L.R. 372). In the absence of evidence of the value of the mortgaged property the court had no jurisdiction to appoint a person to represent the deceased mortgagor and therefore his estate was, in law, not represented in the action on the bond.

In this reason, I would allow the appeal with costs, set aside the order of the District Judge, and direct judgment to be entered for the plaintiff as prayed for.

The judgment in the action and the subsequent order for sale remain binding on A. M. Asiathumma who was herself a mortgagor since she was made a party to the proceedings.

CANEKERATNE, J.

I agree.

*Appeal allowed.*

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*Present:* WIJEYEWARDENE, J.

## NAGOOR ADUMAI vs WILLIAM

*S. C. No.* 216—*C. R. Matale No.* 7631.
Argued on 23rd August, 1945.
Decided on 4th September, 1945.

*Compromise—Challenge by Muslim plaintiff to Buddhist defendant to take oath at Mosque—Acceptance of challenge—Terms of settlement recorded by court—Subsequent application by plaintiff to withdraw from agreement allowed by court—Is such agreement obnoxious to section 7 of the Oaths and Affirmations Ordinance (Chapter 14)—Civil Procedure Code section 408.*

On the trial date viz. 24/8/43, the plaintiff who was a Muslim, challenged the defendant, a Sinhalese Buddhist to take an oath at the Warakamure Mosque that he (the defendant) did not make a payment of Rs. 10 on 31st July, 1938 or a payment of Rs. 5 on 17th January, 1943 on account of a promissory note sued upon. Defendant accepted the challenge and it was agreed by the parties that if the defendant took the oath, plaintiff's action should be dismissed with costs, and if the defendant failed to take the oath, judgment should be entered for plaintiff as prayed for with costs. Both parties signed the record.

Subsequently, plaintiff moved to withdraw from the agreement on the ground that he agreed to the terms on a misunderstanding and that the defendant is a Sinhalese Buddhist. The court allowed this motion. The defendant appealed.

**Held :** (i) That the plaintiff should not have been allowed to resile from the agreement as it was a lawful compromise within the meaning of section 408 of the Civil Procedure Code.

(ii) That the agreement did not fall within section 7 of the Oaths and Affirmations Ordinance (Chap. 14).

**Cases referred to :** *Suppiah vs Abdulla* (1924 – 26 N.L.R. 79)
*Tirugnasambanthapillai vs Namasivayampillai* (1925 – 26 N.L.R. 344).

*H. W. Thambiah*, for the defendant-appellant.
*S. R. Wijayatilake*, for the plaintiff-respondent.

WIJEYEWARDENE, J.

The plaintiff, a Muslim trader, filed this action on February 16, 1943, on a promissory note made by the defendant on February 16, 1937, promising to pay Rs. 292/– with interest at 9% per annum. He pleaded in the plaint a payment of Rs. 20 by the defendant on account of interest and stated that a sum of Rs. 428/24 was due on the note but restricted his claim to Rs. 300.

The defendant denied that he received any consideration on the note, or that he paid any sum to the plaintiff as interest. He pleaded that the action was prescribed.

The case came up for trial on August 24, 1943, and the parties were present with their proctors. The record shows the following entry on that date signed by the plaintiff and the defendant :

> " Plaintiff challenges the defendant to take the following oath at Warakamure Mosque : ' I did not make a payment of Rs. 10 on 31st July, 1938 or a payment of Rs. 5 on 17th January, 1943 on account of interest due on the promissory note sued upon.' Defendant accepts the challenge. Oath to be administered by the Interpreter of this Court. Oath fees paid. If defendant takes the oath plaintiff's action to be dismissed with costs. If defendant fails to take the oath then judgment for plaintiff as prayed for with costs. Parties agree to these terms. Call case on 7/9/43."

On August 26, 1943, the plaintiff's proctor filed an affidavit from the plaintiff and moved " that he be permitted to withdraw his undertaking recorded on August 24, 1943." The defendant objected to the application of the plaintiff. At the inquiry held by the Commissioner the plaintiff stated :

> " I understand that unless I proved those payments ( amounting to Rs. 20 ) I would lose the action, as there was a suggestion that the note was prescribed. The note is not as a matter of fact prescribed. The defendant is a Sinhalese and a Buddhist."

The Commissioner allowed the application of the plaintiff and fixed the case for trial in the ordinary course. After hearing evidence the Commissioner entered judgment for plaintiff.

The only point I have to decide on this appeal is whether the Commissioner was right in allowing the plaintiff to resile from the agreement reached on August 24, 1943. The counsel for the respondent contended that under section 8 of the Oaths Ordinance the plaintiff could have offered to be bound only by " any such oath or solemn affirmation " as is mentioned in section 7 and made by the defendant and that section 7 did not contemplate an oath or affirmation by a Buddhist in a Mohammedan Mosque. He argued therefore that there was no legal basis for the challenge made and accepted on August 24, 1943, and that it could not have been acted upon in a court of law. I am unable to accept this contention.

Section 7 of the Oaths Ordinance refers to an oath or solemn affirmation " common amongst, or held binding by, persons of the race or persuasion to which he ( *i.e.* the person making the oath or affirmation ) belongs and not repugnant to justice or decency and not purporting to affect any third person." Clearly the suggested oath is not repugnant to justice or decency and does not purport to affect any third person. It is, therefore, an oath that could have been taken by the defendant if it is in any form " common amongst " or " held binding " by persons of the race or persuasion to which he belongs. There is no direct evidence on the point. But the fact remains that the defendant who is said to be a Buddhist is willing to take the oath and the plaintiff who is a Muslim challenged the defendant to take the oath though he was well aware that the defendant claimed to be a Buddhist. I could understand a Buddhist refusing to make an oath or affirmation in any place of worship including a Buddhist Vihare. But these matters are not to be determined by immutable religious doctrines but by customs that have been followed by certain classes of people. Cases are not unknown of non-Muslims making their oath in Devatagaha Mosque, Colombo, non-Christians in St. Anthony's Church, Colombo, and non-Buddhists in Kande Vihare, Alutgama. On the material before me I am unable to say that the proposed oath is obnoxious to the provisions of section 7. It will be noted that the oath does not contain any reference to any deity or any saint recognized by the Moslem faith nor is it necessary for the person making the oath to go through a religious ceremony at the Mosque.

I do not think, however, that this is a case falling under the Oaths Ordinance. Here the parties have agreed to settle their dispute in a certain way and that settlement has been recorded fully by the court. The parties have carried out a part of the agreement by depositing in court the fees of the Commissioner. Such an agreement would come within the provisions of section 408 of the Civil Procedure Code ( *vide Suppiah vs Abdulla* ( 1924 – 26 N.L.R. 79 ) and *Tirugnasambanthapillai vs Namasivayampillai* ( 1925 – 26 N.L.R. 344 ) and a court of law would give effect to such an agreement so long as it is not illegal or *contra bonas mores*.

I set aside the decree appealed against and remit the proceedings to the lower court directing the Commissioner after notice to the parties to fix a date for the defendant to make the oath as agreed upon and to enter decree in terms of that agreement.

The appellant is entitled to the costs of this appeal.

*Decree set aside.*

*Present:* WIJEYEWARDENE, J.

JAYAWARDENE (Price Control Inspector) vs AHAMED

*S. C. No.* 860—*M. C. Ratnapura No.* 43561.
Argued on 5th September, 1945.
Decided on 6th September, 1945.

*Control of Prices—Orders under Control of Prices Ordinance, No. 39 of 1939, fixing maximum prices of Koduwa fish and Sunlight soap—Prices fixed per pound and per tablet respectively—Sale of quarter pound of Koduwa fish and twin tablet of Sunlight soap—Applicability of orders.*

Two orders were made under the Control of Prices Ordinance, No. 39 of 1939, fixing the maximum prices of Koduwa fish per pound and of Sunlight soap per tablet.

**Held :** That the orders applied to the sale of a quarter pound of Koduwa fish and a twin tablet of Sunlight soap.

**Cases referred to :** *Sub-Inspector of Police, Kandy vs Wassira** (1945 – 46 N.L.R. 93)

*T. K. Curtis, Crown Counsel*, for the Crown.
*H. W. Jayawardene*, for the accused-respondent.

WIJEYEWARDENE, J.

The accused, a trader in dried fish and Sunlight soap, was charged with having sold on March 8, 1945, (*a*) a quarter pound of Koduwa dried fish for 30 cents in breach of the Order published in Gazette No. 9356 of January 19, 1945, and (*b*) a twin tablet of Sunlight soap for 45 cents in breach of the Order published in Gazette No. 9305 of August 25, 1944. The Orders mentioned in the charge are Orders made by the Controller of Prices by virtue of the powers vested in him by section 3 of the Control of Prices Ordinance, No. 39 of 1939, as amended by the Defence ( Control of Prices ) ( Supplementary Provisions No. 2 ) Regulations.

The evidence led by the prosecution stands uncontradicted and that evidence proves the sale of a quarter pound of Koduwa fish for 30 cents and a twin tablet of Sunlight soap for 45 cents. The Magistrate accepted that evidence but acquitted the accused as he thought the principle underlying the decision in *Sub-Inspector of Police, Kandy vs Wassira** (1945 – 46 N.L.R. 93 ) governed this case.

The present appeal has been preferred with the sanction of the Attorney-General against that order of acquittal.

The learned Magistrate has misdirected himself on the question of law. The case of *Sub-Inspector of Police, Kandy vs Wassira* (*supra*) is clearly distinguishable from the present case. The relevant Order that had to be construed in that case fixed " the maximum prices above which bread shall not be sold in 16-oz. loaves and 8-oz. loaves." (*vide* Gazette No. 9276 of June 2, 1944 ). It was accordingly held in that case that the price of a 4-oz. loaf was not regulated by that Order. The Orders to be considered in this case show clearly that they control the prices of any quantity of Koduwa fish or any number of tablets of soap. Clause (ii) of the Order in Gazette No. 9356 read with the First Schedule shews that the article whose price is regulated is Koduwa fish and not any particular quantity of Koduwa fish. Clause (iv) (*b*) shews that the sale of *any quantity* of Koduwa less than one hundredweight for the purpose of consumption or use is to be regarded as a sale by retail. Column 5 in the First Schedule read with column 4 of the Second Schedule gives the maximum retail price per pound in Kuruwiti Korale as 82 cents and is intended merely to afford a basis for the calculation of the maximum retail price of a quantity of Koduwa fish in that locality. That Order, therefore, fixes the maximum retail price which the accused could have charged for a quarter pound of Koduwa fish at $20\frac{1}{2}$ cents. Similarly the Order in Gazette No. 9305 fixes the maximum retail price for two tablets of Sunlight soap at 36 cents.

I set aside the order appealed against, and convict the accused on the charge framed against him. I remit the proceedings to the Magistrate and direct him to pass an appropriate sentence.

*Appeal allowed.*

*Present:* KEUNEMAN, S.P.J. & ROSE, J.

## SILVA vs JAYASEKERA & ANOTHER

*S. C. No. 47—D. C. (Inty.) Tangalla No. 5000.*
Argued on 31st July, 1945.
Decided on 3rd August, 1945.

*Civil Procedure—Transfer of defendant's interest pending action—Application by such transferee to be added as defendant—Objection by plaintiff and defendants—Does section 404 of the Civil Procedure Code permit such intervention.*

**Held :** (i) A party claiming to be added as a defendant on the ground that such party has acquired interest in the subject-matter of the action is not precluded by section 404 of the Civil Procedure Code from being added.

(ii) That this section vests in the court a discretion as to the persons to be admitted as parties plaintiff or defendant.

**Cases referred to :** *Kino vs Rudkin* (L.R. 1877–Ch. D. 160)
*Kristo Kumar Das vs Girish Chandra Poddar* (1915 A.I.R. Cal. 771)
*Rajaranee Dassee vs Debendra Nath Shaw* (1899 – 3 C.W.N. 754).

*H. V. Perera, K.C.*, with *U. A. Jayasundera* and *S. E. J. Fernando*, for the petitioner-appellant.

*N. E. Weerasooriya, K.C.*, with *G. P. J. Kurukulasuriya*, for the plaintiff-respondent.

*G. P. J. Kurukulasuriya*, for the second defendant-respondent.

KEUNEMAN, S.P.J.

This action has followed a curious and unusual course. The plaintiff on the 30th August 1943 brought this action against the 1st and the 2nd defendants alleging that the premises in question were purchased by the 1st defendant (his mother-in-law) at his request and with his money and in trust for him, and that the 1st defendant conveyed the said premises fraudulently and collusively and without consideration to the 2nd defendant who had been a servant in her household for about 10 years and had full knowledge and notice of the trust. The 1st defendant admitted the allegation in the plaint, and added that the 2nd defendant had compelled her to execute the transfer by threats to kill her if she did not do so.

This answer was filed on the 3rd February 1944. The 2nd defendant had previously on the 4th November, 1943 filed answer, which was amended on the 9th September, 1944 in order to meet an amendment in the plaint. In his answer the 2nd defendant denied the allegations in the plaint and prayed for a dismissal of the plaintiff's action. But on the 27th September, 1944 a motion sent by registered post by the 2nd defendant was received by the court asking that judgment should be entered in favour of the plaintiff as prayed for, and that his proctor's proxy be cancelled. Notices of this motion was not served on the plaintiff or the 1st defendant.

On the 8th November, 1944 the present petitioner-appellant sought to intervene and to be made a party defendant. In his affidavit he alleged that the plaintiff filed action on the 30th August 1943, and that pending the action the 2nd defendant by deed 427 dated 25th September, 1943 transferred and assigned all his rights and interests in the subject-matter of the action for valuable consideration. In his affidavit the petitioner added that he had reason to believe that the 2nd defendant may, acting in fraud and collusion with the other parties to the action, defeat his rights and cause him serious loss and damage.

It has been established (see P1) that the plaintiff had duly registered his action before the date of deed 427, and accordingly the doctrine of *lis pendens* attaches to this transaction.

On the 4th January, 1945, the date of the inquiry into the petition, both the 1st and 2nd defendants consented to judgment in the plaintiff's favour, but decree was not entered for the plaintiff on that date.

In substance, the District Judge held that section 404 of the Civil Procedure Code only permitted the plaintiff or the person to whom his interest has come to continue the action against the defendant or the person to whom his interest has come, and that the court had no right to force the plaintiff to proceed with his action against the petitioner when the plaintiff

was satisfied with obtaining decree against the two defendants alone.

Thereafter on the 31st January 1945 the 1st and 2nd defendants consented to judgment, and judgment was accordingly entered in favour of the plaintiff.

On appeal the petitioner contended that the District Judge had wrongly decided the question of law, and that it was open to the District Judge even at that stage to admit the petitioner as a party to the case.

In England, where the rule is not materially different, it has been held that a purchaser *pendente lite* can be admitted as a party defendant (see *Kino vs Rudkin* (L.R. 1877–Ch.D.160)). There Fry, J. said: "I do not think there is any necessity for Mr. Worley's presence. As the assignment was made to him *pendente lite*, I think he will be bound by the proceedings. But it is very reasonable that he should be made a party, and I will make an order that he be added as a defendant, he submitting to be bound." In this case, however, the plaintiff did not object to the addition of this party.

In India also Order 22 Rule 10 is on the same lines as our section 404. In *Kristo Kumar Das vs Girish Chandra Poddar* (1915 A.I.R. Cal. 771) an argument similar to that addressed to the District Judge was advanced, but the judge held — "As to the first contention we are not prepared to say that Order 22 Rule 10 can only apply to plaintiffs and their representatives. Nor has any authority been put before us to show that it does.....In the case in *Rajaranee Dassee vs Debendra Nath Shaw* (1899 – 3 C.W.N. 754) the application was made under section 372 Civil Procedure Code corresponding to Order 22 Rule 10, and no doubt was expressed by the court or urged by the Bar that such an application would lie on behalf of a person seeking to continue the suit as a party defendant."

I have myself considered the language of section 404 and have come to the conclusion that there is nothing in the section which prevents a party claiming to be added as a defendant in the case of an assignment, creation, or devolution of any interest in the subject-matter of the action. The important and controlling words in my opinion are that "the leave of the court" must be obtained. I think that puts the court in complete control of the case, and vests in the court a discretion as to the persons to be admitted as parties plaintiff or defendant.

There can be, in my opinion, no doubt that the action was still pending, in view of the fact that judgment and decree had been entered at the time of the intervention.

The District Judge has not addressed himself to the question as to whether he will exercise his discretion in favour of the petitioner or not. He has, indeed, made a point of the fact that the deed 427 was not produced before him, but the fact of the execution of that deed has been established by the petitioner's affidavit, and also by the document P1, the schedule of encumbrances produced by the plaintiff.

There are, however, certain matters which are prominent in this case. Not only the plaintiff but also the 1st and 2nd defendants object to the admission of the petitioner as a party defendant. Next, though the action was not entirely dead at the time of the intervention, it was at its last gasp. Again, the petitioner has apparently all along been aware of the action filed and registered; in any event he has not denied that he had actual knowledge of this fact and no excuse has been offered for his delay in seeking to intervene. Further he has given no solid or material facts to help to establish his suggestion that there has been fraud and collusion on the part of the plaintiff and the two defendants. Lastly, in the words of Fry, J. there was no necessity for his presence for the determination of the original matters.

In all the circumstances I do not think that his application to intervene in this action should be allowed. The appeal is dismissed with costs.

ROSE, J.

I agree.

*Appeal dismissed.*

END OF VOLUME XXX