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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.

VOLUME XLV

WITH A DIGEST

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(Consulting Editor)

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Action

Compromise, of action—Terms of Settlement—Subsequent discovery by one party that fulfilment contrary to law—Application to set aside settlement—Other party fulfilling terms undertaken by him—Judgment for party fulfilling—Prejudice to party not taken into consideration by Court—Duty of Court in recording terms of settlement—Need to give effect to intention of parties by rectifying terms recorded or reading into them implied agreement—Equitable considerations applicable in such circumstances.

Plaintiff sued the defendants jointly and severally for the recovery of Rs. 2,500 due on a promissory note. The defendants, while admitting the execution of the note, pleaded in their answer that they had discharged the debt by securing the allotment of 25 shares of the total value of Rs. 2,500 in a private company called "Newton's Ltd." in accordance with a contemporaneous agreement between the parties.

At the trial the parties settled their dispute in the following among other terms. (*a*) that the plaintiff disclaimed all right, title and interests in the said 25 shares allotted to him, that he would have no further claim in the Company, that he would give a writing on or before 7-2-49 to be considered by the Board of Directors of the said Company requesting the Company to buy over all his interests in the said shares.

(*b*) that when all the necessary papers aforesaid are executed and sent over to the Company on or before 7-2-49 the defendants would become liable in the amount claimed on the note to the plaintiff and for the payment of which six weeks' time would be given to the defendants.

A decree was entered accordingly and the plaintiff performed his part of the obligation. The defendants, however, later discovered that Newton's Ltd. was precluded by its Articles of Association from holding shares on it's own business and applied to Court for a declaration that the purported settlement was null and void in that ground.

The plaintiff claimed the sum of Rs. 2,500 on the ground that he had complied with his part of the consent decree and the learned District Judge made order in his favour.

The defendant appealed.

Held : (1) That the learned District Judge erred in making the order as the effect of his order is that the plaintiff would not only succeed in recovering the money advanced to the defendants, but also retain the shares for which he had admittedly not paid.

(2) That from the recorded settlement it is clear that the substantial agreement between the parties was that the plaintiff should have a decree for the payment of money advanced on the note, provided that he agreed to take the necessary steps to transfer the shares to a person nominated and selected by the defendants for the purpose.

(3) That, in equity, the Court is entitled and in duty bound to give effect to the intention of the parties either by rectifying the terms of the recorded settlement or by reading into those terms an implied agreement to the effect that the plaintiff should in the circumstances implement the true purpose of the agreement by transferring the shares to any person nominated by the defendants.

Per GRATIAEN, J.—Indeed, I venture to suggest that some responsibility attaches in such cases to the trial Judge himself, whose duty it is to enter a decree in accordance with the terms of settlement ; that responsibility involves a duty to ensure that the decree so passed is embodied in language which, while giving full effect to the intentions of the litigants, is at the same time capable of enforcement should the necessity arise.

Advocate

Advocate—Conviction of offences involving gross moral turpitude—Name struck off roll of advocates—Redemption of character—Application for re-admission—Principles which apply.

The petitioner, who was an Advocate, was convicted in 1931 of two offences involving gross moral turpitude and was sentenced to terms of imprisonment in respect of both. While he was serving his earlier sentence, the Supreme Court made order that his name should be struck off the roll of Advocates. After his discharge from prison, the petitioner served under various employers in positions involving trust and responsibility. He in 1951 applied for re-admission to the profession on the ground that he had, during the intervening years, qualified himself for re-instatement.

Held : (1) That the petitioner had by his conduct, over a long period of years, proved himself to be a fit and proper person for re-enrolment as a member of the Bar.

(2) That the petitioner had afforded cogent proof that he had redeemed the character which he had once lost.

Per GRATIAEN, J.—" All of them (judicial decisions) remind us that this Court, in dealing with these applications, must not be influenced either by punitive or by sympathetic considerations. Our duty must be measured by the rights of litigants who may seek advice from a professional man admitted or re-admitted to the Bar by the sanction of the Judges of the Supreme Court. It is also measured by the right of the profession, whose trustees we are, to claim that we should satisfy ourselves that re-enrolment will not involve some further risk of degradation to the reputation of the Bar."

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Arbitration—Reference to, without complying with provisions of Civil Procedure Code—Section 676.

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Per BASNAYAKE, J.—" It is clear from the provisions of Chapter LI of the Civil Procedure Code that a *lis* may be taken away from the jurisdiction

of the Courts to an arbitrator only in strict conformity with the prescribed procedure. But there appears to be a good deal of laxity in the trial Courts in the matter of reference to arbitration. It is eminently necessary that Judges and pleaders alike should consult the Code when taking any step thereunder."

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Where on evidence obtained through a decoy the accused was apprehended for receiving illegal bets and a police officer thereafter searched the accused without a warrant and arrested him and the evidence thereby obtained was led to convict the accused.

Held : (1) That there was sufficient evidence, apart from the evidence of the police officer, to warrant the conviction of the accused.

(2) That the police officer had no power to arrest and search the accused without a warrant as neither Section 4 of the Gaming Ordinance nor Section 69 of the Police Ordinance apply to an offence under the Betting on Horse Racing Ordinance.

(3) That the evidence obtained in the course of such unlawful search and arrest is legally admissible.

Per BASNAYAKE, J.—" Today as in the past it is necessary to safeguard the sanctity of the citizen's home against unauthorised entry. The fact that laws designed for the welfare of society have made considerable inroads on the liberty of the subject should not lead public officers to think that the fundamental rights of the citizen no longer exist. Let it be clearly understood that the attitude of the Courts towards admission of evidence illegally obtained carries with it no sanction of illegal arrests and searches. The offender's act nevertheless remains as unpardonable as ever—a trespass—, his liability for which is in no way diminished by the reception of evidence.

Buddhist Temporalities Ordinance

Buddhist Temporalities Ordinance—Section 20—Plaintiff Chief Bhikku residing on land dedicated to Sangha—Permanent buildings erected thereon—Defendant in possession of money collected for preaching hall and vihare—Plaintiff's right to recover money—Meaning of " controlling viharadhipati ", " temple ".

The plaintiff, a Bhikku, as the first incumbent resided on a land dedicated to the Sangha, where subsequently permanent living quarters were erected. Thereafter money collected from lay Buddhists for a preaching hall and vihare was entrusted to the defendant as Treasurer of a Society whose object was to put up buildings for Buddhist worship.

Held : (1) That the plaintiff's place of residence was a " temple " within the meaning of section 20 of the Buddhist Temporalities Ordinance, and that no particular type of buildings were necessary to constitute a temple.

(2) That the plaintiff, was the principal Bhikku of the temple, and there being no trustee, was the controlling vihardhipati within the meaning of section 20 of the Ordinance, and could therefore recover the money from the defendant.

Certiorari

Certiorari—*Writ of—Ceylon (Parliamentary Elections) Order-in-Council, 1946—Application to have claimant's name entered in the register of voters—Decision by Registering Officer that claimant not a citizen of Ceylon, therefore not entitled to be registered—Appeal to Revising Officer under section 13 of Order-in-Council—Reversal of decision by Revising Officer on ground that Ceylon Parliamentary Elections (Amendment) Act, No. 48 of 1949 and Citizenship Act No. 18 of 1948 invalid as offending against section 29 of Ceylon (Constitution and Independence) Orders-in-Council 1946 and 1947.*

Can Revising Officer's decision be reviewed by certiorari—*Section 13 (3) of the Order—Final and conclusive—Effect of—When* certiorari *lies—Affidavits to supplement evidence on record—When admissible—Relevancy of such affidavits—Interpretation of statutes—When permissible to travel outside to ascertain scope and purpose—Validity of Citizenship Act and Ceylon Parliamentary Elections (Amendment) Act.*

The second respondent made a claim to the Assistant Registering Officer of his district, to have his name inserted in the Register of Electors prepared under section 11 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, and supported it by an affidavit, which stated that he possessed the requisite residential qualification, that he was domiciled in Ceylon, and that he was qualified to be an elector under the Order.

The Registering Officer, after inquiry, disallowed the claim on the ground that the second respondent was not a citizen of Ceylon within the meaning of the Citizenship Act No. 18 of 1948.

On appeal under section 13 of the said Order-in-Council, the first respondent as Revising Officer, after considering the evidence placed before him and the arguments adduced, held that the Ceylon Parliamentary Elections (Amendment) Act No. 48 of 1949, which prescribed citizenship of Ceylon as a necessary qualification of an elector, and the Citizenship Act No. 18 of 1948 were invalid as offending against section 29 (2) of the Ceylon (Constitution and Independence) Orders-in-Council 1946 and 1947, and that the operative law was that contained in the Ceylon (Parliamentary Elections) Order-in-Council 1946, as it stood before the Amending Act.

He, accordingly, held that the second respondent was a duly qualified elector, and directed his name to be included in the Register of Electors. By

section 13 (3) of the said Order, the decision of the first respondent is final and conclusive.

The Crown, therefore, made two applications for writs of *certiorari*, one in the name of the Assistant Registering Officer, and, the other in the name of the Commissioner of Parliamentary Elections (as there was a doubt as to the proper party who should make the application), to have the decision of the first respondent reviewed by the Supreme Court.

At the hearing of the applications, the learned Counsel for the second respondent conceded that the said decision was subject to review by the Supreme Court by means of a writ of *certiorari*, and moved the Supreme Court to produce in support of the order, three affidavits from three (other) persons containing statistics relating to Indian Tamils.

Held : (1) That the first respondent acted outside his jurisdiction, when he proceeded to decide as a preliminary issue the question as to what is the law which lays down the qualification of voters, when the jurisdiction invested in him was to decide the question whether the second respondent was qualified to be a voter under the law.

(2) That the affidavits sought to be produced by the second respondent, are irrelevant to the question that arose in the application for *certiorari*, namely, whether the first respondent's decision, as to what is the law that lays down the qualification of voters in general, is erroneous.

(3) That if the affidavits are relevant to supplement the affidavit already on record, such evidence could and should have been placed before the first respondent, at the hearing of the appeal.

(4) That the affidavits will not be admitted at this stage, as an adjudication on them would amount to re-trying the case.

(5) That sections 4 and 5 of the Citizenship Act No. 18 of 1948 and section 3 (1) (*a*) of the Ceylon (Parliamentary Elections) (Amendment) Act No. 48 of 1949, are not rendered void under section 29 (2) of the Ceylon (Constitution) Order-in-Council, as the disabilities and restrictions imposed by the two former Acts, do not, from the language used, attach to persons of any one community, but applies to all communities.

(6) That the fact that a large section of Indians now residing in Ceylon are disqualified by the impugned Acts, is irrelevant, for the reason that it is not the necessary legal effect which flows from the language of the Act.

(7) That where the words in an enactment are clear and unambiguous, it is not legitimate to travel outside the enactment, to ascertain its scope and purpose.

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Misjoinder of defendants and causes of action—Action for declaration of title—Defendants independently in possession of separate defined blocks—Allegation of concerted action by defendants in plaint—Fundamental question of fact—Discretion of Court in permitting amendment in the case of such a misjoinder—Civil Procedure Code, Sections 14, 17 *and* 22.

The plaintiff in one action sued two sets of defendants for a declaration of title to five lots of land possessed by the defendants separately. In his plaint he alleged that the defendants were acting in concert to deprive him of the entire land comprised of the five lots, but was unable to substantiate it in his evidence. The issue of misjoinder of defendants and causes of action was raised at the commencement of the trial, but the learned District Judge at the conclusion of the trial on all the issues ruled against the defendants on the issue of misjoinder and also failed to discuss this point. The defendants appealed and at the conclusion of the argument in appeal, Counsel for the plaintiff-respondent requested that the plaintiff be allowed to amend his pleadings and restrict his claim against one set of defendants.

Held : (1) That the failure of the plaintiff to establish that the defendants were acting in concert, was fundamental to the recognition of his right to proceed against all the defendants in the same proceedings, and as such, there was a misjoinder of defendants and causes of action.

(2) The discretion of the Court must be judicially exercised, after consideration of all relevant circumstances, such as the conduct of the parties, and the belatedness of the application, and, therefore, the application of the plaintiff to amend his pleadings should not be allowed.

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Contempt of Court

Contempt of Court—Article published in newspaper, commenting on the facts of a pending case—Does the publication tend to interfere with the due course of justice?—Apology, and offer to publish unqualified withdrawal of offending passages—Considerations affecting sentence—Costs in criminal or quasi-criminal proceedings.

Where a *rule nisi* for contempt of Court was issued on the editor of a newspaper, in respect of a passage commenting on the facts of a pending case, and the editor apologised, and offered to publish an unqualified withdrawal of the offending passages.

Held: (i) (NAGALINGAM, J., *dissentiente*): That in considering the sentence to be imposed on him, the Court should take into account the question of not only preventing the mischief in that particular case, but also the prevention of mischief arising in other cases, and that, therefore, a punishment, however slight should be imposed on the offender.

(ii) That under our law costs cannot be awarded in criminal or quasi-criminal proceedings except in the case provided by Sect on 352 of the Criminal Procedure Code.

Per BASNAYAKE, J.—" In a case of contempt of this nature, the question that arises for decision is not whether the publication in fact interferes, but whether it tends to interfere with the due course of justice, and if it tended to prejudice either the mind of the judge or any other person who would have to consider the case, then it is a publication that ought not to be allowed ".

Per NAGALINGAM, J.—" In regard to this question I think it is but proper and right that a Court of law should take into consideration all mitigating circumstances and temper justice with mercy. The respondent states, and it has not been challenged, that he started this paper in January this year without any previous experience of journalism, he having been employed as a clerk till 1950 after he had left school. He also states that he published the article as an item of public interest and of news value but without any intention to influence or prejudice the trial of the case. There is the further circumstance that the publication was made at a very early stage of the proceedings, and the effect of such a publication at that date (to prejudice mankind against a party to the cause) would have been almost nil. Besides the respondent has at the earliest possible opportunity without raising any technical or other plea made a full and complete apology ".

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Crown—Liability of—Breach of contract—Service goods lying in Customs premises for long period—Warehouse rent due—Sale of goods by auction by Principal Collector of Customs acting under section 108 of Customs Ordinance—Purchase by plaintiff—Failure to deliver goods to plaintiff—Action for damages against Attorney-General—Customs Ordinance, sections 108, 148, 150.

Among other service goods brought into the Island during the last World War, about 11,000 tons of steel plates of assorted sizes were dumped in the Customs premises in Colombo. These goods though free of Customs duty were liable for warehouse charges. After the cessation of hostilities, the Principal Collector of Customs, after notifying all service Heads his intention to dispose of the goods, advertised with the approval of the Chief Secretary by Gazette notice dated 21-2-1947 for sale of the goods by public auction and the plaintiff purchased the goods at the auction.

In the interval the Services Disposal Board, a local branch of the Ministry of Supply of the Imperial Government, had sold these goods to another firm, and the delivery of the goods was refused to the plaintiff, who sued the Attorney-General of Ceylon for damages for breach of contract.

The District Judge dismissed his action and on appeal the Crown contended :—

(1) That the goods could not be sold under section 108 of the Customs Ordinance for the reason that they had been imported and left in the warehouse by the Crown and the Crown is not bound by section 108.

(2) That even if the Principal Collector of Customs had authority under section 108 to sell the goods, such sale could not bind the Crown because in acting under section 108 the Principal Collector was acting under a statutory duty and not acting as agent or servant under the Crown.

(3) That no action lay against the Crown in this case as the Customs Ordinance itself (sections 148, 150) provided the remedy available to the plaintiff —namely to proceed against the Principal Collector of Customs.

Held: (1) That the Customs Department of Ceylon is a revenue collecting department of the Crown and when its official head, The Principal Collector of Customs acts under section 108 of Customs Ordinance, he is not acting on his own behalf, but on behalf of the Crown.

(2) That whether the Principal Collector acted under statutory powers or on the express orders of the Government, so long as he acts *bona fide* and within the scope of his authority, he is an agent of the Crown and his acts bind the Crown.

(3) That where the case is one of a mere breach of contract, whether the public servant acted under statutory powers or not, the action must be brought against the Attorney-General, and unless the Crown can show that the public servant acted without authority, actual or ostensible, or

that there was no holding out by the Crown that the public servant was its agent, it would be liable.

(4) That sections 148, 150 of the Customs Ordinance do not lay down substantive law and do not create any rights of action against a Customs Officer. They merely indicate certain rules of procedure which must be observed if and when such an officer is sued.

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Damages—Sale of land to two purchasers—Action by third party against one of them—Eviction—Right of other purchaser to sue vendor—Actio de evictione *—Ingredients of.*

Where one of two joint-purchasers of a land was evicted by a third party under a decree against him and the two purchasers jointly claimed damages from the vendor for breach of warranty against eviction.

Held : (1) That no cause of action to sue the vendor accrued to the purchaser who was not bound by the decree and who was therefore not judicially evicted from the land.

(2) That in an *actio de evictione* the plaintiff must prove that " the whole or part of the property of which he was placed in possession under a contract of sale had been recovered from him by a third party *by judicial process per judicem facta recuperatio.*"

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In an action for divorce instituted by the wife on the grounds of (1) constructive malicious desertion and (2) malicious desertion, by her husband, it was *inter alia* established in evidence that the parties, who were married in 1920, had lived happily together for at least nineteen years. In 1942, the plaintiff's brother took up his abode with the parties in the matrimonial home, and indulged in the habit of carrying tales to his sister, about the defendant. Frequent disputes resulted between husband and wife, and, in 1943, the defendant was assaulted by his brother-in-law. Finally, on 29th June, 1949, when the defendant remonstrated with his wife and her brother—(who had refused

to accept an urgent telegram addressed to the defendant by his adopted son)—he was promptly assaulted by his brother-in-law, and finally left home thereafter.

It was further clearly established in evidence that,—despite an allegation that the defendant was "guilty of constructive malicious desertion since 1939, in that he intentionally ceased to cohabit with the plaintiff and thereby repudiated the state of marriage between the parties",—the plaintiff-wife herself was averse to having sexual relations with the defendant.

Held : That the defendant had not in law maliciously deserted his wife, and that, on the evidence as established, the legal concept of constructive malicious desertion did not arise for consideration.

Per GRATIAEN, J.—" .....in my opinion, the legal concept of constructive malicious desertion is not involved in a husband's alleged lack of interest in a mutual matrimonial obligation which his wife herself admittedly disdained."

Donation

Donation—Deed of gift subject to conditions—Property to devolve on donee's brothers—Devolution—Does jus accrescendi *apply?—Wills Ordinance, section 7—Civil Procedure Code, section 247.*

Where under a deed property is gifted to a person prohibiting alienation and subject to certain conditions, and the deed contained a direction that in the event of the donee dying issueless, the property was to devolve on the donee's brothers, subject to the said conditions, and where, after the death of such donee, an action under section 247 of the Civil Procedure Code was instituted to have a share of the property declared liable to be sold in execution of a decree on the ground that at the time of death of one of the brothers, his share devolved on his heirs and not on his other brothers.

Held : (1) That the role of *jus accrescendi* did not apply.

(2) That the gift was valid and as the prohibition in the deed of gift was good and did not extend beyond the life-time of each of the donor's sons, the share of each son would pass to his heirs on his death free of all obligations and restrictions and could therefore be sold in execution against them.

Per BASNAYAKE, J.—Questions of *jus accrescendi* can arise only where property is bequeathed to certain legatees or heirs jointly and one of them dies in the *lifetime* of the testator. Once interests under a will vest there is no room for the *jus accrescendi*."

Donation—Gift subject to fidei commissum *in favour of donee's children and grand-children—Subsequent revocation—Second gift to donee absolutely subject to donor's life-interest—Sale of gifted property to defendant by donee—Action by first donee's children as* fidei commissaries *for declaration of title—*Quia timet *action—Ingredients of—Discretion—Exercise of by Court—*Fidei commissary *rights in partition action—Partition Act No. 16 of 1951.*

The donor having gifted by deed a property to the donee subject to a *fidei commissum* in favour of the donee's children and grand-children, revoked it with the consent of the donee, and by another deed donated it to the same donee absolutely reserving to himself a life-interest. The donee sold the property to the defendant.

The plaintiffs, who are children of the donee, brought an action, (the donor and the donee both being alive and no breach of the prohibitions in first deed of gift having occurred), alleging that the defendant might sell the property to their prejudice or institute a partition action without notice to them. They asked for a declaration of title to the property subject only to the life-interest of the defendant, and contended that the defendant's title to the property was subject to their interests as *fidei commissaries* under the first deed of gift, which by reason of the donee's acceptance could not be validly revoked to their prejudice without their consent.

Held : (1) That no cause of action had arisen entitling the plaintiffs to the relief claimed by them as the facts in the case did not establish an actual or threatened infringement of their alleged *fidei commissary* rights.

(2) That a *fidei commissary* may in certain circumstances legitimately claim a judicial declaration for the protection of his rights, even though such rights can be classified only as future or contingent, provided that he can prove that there is a present risk of their infringement to his ultimate prejudice.

The learned Judge considered it unnecessary and undesirable to decide as to the proper construction of the first deed of gift and as to the validity or otherwise of the purported deed of revocation, as the ultimate beneficiaries under that deed could not at present be ascertained with certainty.

Entail and Settlement Ordinance

Section 5—Proper person to make application for exchange—Effect of order on such application—*Fidei commissum* impressed under section 8 on property exchanged—Can such effect be avoided by execution of deeds—Validity of order made on application by wrong party.

Evidence

Evidence—Charge of selling arrack illicitly—Excise Inspector raiding dwelling house illegally without search warrant—Is evidence obtained in the course of such raid admissible—Excise Ordinance, section 36—Evidence Ordinance and " Public Policy " Evidence of decoy.

Held : (1) That evidence obtained in the course of a raid illegally carried out by an Excise Inspector is evidence admissible under our Evidence Ordinance and upon which a conviction could be based.

(2) That the cases of *Murin Perera vs. Wijeysinghe* (1950) 51 N.L.R. 377, *Andiris vs. Wanasinghe* (1950) 52 N.L.R. 83 and *David Appuhamy vs. Weerasooriya* (1950) 52 N.L.R. 87 have been wrongly decided.

(3) That our Evidence Ordinance contains the whole law of evidence except where the Legislature in other enactments has provided otherwise.

(4) That the Courts cannot import into the Evidence Ordinance new principles based on public policy.

Per DIAS, S.P.J.—(*a*) I agree that it would be immoral and undesirable that *agents provacateur* and others should tempt or abet persons to commit offences ; but it is a question whether it is open to a Court to acquit such persons where the offence is proved, on the sole ground that the evidence was procured by unfair means. Such considerations may induce the trial Judge to disbelieve the evidence, but such evidence is not inadmissible, and, therefore, when the offence charged has been proved, it is the duty of the Judge to convict.

(*b*) I cannot part with this record without condemning in the strongest terms the practice which appears to be prevalent of Excise Officers in making raids and searches without obtaining a search warrant or complying with the provisions of section 36 of the Excise Ordinance. I approve and adopt the language of my brother Gratiaen in *Karalina vs. Excise Inspector, Matara*, (1950) 52 N.L.R. 89 and trust that cases of this kind in the future will be the exception and not the rule.

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Fidei Commissum

Fidei commissum—*Gift of land by deed to donees with direction at their death to make over their shares to P/or P's heirs—Is conveyance by donees to named beneficiaries necessary to effectuate gift ?*

Where a deed of gift contained the following terms :—

" I hereby.....grant and make over as a gift unto.....my daughters Tikiri Menika and Dingiri Menika.....(the land is then described) *to be possessed by them during their life-time*.....

Further, the said Tikiri Menika and Dingiri Menika shall only possess the said lands and premises allotted to them during their life-time and shall not transfer or make the same outside and the said Tikiri Menika and Dingiri Menika shall at their death make over their shares of the lands and premises allotted to them to no other person than Punchirala or to Punchirala's heirs and shall not alienate the same to any other person whomsoever."

Held : (1) That the donor clearly intended to impress the respective shares in the property donated to each of his daughters with a *fidei commissum*, taking effect on her death, in favour of Punchirala or (should Punchirala predecease her) in favour of Punchirala's heirs.

(2) That the failure of either daughter to obey the direction that she should " make over " her share to her *fidei commissary* did not have the effect of defeating the donor's intention.

M. KIRI BANDA *vs.* H. PUNCHI APPUHAMY *et al* ... 14

When may *fidei commissary* claim a judicial declaration for the protection of his rights though such rights can be classified only as future or contingent.
See Donation 73

Risks attaching to *fidei commissary* rights which are not expressly reserved in decrees for Partition.
See Donation 73

Fidei commissum—*Gift to donee—Prohibition against alienation—Property to devolve on donee's children after donee's death—Donee's children free to deal with property—Failure to accept on behalf of* fidei commissaries—*Revocability of such gift with consent of donee.*

Entail and Settlement Ordinance (Cap. 54) Section 5—Proper person to make application for exchange—Effect of order on such application—Fidei commissum *impressed under section 8 on property exchanged—Can such effect be avoided by execution of deeds—Validity of order made on application by wrong party.*

Held : (1) That a donation to X with a prohibition against alienation and with a further provision that after X's death, the property gifted is to devolve on X's children, who are free to deal or dispose of it in any manner they like, creates only a *fidei commissum* simplex or unicum. It does not create a *fidei commissum familiae.*

(2) That in the case of a *fidei commissary* donation creating such a *fidei commissum* simplex or unicum, there must be a valid acceptance not only by the immediate fiduciary donee but also by or on behalf of the *fidei commissary* donees, even though the latter are not in esse at the time the donation is made, in order to render the donation irrevocable. *Carolis vs. Alwis*, 45 N.L.R. 156 approved, and *Wijeyetunge vs. Rossie*, 47 N.L.R. 361, not followed.

(3) That if there is no such valid acceptance by or on behalf of the *fidei commissary* donees, the donation is revocable by the donor with the consent of the fiduciary donee.

(4) That the proper person to make an application under section 5 of the Entail and Settlement Ordinance is the fiduciary alone. A person who is not a fiduciary but only an usufructuary, although such a person may be entitled to the rents and profits during his lifetime of property subject to a *fidei commissum* is not entitled to make an application under section 5 of the Entail and Settlement Ordinance. Where an application is correctly made under the said section 5 and an order is made thereon, the property taken in exchange becomes impressed with the same *fidei commissum* to which the property exchanged was subject to, by operation of section 8 of the Entail and Settlement Ordinance. The parties effecting such exchange cannot excape this consequence by executing deeds in such a way as to avoid the *fidei commissum* applying to the land taken in exchange.

(5) That where an application is made under section 5 of the Entail and Settlement Ordinance, by a person not entitled to make such an application under that section, the order made thereon is not a valid order under the said Ordinance and does not attract to itself the consequences prescribed in the said Ordinance.

WEST *vs.* ABEYAWARDENA AND OTHERS ... 92

Gaming Ordinance

Applicability of section 4 to offence under the Betting on Horse Racing Ordinance.
See Betting on Horse Racing Ordinance ... 28

Interest

Rate of interest agreed on in mortgage bond—Amount that can be recovered Money Lending Ordinance—Civil Law Ordinance.
See Mortgage 48

Judge

Settlement of action—Duty of judge in recording terms of settlement.
See Action 89

Jurisdiction

of Court to rectify on equitable grounds a written agreement which, owing to a common mistake, does not substantially represent the real intention of the parties.
See Action 89

Jus Accrescendi

When does it arise.
See Donation 35

Kandyan Law

Kandyan Law—Intestate succession—Children of two marriages—Daughters married in deega *during lifetime of father—Kandyan Law Declaration and Amendment Ordinance No. 39 of* 1938, *sections* 13, 11.

F, a Kandyan, was married twice. By his first marriage he had one son S and four daughters, and by his second marriage only one child, a daughter. F died intestate on 18th October, 1942 (*after* the commencement of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938), leaving him surviving his widow by the second marriage and the sole child by her, his only son S and two daughters by his first marriage —two of the daughters having pre-deceased him. All the five daughters were married in *deega* during the lifetime of the deceased. The District Judge held that the daughter by the deceased's second marriage was entitled to a half share of the acquired and inherited immovable property subject to her mother's life interest in her half of the acquired property.

Held: (1) That the rights of S and the sole child by the second marriage, in relation to the immovable property of the deceased, were governed by section 13 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938.

(2) That the four daughters of the deceased by his first marriage and the only daughter by his second marriage were not entitled to inherit the immovable property of the deceased, since they were married in *deega* during the deceased's lifetime.

(3) That S was accordingly entitled to the entirety of the deceased's immovable property, subject to the life-interest of the deceased's widow over one-half of the acquired immovable property.

Per BASNAYAKE, J.—"The effect of the statute is to place the children of two or more marriages on the same footing as if they were children of the same marriage."

SIRISENA *vs.* DINGIRI AND OTHERS 24

Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938

Sections 11 and 13—Intestate succession—Children of two marriages.
See Kandyan Law 24

Landlord and Tenant

See also under Rent Restriction Ordinance.

Landlord and tenant—Decree for ejectment against tenant—Is a sub-tenant who was not made party to action bound by its decree—When can a sub-tenant be evicted?—Civil Procedure Code, Section 324.

Held: (1) "That a sub-tenant in occupation of premises, under a contract of sub-tenancy entered into before an action for ejectment has commenced against the tenant, would not be bound by the decree in such an action unless he was joined as a party to the proceedings."

(2) "That such a sub-tenant cannot be judicially evicted from the premises except in terms of a decree for ejectment entered against him in an action to which he was made a party."

(3) "That the ruling of de Kretser, J. in *Siripina vs. Ekanaike* (1944) 45 N.L.R. 403 on the above points is correct, and must be regarded as binding authority unless and until it is expressly overruled by a Divisional Bench or set at nought by the Legislature".

(4) That after the tenant's rights have been extinguished to the knowledge of the sub-tenant, the landlord, *qua* owner, is entitled to sue the over-holding sub-tenant, *qua* tresspasser for ejectment.

(5) "That a sub-tenant would be bound by a decree for ejectment against the tenant, if the contract of sub-tenancy was entered into after the date of the decree. (If in the other hand, the contract of sub-tenancy was entered into *after* the institution of action, but before the date of the decree, the question whether the sub-tenant was bound by such a decree must presumably be considered with reference to the doctrine of *lis pendens*.")

Per GRATIAEN, J.—"Section 9 of the Rent Restriction Act No. 29 of 1948, now prohibits a tenant of any premises to which the Act applies from sub-letting the premises *without the prior written consent of his landlord*. Upon a breach of this statutory provision, the landlord is entitled to a decree ejecting both the tenant and the sub-tenant in occupation, and the Act in this way gives to the landlord the same right of action against both parties which, under the common law, would apparently have been available to him for the breach of an express *contractual* prohibition against sub-letting."

JUSTIN FERNANDO *et al vs.* ABDUL RAHAMAN AND ANOTHER, ... 1

Landlord and tenant—Rent Restriction Act No. 29 of 1948—Retrospective effect—Action for ejectment pending—Section 6 (3) Interpretation Ordinance—Recognised Agent—Special Agent and General Agent—Section 25 (b), (c), Civil Procedure Code.

Where, during the pendency of an action for ejectment, the provisions of the Rent Restriction Act No. 29 of 1948 were, by proclamation, declared to be applicable to the locality in which the premises in question were situated.

Held : That the coming into operation of the Act after an action for ejectment has already commenced, does not affect the landlord's right to claim ejectment under the common law which governs the relationship of landlord and tenant.

Held further : (1) That an action instituted in the name of the landlord by his attorney, holding a *general* power of attorney from the landlord, was properly constituted.

(2) That a *special* agent is one who has authority to act on his principal's behalf for some special occasion or purpose ; on the other hand, an agency may legitimately be regarded as *general* if, as in the case of a house agent, the person concerned is authorised to act generally on behalf of his principal in relation to that employment.

Per GRATIAEN, J.—Even if it were correct to say that the language of Section 13 may fairly be interpreted as being retrospective, I would say that it might at any rate be interpreted with equal fairness as being prospective only. In that state of things the law requires that the interpretation which preserves the cause of action which has already accrued to the landlord in a pending action should be preferred.

LANKA ESTATES AGENCY, LTD. *vs.* W. M. P. COREA 33

Mandamus

Mandamus, Writ of—Export of coconut oil—Procedure to be adopted in respect of shipments—Requests for information in regard to such procedure ignored—Insistence by authorities upon procedure subsequently admitted to be incorrect—Refusal to perform public duty—What constitutes such refusal—Payment of costs—Principles which apply—Customs Ordinance, sections 59, 103, and rules passed under section 103.

The petitioner company, which was an exporter of coconut oil and other commodities, applied for a mandate in the nature of a writ of mandamus, directing the respondent, the Principal Collector of Customs *inter alia* " to permit the company to export the said consignment of 200 tons of coconut oil by the s.s. ' President Buchanan ' and to pass the same for shipment on the company making payment of the correct duty and other dues in respect of the same and on its complying with the formalities imposed on it by law ". A rule *nisi* was issued by the Supreme Court on 20th February, 1951. Thereafter, and before the application could be finally disposed of, the respondent gave the petitioner an undertaking that it would not be called upon to enter a bill of lading, any quantity of oil in excess of the true quantity. The petitioner was satisfied with this undertaking, and when the application came up for disposal on 18th April, 1951, the petitioner stated that it was no longer necessary to ask that the rule be made absolute. Each party, however, insisted upon an order for costs in his favour, and this outstanding issue came up for adjudication.

Held : (1) That the petitioner's right to an order for costs against the respondent depended on whether, at the time when the proceedings were instituted, good grounds existed to justify the application for a writ.

(2) That, despite a statutory direction to the contrary, the insistence by the respondent upon the bill of entry being incorrectly filled up, in such a manner that, upon the face of the document, the petitioner would be liable to pay a heavier export duty than was justly due, would amount to a refusal to perform a public duty, and that a *mandamus* would clearly lie.

Held further : That there is a refusal to perform a duty, where it is shown that a party withholds compliance and distinctly determines not to do what is required.

Per GRATIAEN, J.—" I trust that it will never be suggested that public officers need not observe the same high standard which is expected from ordinary citizens with regard to the duty to attend promptly to official or business correspondence."

WIJESEKERA & CO., LTD. *vs.* THE PRINCIPAL COLLECTOR OF CUSTOMS, COLOMBO 81

Mortgage

Mortgage Bond—Rate of interest agreed on in bond—What is recoverable—Money-Lending Ordinance—Civil Law Ordinance.

Where on a mortgage bond the rate of interest agreed on was 30% there is no justification for the trial Judge's view that only 20% is recoverable.

The rates prescribed in section 4 of the Money-Lending Ordinance are not maximum rates of interest. In a mortgage bond action which is not a proceeding under the Money Lending Ordinance the plaintiff can recover interest at the agreed rate, provided of course the interest recovered does not exceed the principal.

GUNATILAKA & OTHERS *vs.* DE ZOYSA ... 48

Motor Car Ordinance No. 45 of 1938

Motor Tribunal—Case stated by way of Appeal—Application for licence for lorry—Form and validity of—Motor Car Ordinance No. 45 of 1938—Sections 4 (6) (a), 31, 43, 45 (3) (d).

An application for a licence for a lorry stated that the lorry was to be used for the purpose of carrying sundry goods, tiles, bricks, etc. of applicant's business and for hire, and that it was to provide a service for the Kandy District and on the routes Kandy to Kurunegala and Kandy to Colombo.

Objections were taken on the grounds that the application did not comply with the requirements of sections 43, 31, 45 (3) (*d*) of the Motor Car Ordinance No. 45 of 1938 in that the application was not in the form prescribed in the 2nd Schedule to the Ordinance and the applicant failed to specify the place or places outside the proposed area of operation and the purposes for which such service was necessary.

On a case stated by the Motor Tribunal,

Held: (1) That as the application had substantially complied with the requirements of the Motor Car Ordinance the Commissioner had properly entertained it.

(2) That where an appeal by way of case stated lies only on a question of law, the Tribunal should base the question of law, on which the opinion is desired, on the facts as found by them.

Motor Car Ordinance, No. 45 of 1938—Sections 69, 130, 133, 137 and 138—Motor Car Accident—Driver authorised in certificate of competence to drive car not exceeding specified weight—Action claiming damages by injured party—Comprehensive policy of Insurance—Condition of policy that insurer not liable for damage caused while car being driven by person not holding certificate of competence—Action by Insurer for declaration pending action by injured party for damages that insurer not liable to indemnify owner of car or to pay damages that may be decreed in favour of injured party—Injured party added-defendant—Rights and duties of insurer.

The defendant was at all material times the owner of a motor car which was 23 cwts. 3 qrs. in weight. On 11-4-46 the plaintiff company—" an authorised insurer ", within the meaning of the Motor Car Ordinance No. 45 of 1938—issued to the defendant in respect of his motor car a comprehensive policy of insurance covering 3rd party risks for a period of one year. It was a condition of the policy that that the company would not be liable in respect of any claim arising while the vehicle was being driven by an " excluded driver " which expression as defined in the Schedule to the policy included " any person who is not the holder of a certificate of competence unless he has held and is not disqualified from obtaining such certificate ".

On 17-5-46 the said car, while being driven by the defendant's driver, who held a certificate of competence only to drive a motor car not exceeding 19 cwts. in weight, met with an accident resulting in injuries to the added-defendant, who instituted action No. 18669 of the District Court of Colombo, claiming damages in Rs. 15,000.

The plaintiff company thereafter instituted the present action under section 137 of the Motor Car Ordinance for a declaration against the defendant that it was not liable to indemnify him in respect of the accident because the motor car was at the relevant time being driven by an excluded driver within the meaning of the policy. The company further prayed for a declaration that as the condition in respect of which the breach was committed was a condition referred to in section 130 (4) of the Ordinance, it was not liable under section 133 to pay any damages that may be decreed in favour of the added-defendant in the pending action 18669.

The added-defendant intervened on notice of action being served on him.

The learned District Judge dismissed the company's action on the ground that it could not rely on a breach of the condition of the policy which excludes liability when the car is being driven by an " excluded driver ".

The plaintiff appealed and the added-defendant cross-appealed

Held: (1) That in view of section 69 of the Motor Car Ordinance, the defendant's driver's certificate of competence was not valid for any motor car which exceeded 19 cwts. in weight, and therefore in permitting the driver to drive the motor car in question the defendant committed a breach of a condition of the policy.

(2) That the breach of the condition relied on by the company was a breach of a condition contemplated by section 130 (4) (*c*) (ii) of the Ordinance, because the driver was not the holder of a certificate of competence within the meaning of that section.

(3) That the company was under no contractual liability to indeminify the defendant in respect of the said accident.

(4) That as the company in its notice to the added defendant failed to specify the breach of the condition relied on by it as required by the proviso to section 137 of the Ordinance the added defendant's statutory right to obtain satisfaction of the decree under section 133 direct from the company would be unaffected by the declaration of non-liability against the defendant.

(5) That in the circumstances, the company could discharge its obligation under section 133 and seek its remedies against the defendant under section 138 of the Ordinance.

Partition

Transfer pending partition—Final decree—Suit for cancellation of deed of transfer—Failure of consideration.

Sale—Undivided land—Contingent interest in transfer pending partition suit, together with another land—Allocation of a smaller interest by final decree—Action by vendee to cancel sale—Failure of consideration—Conventio rei speratae—*Impossibility of performance—Roman-Dutch Law.*

By deed, the plaintiff bought from the defendant for Rs. 5,000 two lands :—(*a*) an undivided one hundred acres of a land called " Shand's Land ", in extent 4,000 acres, together with the share which may be alloted to him under the final decree in the partition case then pending : (*b*) an undivided paddy field in " Shand's Land."

There were no express covenants in the deed, by which the defendant undertook to indemnify the plaintiff against loss.

In the final decree, the plaintiff was allotted only 13 acres 1R. 20P. and he instituted an action to cancel the deed of sale, and for the return of Rs. 5,000, on the ground that there was a total failure of consideration of the contract of sale.

Held: (1) That the express terms of the deed and the facts of the case, show that the sale of the contingent interests in the land under partition, was a contract under which the plaintiff purchased " a chance or expectation that a thing would come into existence ", and was binding on the parties.

(2) That there was no total failure of consideration, as some benefits, even though smaller than the parties had hoped, had accrued to the plaintiff under the partition decree, together with an interest in the paddy land.

(3) That the principles of Roman-Dutch Law dealing with "impossibility of performance" in relation to contracts, apply only to "executory contracts", and did not apply to the contract of this case, which from the moment of its execution, operated as a present sale of a contingent interest in one land, as well as of an existing interest in another.

E. A. WIJESINGHE *vs.* D. H. SONNADARA ... 64

Penal Code

Penal Code — Section 398 — Cheating — Cheque issued without sufficient funds in bank—Reasonable grounds for believing that cheque would be met—Intention to defraud.

Held: That where a person, being aware that he has not sufficient funds in his bank to meet the full amount of a cheque, nevertheless issues such cheque in the honest belief that it would be met on presentation, he cannot be held guilty of cheating as he had no intention to defraud.

Per GRATIAEN, J.—The position would be different, of course, if at the time when the cheque is given the accused has nothing but a hope (as opposed to a genuine and reasonable belief) that sufficient money would be paid into his bank to meet the cheque.

SALIH BIN AHMED *vs.* N. M. HOWTH 62

Pleadings

Application to amend—When should it be refused.
See Civil Procedure Code 67

Police Ordinance

Section 69—Applicability of—To offence under the Betting on Horse Racing Ordinance.
See Betting on Horse Racing Ordinance ... 28

Prevention of Frauds Ordinance

Informal agreement to reconvey land—is obnoxious to the provisions of section 2.
See Trust 41

Privy Council

Privy Council—Appellant charged with murder of three persons—Three separate counts—No evidence of corpus delicti *of one of the deceased—Defence that missing personal committed the murder—Conviction on all counts—Function of the Court of Criminal Appeal—Court should decide whether sufficient evidence for jury to infer missing person dead and to convict appellant on each count—Not necessary for the Court to consider whether charges have been proved beyond reasonable doubt—Charge fairly put to jury—No misdirection—Joinder of murder charges in the same indictment.*

The appellant was charged in three separate counts with the murder of three persons Muttusamy (count 1), Baby Nona (count 2), Hemalatha (count 3). The Crown could not establish the *corpus delicti* of Muttusamy, but led evidence to prove that the three persons had been murdered by the appellant. The defence of the appellant at the trial was that Muttusamy had committed the murder of Baby Nona and Hemalatha, and had disappeared. The jury found the appellant guilty on all three counts.

On appeal in the Court of Criminal Appeal it was argued by the defence (1) that on count 1 there was no evidence that Muttusamy was dead, and (2) that with regard to counts 2 and 3 as the Crown had put forward as the motive for killing Baby Nona and Hemalatha the fact they were privy to the killing of Muttusamy the conviction on these counts could not stand if Muttusamy was not proved to be dead.

The Court of Criminal Appeal held that the death of Muttusamy was not established beyond reasonable doubt, but that there was sufficient evidence to establish beyond reasonable doubt the charges on counts 2 and 3.

On appeal to the Privy Council the counsel for the appellant argued that the Court of Criminal Appeal had exceeded its function by substituting its own verdict for that of the jury, and that the Commissioner at the trial had failed to direct the jury that if they acquitted the appellant on count 1 for lack of evidence of Muttusamy's death, they should approach counts 2 and 3 on the assumption that Muttusamy was alive, and to point out that this was a matter vital to appellant's defence.

Held: (1) That it was sufficient for the Court of Criminal Appeal merely to have considered whether there was any evidence for the jury to infer that Muttusamy was dead and not to have decided that the death of Muttusamy had not been established beyond all reasonable doubt.

(2) That there was clearly abundant evidence to justify a verdict of guilty on each of the counts 2 and 3 whether Muttusamy was or was not proved to be dead.

(3) That it was sufficient for the Court of Criminal Appeal to have considered whether there was any evidence upon which the jury could find their verdict and not to have enquired whether the evidence established the charges on counts 2 and 3 beyond reasonable doubt.

(4) That the charge as a whole was fairly and squarely put to the jury, and the jury had clearly put before them the issue whether the appellant or Muttusamy was the murderer of Baby Nona and Hemalatha, and there was no misdirection by the Commissioner.

(5) That the evidence in the present case justified the joinder of all three counts for murder in the same indictment.

EBERT SILVA *vs.* THE KING 21

Proctor and Client

Proctor and client—Gift—Donee, wife of donor's proctor—Deed of gift drafted on proctor's instruction by another notary who attested same—No opportunity to donor of independent advice—Undue influence—Presumption of.

The plaintiff apprehensive of death entrusted to one W, his proctor and a close relative, the duty of drafting and attesting a number of conveyances. W, obtained the services of another notary to draft and attest one of the deeds by which the plaintiff conveyed irrevocably and with immediate effect a house to his niece, who was the proctor's wife. The terms of the deed were communicated by W,

himself and were in complete accord with the plaintiff's wishes. At the time of the execution the plaintiff's faculties were normal and unimpaired.

The plaintiff sought to set aside the deed of gift on the ground that it was obtained by undue influence and duress on the part of W, that the transaction was vitiated because W, being plaintiff's legal adviser stood in a position of active confidence, and that the gift was bad because no delivery of the property had taken place.

Held : (1) That the deed of gift belongs to a class of case where the special relationship between the proctor and his client at the time of execution of the gift raises a presumption that the former had influence over the latter.

(2) That in such a case the gift should be set aside unless the presumption is rebutted by the donee by proof of circumstances which satisfy the Court that the gift was the result of the free exercise of the donor's independent will.

(3) That in the circumstances of this case the presumption of undue influence has not been rebutted.

Per GRATIAEN, J.—" The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee (*i.e.* the solicitor or the relative in whom the solicitor has a special interest) and with the full appreciation of what he was doing."

Public Duty

Refusal to perform—What constitutes refusal.
See Mandamus 81

Public Servant

Does action lie against public servant personally for alleged breach of contract entered into by him in his official capacity and not for his personal benefit.
See Contract 17

Refusal to perform public duty—What constitutes refusal.
See Mandamus 81

Quia Timet Action

Ingredients of cause of action.
See Donation 73

Registration

Registration—Sale of land to defendants—Registration in wrong folio—Sale to plaintiff—Registration in correct folio—Valuable consideration—Burden of proof—Fraud and collusion—Section 7 (2) *of Registration of Documents Ordinance No.* 23 *of* 1927.

The plaintiff, being aware that a vendor's interests in a certain land had already been sold by him to the defendants, who were in possession thereof, but whose deed was wrongly registered, purchased a portion of the same interest, and instituted an action to partition the land, making the defendants and his vendor, parties to it.

The main contest was between the defendants and the plaintiff as to the superiority of their respective titles. The plaintiff failed to lead sufficient evidence on the issue of valuable consideration on his deed. The learned Judge, too, without recording any specific finding on this issue, proceeded to decide the issue of fraud and collusion, which he held in plaintiff's favour, and gave the interest claimed by him to the plaintiff.

The evidence, however, disclosed that the plaintiff had joined together with the vendor, in order to gain for themselves a mutual advantage against the defendants. The defendants appealed.

Held : (1) That the burden was on the plaintiff, to establish that valuable consideration had passed on his deed, before he could claim the benefit of prior registration.

(2) That in the circumstances outlined above, the plaintiff was guilty of fraud and collusion, as contemplated in section 7 (2) of Ordinance No. 23 of 1927.

Registration of Documents Ordinance No. 23 of 1927

Fraud and collusion as contemplated in section 7 (2).
See Registration 70

Rent Restriction Ordinance

See also under Landlord and Tenant.

Landlord and Tenant—Premises required for a member of landlord's family for trade or business—Landlord's right to eject—Section 13 (1) (*c*), *Rent Restriction Act No.* 29 *of* 1948.

Held : That section 13 (1) (*c*) of the Rent Restriction Act No. 29 of 1948 does not give the landlord the right to bring a suit in ejectment in a case where he requires the premises for the purpose of trade or business for a member of his family.

Landlord and Tenant—Co-owners—Premises reasonably required for residence for one co-owner—Rent Restriction Act No. 29 *of* 1948—*Section* 13 (1) (*c*).

Held : That section 13 (1) (*c*) of the Rent Restriction Act No. 29 of 1948 does not enable one of several co-landlords to sue a tenant in ejectment on the ground that he requires the premises for his occupation as a residence.

Sale

Sale—Undivided land—Contingent interest in transfer pending partition suit, together with another land—Allocation of a smaller interest by final decree—Action by vendee to cancel sale—Failure of consideration.
See Partition 64

Search Warrant

Legality of raiding dwelling house without obtaining search warrant.
See Evidence 6

Legality of searching and arresting accused without warrant—Offence of receiving illegal bets.
See Betting on Horse Racing Ordinance ... 28

Statutes

Construction of—Retrospective effect not to be given so as to impair existing rights—unless language of statute is quite clear.
See Landlord and Tenant 33

Interpretation of—When is it permissible to go outside enactment to ascertain its scope and purpose.
See Certiorari 49

Thesawalamai

Thesawalamai—Right of pre-emption—Sale without notice in derogation of pre-emptor's right—Time within which right could be exercised.

Under the Thesawalamai, where a person having the right of pre-emption of a land complained that his parents, in derogation of his right, had sold the property to strangers without notice to him, and alleged that he had always been ready and willing to buy the land at its market value, had the purchasers been willing to sell it.

Held : (1) That such a person is in law entitled to reasonable notice of his parents' intention to sell the property.

(2) That it is incumbent on him to establish by positive proof that, had he in fact received the requisite notice, he would and could have purchased the property himself within a reasonable time, rather than permit it to be sold to a stranger.

(3) That the burden of such proof lay on the person seeking to exercise the right of pre-emption.

(4) That a would-be pre-emptor cannot claim to be in a better position by not receiving notice of the intended sale than he would have been if he had received such notice.

K. VELUPILLAI *et al vs.* S. R. PULENDRA AND T. M. Sabaratnam *et al* 45

Thesawalamai—Dowried daughters—Gift after marriage, not dowry—Married daughters under the Thesawalamai, who have been dowried at the time of their marriage, can prefer a claim to the estate of their parents, only if there are no other children.

Held : That a gift of lands made after marriage is not a *doty* or *doty ola.*

KANDAPPER *vs.* VEERAGATHY AND ANOTHER ... 61

Thesawalamai—Ordinance 59 of 1947—Action for pre-emption brought one year after registration of transfer deed—Sale before Ordinance came into operation—Vested rights—Retrospective effect.

Held : (1) That Ordinance 59 of 1947, which lays down that no action to enforce the right of pre-emption shall be instituted or maintained, if more than one year has elapsed from the date of registration of the purchaser's deed of transfer, does not apply, where the sale took place before the Ordinance came into operation.

(2) That under our law, a statute is not to be construed as taking away vested rights unless there is express provision to that effect.

KUMARASWAMY *vs.* SANMUGAM AND OTHERS ... 112

Transfer of Land

Transfer pending partition—Final decree—Suit for cancellation of deed of transfer—Failure of consideration.
See Partition 64

Trust

Trust—Sale of land by defendants—Subsequent lease to them—Purchase of land by plaintiff after expiry of lease—Plaintiff's action to eject defendants—Defence that land held in trust by plaintiff's vendor on informal agreement to reconvey—Prevention of Frauds Ordinance section 2 (Chap. 57).

The defendants sold by deed for valuable consideration a land to one I, who thereafter notarially leased it to them, and after the expiration of the lease sold it to the plaintiff.

In an action for ejectment by the plaintiff, the defendants successfully contended in the District Court that they had conveyed the property to I "in trust" and subject to the terms of an informal agreement where I had undertaken to reconvey the land to them within eight years on payment of Rs. 2,000.

Held : (1) That the conveyance of land by the defendants to I by deed was clearly a sale and the facts in the case establish that there was no trust in favour of the defendants.

(2) That an informal agreement to reconvey land is of no evail as it is obnoxious to the provisions of section 2 of the Prevention of Frauds Ordinance.

P. THANGARELANTHAM *vs.* S. SAVERIMUTTU *et al*... 41

Undue Influence

Presumption of—Deed obtained under—Action to set aside deed.
See Proctor and Client 107

Vendor and Purchaser

Sale of land to two purchasers—Action by third party against one of them—Eviction—Right of other purchaser to sue vendor.
See Damages 38

Wages Boards Ordinance

Wages Boards Ordinance—Charge under section 44 (1) (b)—Proceedings instituted against company with sanction of Commissioner of Labour—Summons

served on managing director—Is the managing director the lawful representative of the company?—Criminal Procedure Code—Meaning of the words "other like officer" in section 45 (3)—Has the Company been duly summoned and afforded opportunity of being heard?

Where, on the prosecution of a company under the Wages Boards Ordinance, summons was served on the managing director as the legal representative thereof—

Held : (1) That the summons had not been duly served on the company, and that the conviction was bad, as the trial had taken place in its absence.

(2) That the presence of the managing director in Court cannot regularise the failure to serve summons on the company and secure its attendance in the way prescribed by the Criminal Procedure Code.

(3) That the persons contemplated by the words "other like officer" in section 45 (3) of the Criminal Procedure Code are *ejusdem generis* of Secretary, and cannot be persons belonging to a category different to that of Secretary.

Per BASNAYAKE, J.—"An accused person cannot under our law be convicted of an offence unless he has had an opportunity of being heard. Our Criminal Procedure Code contains provisions designed to achieve that end."

Wills Ordinance

Words and Phrases

Present : GRATIAEN, J. AND GUNASEKARA, J.

JUSTIN FERNANDO *et al* vs. ABDUL RAHAMAN & ANOTHER

S. C. No. 167—*D. C. Colombo, No.* 16361/*M*

Argued on : 3-7-1951.
Decided on : 16-7-51.

Landlord and tenant—Decree for ejectment against tenant—Is a sub-tenant who was not made party to action bound by its decree—When can a sub-tenant be evicted?—Civil Procedure Code, Section 324.

Held : (1) " That a sub-tenant in occupation of premises, under a contract of sub-tenancy entered into before an action for ejectment has commenced against the tenant, would not be bound by the decree in such an action unless he was joined as a party to the proceedings."

(2) " That such a sub-tenant cannot be judicially evicted from the premises except in terms of a decree for ejectment entered against him in an action to which he was made a party."

(3) " That the ruling of de Kretser, J. in *Siripina vs. Ekanaike* (1944) 45 N. L. R. 403 on the above points is correct, and must be regarded as binding authority unless and until it is expressly overruled by a Divisional Bench or set at nought by the Legislature ".

(4) That after the tenant's rights have been extinguished to the knowledge of the sub-tenant, the landlord, *qua* owner, is entitled to sue the over-holding sub-tenant, *qua* tresspasser for ejectment.

(5) " That a sub-tenant would be bound by a decree for ejectment against the tenant, if the contract of sub-tenancy was entered into after the date of the decree. (If in the other hand, the contract of sub-tenancy was entered into *after* the institution of action, but before the date of the decree, the question whether the sub-tenant was bound by such a decree must presumably be considered with reference to the doctrine of *lis pendens*.")

Per GRATIAEN, J.—" Section 9 of the Rent Restriction Act No. 29 of 1948, now prohibits a tenant of any premises to which the Act applies from sub-letting the premises *without the prior written consent of his landlord.* Upon a breach of this statutory provision, the landlord is entitled to a decree ejecting both the tenant and the sub-tenant in occupation, and the Act in this way gives to the landlord the same right of action against both parties which, under the common law, would apparently have been available to him for the breach of an express *contractual* prohibition against sub-letting."

Cases referred to : *Siripina vs. Ekanaike* (1944) 45 N. L. R. 403.
Mohamed Haniffa vs. Dissanayake (1922) 4 T. C. L. R. 94.
London Jewellers Ltd. vs. Attenborough (1934) 1 K. B. 206 at 222.
Jacobs vs. London County Council (1950) A. C. 367.
Abdulla & Co. vs. Kramer Bros. (1928) C. P. D. 423.
Udayappa vs. Goonetilleke (1925) 27 N. L. R. 59.
Landers vs. Vogel (1906) 27 Natal L. R. 458.
Poulter vs. Davis (1908) T. B. 36.
Glathar vs. Hussan (1912) T. P. D. 327.
Colonial Government vs. Aunalinda Village Management Board (1907) 24 S. C. 276.
Macdonald vs. Hume (1875) Buch. 8.

Disapproved : *Kudoos Bhai vs. Visvalingam* (1948) 50 N. L. R. 58.*

H. W. Jayawardene, for the appellants.
E. B. Wikremanayake, K.C., with *C. Renganathan*, for the plaintiff-respondent.
G. L. L. de Silva, for the defendant-respondent.

GRATIAEN, J.

This appeal relates to premises No. 97, Chatham Street, Colombo, in which the 1st appellant has for over 20 years run a barber's saloon. The premises form part of a valuable property which had belonged for many years to a gentleman named Brodie. A previous tenant of Brodie had carried on a hotel business in the other portion of the premises, but he later sold the hotel business and assigned the tenancy rights under Brodie in respect of the entire property including No. 97 to the defendant Robert de Silva who attorned to Brodie. At the same time the 1st appellant, who had been the sub-tenant under the previous tenant in respect of No. 97, attorned to the defendant as his sub-tenant. The monthly rental for the barber's saloon—*i.e.*, premises No. 97—was Rs. 115. The 2nd appellant is employed as a servant by the 1st appellant.

In 1944, the plaintiff purchased the entire premises, including No. 97, from Mr. Brodie, and the defendant having now attorned to the plaintiff as his tenant, continued to carry on the hotel business in the main portion of the building while the 1st appellant, as his sub-tenant, continued to run the barber's saloon at premises No. 97, as the 1st defendant's sub-tenant.

*39 C. L. W. p 20. (Edd.)

Admittedly, no privity of contract was established between the 1st appellant and the plaintiff.

At the end of June, 1945, the plaintiff gave the defendant one month's notice to vacate the entire premises. It has not been proved that the 1st appellant was informed of this fact at the time. The defendant in the first instance refused to quit, and on 2nd August, 1945, the plaintiff sued him in this action for ejectment pleading, *inter alia*, that the entire premises were " reasonably required by him for use and occupation as a place of business " within the meaning of section 8 (*c*) of the Rent Restriction Ordinance No. 60 of 1942. The 1st appellant was not joined as a party in the action, and remained in occupation of premises No. 97, continuing regularly to pay rent to the defendant on the footing that the sub-tenancy was still in force.

The action for ejectment was settled on 13th May, 1946, as between the plaintiff and the defendant. The consent decree provided that the defendant should be forthwith ejected from the premises No. 97—that is, the barber's saloon occupied by the 1st appellant—but that he should, subject to certain conditions which do not affect the present issue, remain in occupation as the plaintiff's tenant of that part of the premises in which the hotel business was carried on. But for this settlement, the Court would not have had jurisdiction to grant a decree for ejectment except on proof that the case fell within section 8 (*c*) of the Rent Restriction Ordinance of 1942. The 1st appellant was not a party to this compromise.

In the state of the law as it was understood by practitioners and litigants at that time, the order for ejectment in respect of premises No. 97, Chatham Street, was assumed to be ineffectual against the 1st appellant. *Vide* the judgment of de Kretser J., with whom Soertsz J. agreed, in *Siripina vs. Ekanaike* (1944) 45 N. L. R. 403. In this view of the legal position, the plaintiff called upon the defendant to institute separate proceedings, independently of the decree in the present action, to eject the 1st appellant so that the plaintiff could have vacant possession of the premises. Accordingly the defendant made an application to the Board of Assessment constituted under the Rent Restriction Ordinance of 1942 (which was then in force) for authority to sue the 1st appellant for ejectment. After due inquiry the Board refused this application on 9th September, 1946.

There is no evidence as to what negotiations took place between the plaintiff and the defendant after this order of 9th September, 1946, was made. All that is clear is that the 1st appellant continued from month to month to pay his rent to the defendant for the occupation of the barber's saloon. Whether this rent was passed on to the plaintiff is not clear. At any rate, no attempt was made in the present action for over two years to execute the decree for ejectment in respect of premises No. 97. Nor was a regular action instituted against the 1st appellant either by the plaintiff or by the defendant in order to test his right to remain in occupation.

Matters stood in this way until February, 1949. Shortly before this date a judgment of special interest to landlords, tenants, and sub-tenants had been pronounced by Nagalingam J., sitting alone, in *Kudoos Bhai vs. Visvalingam* (1948) 50 N. L. R. 59.* That judgment was immediately concerned with the question whether a sub-tenant could properly be joined in a landlord's action for ejectment against the tenant and the question was answered in the negative. The judgment proceeded, however, upon a consideration of several decisions of the Indian Courts and of certain passages in Voet and Nathan's Common Law of South Africa, to dissent from the earlier ruling which was considered on this particular point to be an *obiter dictum* in *Siripina's case*. In the result my brother Nagalingam pronounced that although a sub-tenant could not be joined in an action for ejectment instituted by the landlord against the tenant, he was nevertheless bound by the decree for ejectment entered in such an action, and was accordingly liable to be ejected summarily from the premises in execution proceedings taken against the judgment-debtor under section 324 of the Civil Procedure Code.

The plaintiff encouraged no doubt by the terms of this decision now made an application for execution of his decree in respect of premises No. 97, Chatham Street. To this application the defendant consented in due course. The appellants refused, however, to vacate the premises and resisted the attempt of the Fiscal's Officer to turn them out. Their position was that the decree did not bind the 1st appellant, and that it therefore could not bind his servant the 2nd defendant either. The plaintiff then made a further application to have the appellants removed from the premises in terms of the decree under which, it was argued, they were bound on the authority of *Kudoos Bhai's case*.

The learned District Judge, in dealing with this application, was faced with the invidious choice of deciding whether he should follow what had been ruled by Nagalingam J. to be an *obiter dictum* of de Kretser J. in *Siripina's case* or the later *obiter dictum* of Nagalingam J. himself in

* 39 C. L W. p 20. (Edd.)

Kudoos Bhai's case. He selected the latter alternative, and allowed the plaintiff's application. The appellants have now invited this Court to hold that *Siripina's case* was correctly decided. The only other local decision to which we have been referred was *Mohamed Haniffa vs Dissanayake* (1922) 4 T.C.L.R. 94, where Porter, J. sitting alone took the view, in connection with a criminal prosecution, that a writ of possession issued under a decree for ejectment did not bind a sub-tenant who was not a party in the action. Unfortunately, this last decision makes no specific reference to the Roman Dutch Law or to the provisions of the Civil Procedure Code which are applicable.

I desire to state at the outset that I am unable to agree that the view expressed by de Kretser, J. and endorsed by Soertsz, J. in *Siripina's case* regarding the position of a sub-tenant in relation to a decree for ejectment against the tenant only can properly be described as an *obiter dictum.* It is true that this judgment decided that the landlord's application under the relevant provisions of the Civil Procedure Code had not been made in proper form. Nevertheless, the learned Judges *also* decided that the sub-tenant was in any event not " bound by the decree " entered against the tenant who was his immediate landlord in proceedings to which he, *i.e.*, the sub-tenant, was not a party. " Certain subordinates ", said de Kretser, J., " may be bound by the decree, but a tenant's position is different. Ordinarily, he would not be bound by the decree unless he was a party to the case ". In another passage of the judgment, he expressly states " *If it is sought to bind him (the sub-tenant) by a decree, he ought to be made a party to the action* ".

The decision in *Siripina's case* is in my opinion based squarely upon two separate and distinct grounds, and each ground is part of the *ratio decidendi.* " We are not entitled to pick out the first reason as the *ratio decidendi* of the case and neglect the second, or to pick out the second reason as the *ratio decidendi* and neglect the first ; we must take both as forming the grounds of the judgment ", per Greer, J. *in London jewellers Ltd. vs. Attenborough* (1934) 1 K. B. 206 at 222. This point of view was recently emphasised by Lord Simonds in *Jacobs vs. London County Council* (1950) A. C. 367. " There is no justification ", he said, " for regarding as *obiter dictum* a reason given by a Judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be *obiter*, then a case which *ex facie* decides two things would decide nothing ". Applying these principles, I think that the decision in *Siripina's case*, unless over-ruled by a Divisional Bench, is an authority which must be followed by all Judges of first instance and by any Judge of this Court who sits alone to dispose of appeals from a decision of a minor Court.

Section 324 (1) of the Civil Procedure Code appears in the Chapter dealing with the execution of decrees for possession of immovable property. Its provisions are in the following terms ;—

> " (1) Upon receiving the writ the Fiscal or his officer shall as soon as possible as reasonably may be repair to the ground, and there deliver over possession of the property described in the writ to the judgment-creditor or to some person appointed by him to receive delivery on his behalf, *and if need be by removing any person bound by the decree who refuses to vacate the property* :
>
> Provided that as to so much of the property, if any, as is in *the occupancy of a tenant or other person entitled to occupy the same as against the judgment-debtor, and not bound by the decree to relinquish such occupancy,* the Fiscal or his officer shall give delivery by affixing a copy of the writ in some conspicuous place on the property and proclaiming to the occupant by beat of tom-tom, or in such other mode as is customary, at some convenient place, the substance of the decree in regard to the property ; and
>
> Provided also that if the occupant can be found, a notice in writing containing the substance of such decree shall be served upon him, and in such case no proclaiming need be made ".

It is significant that the language of the first proviso recognises that, at least in certain cases, a tenant in occupation may, notwithstanding a decree for possession, be entitled under the common law " to occupy the (premises) as against the judgment-debtor " whose rights have been defeated by the successful party. Section 287 (2) makes section 324 (1) also applicable to orders made under section 287 (1) for delivery of possession to execution-purchasers under money decrees. Such an order, it should be noted, is only permissible if the property sold is " in the occupancy of the judgment-debtor *or* of some person on his behalf *or* of some person claiming under a title created by the judgment-debtor *subsequent to the seizure of the property* ". A person in the position of the 1st appellant does not fall within any of these categories, and such a case must be dealt with under the special provisions of section 288. Section 324 has therefore no application if the property purchased in execution proceedings is in the occupation of a tenant who does not answer to one of the descriptions specified in section 287 (1).

The question whether in Ceylon a person in occupation of premises as a sub-tenant of the judgment-debtor is " bound by " the decree in favour of the latter's landlord, *qua* judgment creditor, must necessarily be determined by

reference to the principles of the Roman Dutch Law which regulate the rights and obligations of landlords, tenants and sub-tenants *inter se*—subject, of course, to any local enactments which may be applicable. No useful purpose can therefore be served by examining the position of sub-tenants under the English Law or the Law of India. If those systems be identical in any respect with the Roman Dutch Law on this subject, the coincidence, however interesting to students of comparative law, is nevertheless irrelevant.

Under the common law the tenant of an *urban tenement* is free, in the absence of any express agreement to the contrary, to sub-let the premises to a third party without his landlord's permission. There are apparently certain exceptions to this general rule, but they do not touch the present issue. *Voet* 19-2-5 (*Berwick's translation*). *Wille's Landlord and Tenant* (*4th Edition*) *page 112*. The contract of sub-tenancy between the 1st appellant and the defendant was therefore at its inception a perfectly legitimate transaction. When the plaintiff purchased the premises, and the defendant attorned to him, a new contract of tenancy came into operation between the plaintiff and the defendant, but it did not affect and was not affected by the existing contract of sub-tenancy between the defendant and the 1st appellant. The rent under the main lease was payable by the defendant to the plaintiff, and the rent under the sub-tenancy continued to be payable by the 1st appellant to the defendant. No privity of contract existed between the plaintiff and the 1st appellant. *Voet* 19-2-21 ; *Wille's Landlord and Tenant* (*4th Edition*) *page 108*. As I see it, each of these co-existing contracts would remain in force until it was terminated by due notice or in some other manner recognised by law. Upon its termination, the overholding tenant (or sub-tenant as the case may be) became liable to be ejected by due process of law under a decree entered against him by a Court of competent jurisdiction. If the tenant retained the right to occupy the premises as against his overholding sub-tenant, only the tenant could sue the latter for ejectment on a cause of action founded on contract. If, on the other hand, the tenant had himself lost his tenancy rights, other considerations would arise.

Admittedly no privity of contract exists between a landlord and a sub-tenant, but I am aware of no principle of the common law which precludes a landlord from recovering possession of the premises in an action for ejectment against the overholding sub-tenant *after the rights of the tenant have been extinguished*. In *Kudoos Bhai's case* Nagalingam, J. took the view that " no person other than the tenant can properly be sued by the landlord for ejectment ". In arriving at this conclusion he relied on the authority of *Voet 19-2-21* and *Nathan's Common Law of South Africa Vol. 2 (1904 Edition) page 807* (which seems to correspond to *page 904 para 911* of the 1913 Edition). With great respect, I think that these passages refer to actions *for the recovery of rent* and not specifically to proceedings *for ejectment*. No doubt a landlord's claim to eject his immediate tenant is also founded on contract, but this does not mean that he is not entitled, *qua* owner, to claim a decree for ejectment against an overholding sub-tenant whose continued occupation of the premises has in law been reduced to that of a mere trespasser.

The South African Courts have assumed that there are circumstances in which the joinder of the tenant and his sub-tenant as co-defendants in an action instituted for a cancellation of the main lease *and for ejectment* is quite appropriate. In *Abdulla & Co. vs. Kramer Bros.* (1928) C. P. D. 423, a lessee, contrary to an express term in the contract of lease, had sub-let the premises to a third party. The landlord relying on this breach, claimed a cancellation of the lease and an order for ejectment in an action to which the lessee and his sub-tenant were made defendants. Benjamin, A. J. P. in a considered judgment entered a decree (1) declaring as against the lessee that the lease was cancelled (2) issuing as against both defendants an order for ejectment. In Ceylon, I find that in *Udayappa vs. Goonetilleke* (1925) 27 N. L. R. 59 a decree for rent and ejectment against a sub-lessee (who was a co-defendant with the lessee) was set aside by Sampayo, J. and Maartensz, A. J. in respect of the decree for rent but *not in respect of the decree for ejectment*. This authority is admittedly of little assistance because the question of the propriety of the decree for ejectment had been raised but was later abandoned by Counsel.

Section 9 of the Rent Restriction Act, No. 29 of 1948, now prohibits a tenant of any premises to which the Act applies from sub-letting the premises *without the prior written consent of his landlord*. Upon a breach of this statutory provision, the landlord is entitled to a decree ejecting both the tenant and the sub-tenant in occupation, and the Act in this way gives to the landlord the same right of action against both parties which, under the common law, would apparently have been available to him for the breach of an express *contractual* prohibition against sub-letting.

I have been handicapped by my inability to have access to some of the South African Reports

cited in the text-books, but the following reference appears in *Bisset and Smith's Digest of South African Case Law Vol.* 2 *page* 810 :—

> " In an action by plaintiff against defendant for cancellation of a lease in consequence of default, and for ejectment of the defendant ' *or any other person* ' from the property, and for damages, *Held* that plaintiff was entitled to cancellation of the lease and damages, but that *as to the claim for ejectment*, as persons other than the defendant were in occupation and had not been joined as defendants, *the claim must fail. Landers vs. Vogel* (1906) 27 Natal L. R. 458 ".

Nathan (1913 *edition*) 11, 901, also refers to the ruling in *Poulter vs. Davis* (1908) T. H. 36 which held that an order of Court " directing a tenant to vacate leased premises has *no application to sub-tenants*, holding under him with the landlord's knowledge, *who have not had notice of the proceedings in ejectment* ". (This report is unfortunately not available to me).

Mr. Wikremanayake has relied on *Wille on Landlord and Tenant* (*4th edition*) *page* 249 where it is stated, on the authority of *Voet* 19-2-16, that " the extinction of the landlord's title to the leased property must necessarily extinguish the title of the tenant, because the latter's claim is founded entirely on that of the landlord ". He therefore contended that, the defendant's rights having been extinguished by the consent decree in favour of the plaintiff, the 1st appellant's right to remain in occupation of the premises was automatically wiped out. Does it necessarily follow that a person who has lost his legal rights of occupation by virtue of the termination or the forfeiture of his landlord's title, is necessarily *bound by* a decree to which he was not a party and which in terms orders not him, but someone else, to be ejected from the premises ? It is important to note that Wille, in the passage which I have quoted—indeed, in the same sentence—proceeds to state that the extinction of the title of the landlord (*i.e.*, in this case, of the defendant) " does not *ipso facto terminate the contract of tenancy* ". Wille relies on *Voet* 19-2-17, and on *Glathar vs. Hussan* (1912) T. P. D. 327 and *Colonial Government vs. Aunalinda Village Management Board* (1907) 24 S. C. 276, for the proposition that " the true owner of the property is not bound by a lease of it made without his consent or authority, and may, *by virtue of his ownership*, claim the ejectment *of the tenant* at any time ". I have been able to trace this latter report, and find that the owner successfully sued the lessor and the unauthorised lessee in the same proceedings (*a*) for a declaration that the purported lease was invalid and of no legal force or effect (*b*) for the immediate ejectment of the lessee, his agents and servants.

A landlord who, being the owner of premises, has duly terminated a contract of tenancy by proper notice or in any other manner recognised by law, is clearly entitled under the common law to sue a sub-tenant for ejectment if he remains, *qua* trespasser, in occupation with knowledge that the tenant's rights have been extinguished. *Wille's Landlord and Tenant* (*4th edition*) *page* 118 mentions a number of South African decisions on this point. As at present advised, I am not satisfied that the landlord cannot properly obtain a decree for ejectment against the overholding sub-tenant in an action in which the tenant is also joined as defendant in order to achieve finality in the litigation. The judgment of De Villiers, C. J. in *Macdonald vs. Hume* (1875) *Buch.* 8, is interesting in this connection. A lessee had sub-let the premises in contravention of the terms of the lease. The landlord sued the sub-lessee alone for ejectment. De Villiers, C. J. expressed some surprise that the lessee " whose words, acts and conduct constituted so material a portion of the evidence and who had so serious an interest in the issue of the case " had not been summoned as a co-defendant. Nevertheless, as the lessor admittedly had notice of and could if he so desired have intervened in the action, a decree for ejectment *as against the sub-lessee alone* was affirmed. This judgment seems to indicate that in South Africa the joinder of both lessor and lessee in such cases is considered desirable and, as a rule, necessary. It is by no means clear that our Code of Civil Procedure regarding the joinder of defendants and causes of action prohibits an action so constituted, provided that a cause of action against only a single defendant is not combined with a cause of action against both. I refrain, however, from expressing any *obiter dictum* on this point which might cause embarassment when the question is raised specifically.

In the present action there is an additional ground for holding that the 1st appellant is not " bound by the decree " against the defendant. The order made by the Board of Assessment on 9th September, 1946, refusing the defendant authority to sue the 1st appellant for ejectment had not been superseded by a decree of any Court in terms of section 8 (*c*) of the Ordinance of 1942. By virtue of this order, which was made by a tribunal of competent jurisdiction, the 1st appellant was at the date of the present application " entitled to occupy the premises as against the judgment debtor " within the meaning of the first proviso to section 324 (2).

The general conclusions at which I have arrived for the purpose of deciding this appeal before us may be summarised as follows :—

(*a*) that a sub-tenant in occupation of premises under a contract of sub-tenancy entered into before an action for ejectment has commenced against the tenant would not be bound by the decree in such an action unless he was joined as a party to the proceedings ;

(*b*) that such a sub-tenant cannot be judicially evicted from the premises except in terms of a decree for ejectment entered against him in an action to which he was made a party ;

(*c*) that the ruling of de Kretser, J. and Soertsz, J. in *Siripina vs. Ekanayake* (1944) 45 N. L. R. 403 on the above points is correct, and must be regarded as a binding authority unless and until it is either expressly over-ruled by a Divisional Bench of this Court or set at nought by the Legislature ;

(*d*) that after the tenant's rights have been extinguished to the knowledge of the sub-tenant, the landlord, *qua* owner, is entitled to sue the overholding sub-tenant, *qua* trespasser, for ejectment ; (it is not necessary to decide in this case whether in such an action the overholding sub-tenant and the tenant whose rights have been extinguished can properly be joined as co-defendants in the same proceedings) ;

(*e*) that a sub-tenant would be bound by a decree for ejectment against the tenant if the contract of sub-tenancy was entered into *after* the date of the decree ; (if, on the other hand, the contract of sub-tenancy was entered into after institution of action but before the date of the decree, the question whether the sub-tenant was bound by such a decree must presumably be considered with reference to the doctrine of *lis pendens*).

In the present case, for the reasons which I have given, I would hold that the 1st appellant and his servant the 2nd appellant are not bound by the decree for ejectment against the defendant. I would therefore set aside the judgment appealed from and refuse the plaintiff's application as against the appellants with costs both here and in the Court below. The defendant should bear his own costs in both Courts.

GUNASEKARA, J.

I agree.

Set aside.

Present : DIAS, S.P.J., GUNASEKARA, J. AND PULLE, J.

RAJAPAKSE (Excise Inspector) vs. FERNANDO

S. C. 16—*M. C. Kegalle,* 29,444

Argued on : 4th May, 1951
Decided on : 24th May, 1951

Evidence—Charge of selling arrack illicitly—Excise Inspector raiding dwelling house illegally without search warrant—Is evidence obtained in the course of such raid admissible—Excise Ordinance, section 36—Evidence Ordinance and "Public Policy"—Evidence of decoy.

Held : (1) That evidence obtained in the course of a raid illegally carried out by an Excise Inspector is evidence admissible under our Evidence Ordinance and upon which a conviction could be based.

(2) That the cases of *Murin Perera vs. Wijeyesinghe* (1950) 51 N. L. R. 377, *Andiris vs. Wanasinghe* (1950) 52 N. L. R. 83 and *David Appuhamy vs. Weerasooriya* (1950) 52 N. L. R. 87 have been wrongly decided.

(3) That our Evidence Ordinance contains the whole law of evidence except where the Legislature in other enactments has provided otherwise.

(4) That the Courts cannot import into the Evidence Ordinance new principles based on public policy.

Per DIAS, S.P.J.—(*a*) I agree that it would be immoral and undesirable that *agents provacateur* and others should tempt or abet persons to commit offences ; but it is a question whether it is open to a Court to acquit such persons where the offence is proved, on the sole ground that the evidence was procured by unfair means. Such considerations may induce the trial Judge to disbelieve the evidence, but such evidence is not inadmissible, and, therefore, when the offence charged has been proved, it is the duty of the Judge to convict.

(*b*) I cannot part with this record without condemning in the strongest terms the practice which appears to be prevalent of Excise officers in making raids and searches without obtaining a search warrant or complying with the provisions of section 36 of the Excise Ordinance. I approve and adopt the language of my brother Gratiaen in *Karalina vs. Excise Inspector, Matara,* (1950) 52 N. L. R. 89 and trust that cases of this kind in the future will be the exception and not the rule.

Followed : *Bandarawella vs. Carolis Appu* (1926) 27 N. L. R. 401.
Ekanayake vs. Deen (1940) 18 C. L. W. 60.
Hendrick Appuhamy vs. Price Control Inspector (1947) 48 N. L. R. 521.
Karalina vs. Excise Inspector, Matara, (1950) 52 N. L. R. 89.*

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*43 C. L. W. p 81.

Overruled : *Murin Perera vs. Wijeysinghe* (1950) 51 N. L. R. 377.*
Andiris vs. Wanasinghe (1950) 52 N. L. R. 83.
David Appuhamy vs. Weerasooriya (1950) 52 N. L. R. 87.

Cases referred to : *Calcraft vs. Guest* (1998) 1 Q. B. 759.
R. vs Leatham (1861) 8 Cox Crim. Cases 498.
Silva vs. Hendrick Appu (1917) 4 C. W. R. at p. 233.
Bandarawella vs. Carolis Appu (1926) 27 N. L. R. 401.
Silva vs. Sinno (1914) 17 N. L. R. 473.
David Appuhamy vs. Weerasooriya (1950) 52 N. L. R. 87
Emperor vs. Ravalu Kesigadu (1902) Madras 124.
S. I. of Police, Mirigama vs. John Singho (1926) 4 T. L. R. 71.
Silva vs. Menikrala (1928) 9 C. L. Rec. 78.
Almeida vs. Mudalihamy (1929) 7 T. L. R. 54 ; 10 C. L. Rec. 148.
Attorney-General vs. Harthewyck (1932) 12 C. L. Rec. 56.
Ekanayake vs. Deen (1940) 18 C. L. W. 60.
Hendrick Appuhamy vs. Price Control Inspector (1947) 48 N. L. R. 521.
Emperor vs. Allahadad Khan (1913) 14. Crim. Law Journal Reports, 236.
Ali Ahmad Khan vs. King Emperor (1924) Allahabad 214.
Khan vs. Emperor (1926) Allahabad 188.
Chwa Hum Htive vs. Emperor (1933) Rangoon 146.
Murin Perera vs. Wijeysinghe (1950) 51 N. L. R. 377.
Andris vs. Wanasinghe (1950) 52 N. L. R. 83.
Karalina vs. Excise Inspector, Matara (1950) 52 N. L. R. 89. 43 C. L. W. 81.
Silva vs. Menikrala (1928) 9 C. L. Rec. 78.
Janson vs. Driefontein Consolidated Mines, Ltd. (1902) A. C. at p. 491.
Fernando vs. Ramanathan (1913) 16 N. L. R. 337.
Richardson vs. Mellish 2 Bing. 252.
The Bank of England vs. Vagliano Brothers (1891) A. C. at p. 120.
Administrator-General of Bengal vs. Pram Lal Muttiah L. R. 22 Indian Appeals at p. 116.
Collector of Gorakhpur vs. Palakdhari Singh 12 Allahabad at p. 35.
R. vs. Carupiyah (1933) 35 N. L. R. 401.

T. S. Fernando, Crown Counsel, with *H. A. Wijemanne, Crown Counsel*, for the Attorney-General.
G. E. Chitty with *Vernon Wijetunge* and *J. C. Thurairatnam* as *amicus curiae* at the instance of the Court.

DIAS, S.P.J.

This case comes before us on a reference by his Lordship, the Chief Justice, under section 48 of the Courts Ordinance, the question for our determination being formulated thus : " Whether evidence obtained illegally in the course of a raid carried out by an Excise Inspector is evidence upon which a conviction could be based ? "

The facts which gave rise to this reference are simple. The accused was charged with unlawfully selling arrack on June, 17, 1950, without a licence in breach of section 17 of the Excise Ordinance (Chapter 42). Excise Inspector Rajapakse gave a decoy a marked rupee note and told him to go to the boutique of the accused and buy a rupee's worth of arrack. The decoy did so and was engaged in drinking arrack when the Inspector raided the place. The Magistrate says " The evidence of the bogus customer is corroborated by that of the Excise Inspector, and I cannot say that story is false. On the facts I am satisfied that the prosecution has proved that the accused did sell arrack to the bogus customer on the day in question ". The Magistrate, however, acquitted the appellant on the ground that the premises raided were a dwelling-house, and the Excise Inspector admittedly had no search warrant. The Magistrate said " In similar circumstances it was held in the case* reported in 51 N. L. R. 377 by Justice Nagalingam that where an unlawful entry into a dwelling-house is made by an excise officer, the evidence obtained by such entry is inadmissible... It is not for me to say that that decision is wrong. I am bound by it. The evidence, therefore, in this case obtained by the Inspector becomes inadmissible. I accordingly acquit the accused ". The complainant appealed with the sanction of the Attorney-General, and the case now comes before this Court.

Although this question has been raised in a prosecution under the Excise Ordinance, it appears to have a wider application. For example—X with the intention of committing theft may break into and enter the house of Y. X while engaged in the burglary may witness Y committing the murder of his wife Z. At the trial of Y for murder, does the evidence of X become *inadmissible* because he obtained the information which he is capable of making known to the Court while he was engaged in an unlawful or illegal act after an unlawful entry ? To take another illustration—under the Criminal Procedure Code certain rules are laid down to be

*43 C. L. W. p 8.

observed by officers conducting a search under the Code. Supposing a public officer in defiance of those rules conducts a search and obtains unequivocal evidence of the commission of some offence by the householder, does that illegality make the evidence of that offence inadmissible?

The English Law, which is the Common Law, on this point is clear: In 13 *Halsbury's Laws of England* (Hailsham edition) pages 533-534, the rule is stated thus: "Although it is the duty of the Court to reject evidence which is not legally evidence, the fact that evidence has been obtained improperly does not necessarily render such evidence inadmissible".—See also *Phipson on Evidence* (8th edition) pages 187-188, where it is pointed out that even privileged evidence which has been obtained by illegal means would be admissible, for it has been said the Court will not inquire into the methods by which the parties have obtained their evidence—see also *Calcraft vs. Guest* (1898) 1 Q. B. 759 and *R. vs. Leatham* (1861) 8 Cox Crim. Cases 498. There is a right to search a person arrested, and to seize articles or documents in his possession which will form material evidence against him or anyone else on a criminal charge. The interests of the State will excuse a seizure which would originally have been unlawful, if subsequently it should appear that the articles or documents are evidence of a crime committed by anyone—*Archbold* (32nd edition) p. 1163.

Under the Excise Ordinance (Chapter 42) there is no provision which enacts that evidence observed or discovered during an illegal raid or search should be withheld from the Court of trial. Therefore, if such a rule exists, it must be sought for elsewhere than in the Excise Ordinance. There is nothing in the Evidence Ordinance which shuts out such evidence. The Evidence Ordinance makes special provision for cases where certain types of evidence are to be excluded —*e.g.*, see sections 24, 26, 30 (confessions), 54 (bad character of an accused), section 120 (2) (the spouse of the accused as a witness for the prosecution), sections 121, 131 (privilege), &c. Subject to such special restrictions, under our law of evidence, relevant evidence cannot be shut out when tendered by a party to the proceedings through the mouth of a competent and compellable witness. Provided relevant evidence is not barred by some positive rule of statute law, and provided it is given by a competent and compellable witness, can such evidence be shut out as being inadmissible merely because that evidence was obtained illegally or by illegal means? Such facts may affect the *credibility* of the evidence, but do they also affect its *admissibility*?

The question which has been submitted to us for decision has been before our Courts previously.

In *Silva vs. Hendrick Appu*, (1917) 4 C. W. R. at p. 233.

Wood Renton, C.J., said:—

> "I am clearly of opinion, however, that a contravention of the provisions of section 36 of the Excise Ordinance does not invalidate proceedings like the present in which there is ample independent evidence of the illicit sale. It merely deprives the officer who omits to act in accordance with the provisions of the section of the right to complain that any obstruction that he may meet with in the course of the search is illegal".

This case, however, is distinguishable from the present case, in that in the case before us there is no independent evidence as there was in *Silva vs. Hendrick Appu* (1917) 4 C. W. R. at p. 233.

Bandarawella vs. Carolis Appu (1926) 27 N. L. R. 401 is more in point. There, as here, the excise raid was illegal.

Jayawardene (A. St. V.) J. said:—

> "Then the question arises whether the evidence obtained by such an entry is admissible in law. The object of section 36 is to give excise officers power to enter and search houses without a warrant in circumstances of urgency. It protects them against resistance and obstruction in so doing if they comply with its requirements. If an officer enters without such compliance and is resisted or obstructed, he is without remedy as his entry is illegal; but if he is allowed to enter and search without objection, can it be said that his evidence of what he heard, saw, or found is admissible? Section 36 itself does not exclude evidence obtained under such circumstances, and I know of no provision of law requiring its exclusion".

The learned Judge then referred to *Silva vs. Hendrick Appu* (supra). He also referred to the case of *Zilva vs. Sinno* (1914) 17 N. L. R. 473. This is a decision of a bench of two Judges, but I respectfully agree with Jayawardene, J., that that case has no bearing on the question of the admissibility of the excise officer's evidence, which is the sole point we have to decide. In *Zilva vs. Sinno* (1914) 17 N. L. R. 473 an excise inspector who made an illegal search was resisted and obstructed. The accused were charged under section 183 of the Penal Code, and a bench of two Judges held that such resistance and obstruction were not illegal and acquitted the

accused. I draw attention to this case, because it seems to me that its scope and effect have not been fully appreciated in the later case of *David Appuhamy vs. Weerasooriya* (1950) 52 N. L. R. 87 which I shall deal with presently. In *Bandarawella vs. Carolis Appu,* (1926) 27 N. L. R. 401 Jayawardene J., proceeded as follows :—

> " But it was argued, however, that if evidence obtained without complying with the requirements of section 36 be held to be admissible, the provisions of that section would be reduced to a nullity, particularly (and this be it noted was Counsel's argument, and not an expression of the learned Judge's view) in view of the fact that as a general rule the villager here does not dare to oppose a uniformed officer even when he attempts to enter a house for the purpose of searching it. I am not prepared to say that villagers, specially those engaged in committing excise offences, are so docile as to allow their houses to be searched without protest. But, however that may be, there is no rule of law requiring the rejection of such evidence, and common sense commends its admission ".

The *ratio decidendi* of that decision is plain, namely, that in the absence of an express prohibition against the admission of such evidence, both law and common sense commend its admission. It is in my opinion incorrect to say that Jayawardene, J., based his judgment on the Indian case of *Emperor vs. Ravalu Kesigadu* (1902) Madras 124. The judgment shows that Jayawardene J., reached his conclusions quite independently of the Indian case which he cited.

The facts of *Emperor vs. Ravalu Kesigadu* (1902) Madras 124 are as follows : This was a prosecution under the Madras Akbari Act which is the equivalent of the local Excise Ordinance. An inspector of Circle P. received information that illicit tapping and distillation were going on a village in Circle K. He therefore entered Circle K. and arrested the accused who was in the vicinity of a still secreted in some bushes. That inspector handed the accused over to the inspector of Circle K. The Magistrate accepted the evidence, but was doubtful whether an officer of Circle P. had been empowered by law to enter Circle K. and detect a case there. In appeal it was held " The question whether the officer who effected the arrest was acting within or beyond his powers in making the arrest does not affect the question of whether the accused were guilty or not guilty of the offence with which they were charged." It is true that the question as to whether the evidence of the excise officer was admissible or not is not expressly stated in the judgment. But the judgment when fairly read implies that such evidence would be admissible, otherwise, how could the guilt of the accused be established unless the officer who detected the offence gave evidence ? Had there been independent evidence, one would expect the Indian Court of Appeal to say so, as Wood Renton, C.J., did in *Silva vs. Hendrick Appu* (1917) 4 C. W. R. at p. 233. As I have pointed out, Jayawardene, J., in *Bandarawella vs. Carolis Appu* (1926) 27 N. L. R. 401 decided the case independently of the Indian case. The Indian case does not assist the accused respondent in this case. If anything it is against him.

In *S. I. of Police, Mirigama vs. John Singho* (1926) 4 T. L. R. 71 the same question came up for decision before Garvin J. In that case, before any evidence had been recorded, the Magistrate discharged the accused.

Garvin J. said :—

> " It may be that he (the inspector) entered legally for another purpose, and that it was only incidentally that the discovery of ganja was made. It may be that the entry may be justified upon other grounds ; but I agree that under whatever circumstances the entry was made, it was the plain duty of the officer who made the discovery to bring that fact to the notice of those entrusted with the administration of the Excise Ordinance. I agree also that a prosecution otherwise properly constituted is not vitiated by the mere fact that the discovery was made by a person who, if that was the case, entered the premises otherwise than in accordance with the provisions of the Excise Ordinance."

Garvin J. did not expressly deal with the question whether the evidence of the officer, assuming his entry and search were irregular, would be inadmissible. That question became unnecessary because the appeal of the Attorney-General was dismissed on another ground. Therefore, the words of Garvin J. I have quoted are really *obiter*.

The same question, however, directly arose again before Garvin J. in *Silva vs. Menikrala* (1928) 9 C. L. Rec. 78 when he said "Presumably the impression of the Magistrate is that evidence which has been discovered as a result of a search which was irregular.....could not be admitted or received in support of the charges laid against the accused. But this is a mistaken view. *Evidence which is legally admissible does not cease to be admissible merely because that evidence was*

discovered by an excise officer who did not comply with the requirements of section 36 *when searching premises without a warrant.* The attention of the Magistrate is invited to the case of *Bandarawella vs. Carolis* (1926) 27 N. L. R. 401. The acquittal was set aside and the case was sent back for trial in due course.

The question next arose before Lyall Grant J. in *Almeida vs. Mudalihamy* (1929) 7 T. L. R. 54 ; 10 C. L. Rec. 148. The learned Judge followed *Bandarawella vs. Carolis* (1926) 27 N. L. R. 401 and the acquittal was set aside and the case sent back for a new trial. In *Attorney-General vs. Harthewyck* (1932) 12 C. L. Rec. 56 Drieberg J. following *Almeida vs. Mudalihamy* (1929) 7 T. L. R. 54 ; 10 C. L. Rec. 148 held that a Court cannot for the reason that the entry is illegal, discharge the accused, for if an offence has been committed, the illegality of the entry and search is no bar to a conviction. Drieberg J. also suggested that the Magistrate should report the conduct of the Inspector to the head of his department.

In *Ekanayaka vs. Deen* (1940) 18 C. L. W. 60 a similar question arose under the Motor Car Ordinance, 1938. Section III (6) of that Ordinance empowered a police officer not below the rank of sergeant to stop a motor bus in order to ascertain whether an offence under that section has been committed. A motor bus was stopped by a police constable and an offence was discovered.

Wijeyewardene J. said :—

" Disregard of the provisions of section 111 (6) by a police constable may, perhaps, amount to an offence under section 150 of the Ordinance or some other provisions of the law, *but cannot possibly affect the competency of the officer in question as a witness in a case under section* 111 *of the Ordinance.*'

This is a decision of importance because the learned Judge, without any reference to the foregoing authorities, independently reached the same conclusion in a case quite unconnected with the Excise laws. The same learned Judge came to the same conclusion in a case under the Defence Regulations for selling rice above the controlled rate in *Hendrick Appuhamy vs. Price Control Inspector* (1947) 48 N. L. R. 521.

Wijeyewardene J. said :—

" It may be that the accused could have resisted any person, other than an authorized officer, trying to enter his premises.....It does not follow that, because such a person could be resisted, *the evidence given by that person regarding a sale detected by him is not admissible.*"

Turning to the Indian cases. In *Emperor vs. Allahadad Khan* (1913) 14 Crim. Law Journal Reports, 236 it was held that in a case under section 63 of the Excise Act of 1910, where it is necessary to search a house, a search warrant should be obtained beforehand. But even if the search is illegal, the occupier of the house searched can be convicted under section 63 for the unlawful possession of an excisable article. In *Ali Ahmad Khan vs. King Emperor* (1924) Allahabad 214 it was held that where the discovery of articles showing the guilt of the accused and found at a search has been proved by direct evidence, any irregularity or illegality in the search can neither vitiate the trial nor affect a conviction. The same principle was reaffirmed in *Khan vs. Emperor* (1926) Allahabad 188 and in a Rangoon case, *Chwa Hum Htive vs. Emperor* (1933) Rangoon 146.

It is in the light of the foregoing principles and with this body of case law as a background that we have to consider the case of *Murin Perera vs. Wijeysinghe** (1950) 51 N. L. R. 377 which is the case cited by the Magistrate in his judgment acquitting the accused respondent.

The facts of this case are that an excise inspector sent a decoy with a marked currency note to purchase arrack. He thereafter made an irregular and illegal raid and stated in evidence that he had detected the accused in the act of committing the offence. My brother Nagalingam set aside the conviction of the accused. Thereafter in two subsequent cases the learned Judge set aside the convictions of two other accused persons—*Andris vs. Wanasinghe* (1950) 52 N. L. R. 83 and *David Appuhamy vs. Weerasooriya* (1950) 52 N. L. R. 87. These three cases are in conflict with the case of *Karalina vs Excise Inspector, Matara*† (1950) 52 N. L. R. 89 where my brother Gratiaen came to a different conclusion: and held that evidence obtained without the authority of a search warrant and in contravention of the provisions of section 36 of the Excise Ordinance is not inadmissible for the purpose of securing a conviction under the Excise Ordinance. It is with the object of resolving the difficulties created by these conflicting decisions that this case has been referred to a Divisional Bench.

What was the *ratio decidendi* in *Murin Perera vs. Wijeysinghe* ? (1950) 51 N. L. R. 377.*

Nagalingam J. concluded his judgment in that case with the following words :—

" Having regard to all these circumstances, I think the conviction cannot be sustained, which I, therefore, set aside, and acquit the accused ". What are those reasons ? There were no less than eight reasons which caused

*43 C. L. W. p 8. †43 C. L. W. p 81.

the learned Judge to reach the conclusion which he did—(1) In view of the contradictions in the evidence he was " quite unable to say that the prosecution evidence should in these circumstances receive all the credit which it otherwise might have received ". (2) The fact that the decoy was " strongly smelling of arrack " would by itself be no proof that he had consumed arrack at the alleged sale. (3) He held that inadmissible evidence regarding the bad character of the accused had been admitted. (4) That there existed grounds for the view that the whole case for the prosecution was a fabrication as a retaliation by the excise officer for something done by the husband of the accused. (5) That whereas the prosecution stated that it was the verandah of the accused's house that was searched without a warrant, the whole house had been searched. (6) Apart from this attempted justification, the learned Judge was of the view that section 34 of the Excise Ordinance does not cover the case of a decoy—but he expressed no final view on this point. (7) As the bottle containing the alleged arrack had not been sealed, a difficult question arose as to what weight should be attached to the evidence given by the inspector with regard to his search and discovery of the bottles in the house of the accused. (8) Where an unlawful entry into a dwelling house is made by an excise officer, the evidence obtained in consequence of such entry is inadmissible.

With regard to point (8) the learned Judge considered the case of *Bandarawella vs. Carolis Appu* (1926) 27 N. L. R. 401 which had been followed in the later cases of *Silva vs. Menikrala* (1928) 9 C. L. Rec. 78 and *Almeida vs. Mudalihamy* (1929) 7 T. L. R. 54 ; 10 C. L. Rec. 148. He held that " the first of these cases were decided by Jayawardene A.J. who was influenced in his view by the Indian case of *Emperor vs. Ravalu Kesigadu* (1902) Madras 124. I have already stated my reasons for saying with the greatest respect that it is incorrect to say that Jayawardene J. either based his judgment upon or was entirely influenced by this Indian case. Furthermore, I have pointed out that although the judgment in appeal in *Emperor vs. Ravalu Kesigadu* (1902) Madras 124 does not expressly decide whether the evidence of the excise inspector was admissible or not, the judgment when fairly read implies that such evidence would be admissible, for if the evidence of the officer who detected the offence and made the arrest was withheld from the Court, the prosecution would not be able to establish the charge. Nagalingam J. disposes of the other two local cases with the observation " The local cases cited are all based upon this Indian decision, and the soundness of the views laid down in these cases may have to be reconsidered in an appropriate case ".

I agree with the observations of my brother Nagalingam J. in *Andris vs. Wanasinghe* (1950) 52 N. L. R. 83 in regard to *Silva vs. Hendrick Appu* (1917) 4 C. W. R. at p. 233. That case is clearly distinguishable from the present case, because as pointed out by Wood Renton C.J. there was independent evidence apart from that of the excise inspector to support the conviction. I also am of the view that *S. I. of Police, Mirigama vs. John Singho* (1926) 4 T. L. R. 71 is of no weight, but not for the reasons given by Nagalingam J. I have already pointed out that Garvin J.'s judgment in that case is *obiter* because the appeal was decided on another point.

In *David Appuhamy vs. Weerasooriya* (1950) 52 N. L. R. 87.

Nagalingam J. said :—

> " The question whether evidence should be placed before a Court establishing that the search was lawful came up for consideration before a bench of two Judges in *Zilwa vs. Sinno* (1914) 17 N. L. R. 473. In that case too there was no evidence one way or the other as to the making of the record by an excise inspector as required by section 36 of the Excise Ordinance. The accused in that case was acquitted on the sole ground that there was no evidence of the legality of the entry into the premises of the accused.....This case, then, is an authority for two propositions (1) that there must be positive evidence placed before the Court that the search by the excise officer was lawful, and (2) that in the absence of such evidence the conviction cannot be sustained. I have not been referred to any case in which this view has been doubted or dissented from ".

With great respect, while *Zilwa vs. Sinno* (1914) 17 N. L. R. 473 lays down a perfectly correct rule for the facts of that case, it is irrelevant to the question which we are now considering. In that case the accused was charged under section 183 of the Penal Code with obstructing an illegal search by an excise inspector. The search being illegal, the resistance offered by the accused was perfectly justified. Therefore, in such cases, the prosecution, unless it can prove that the entry and search were lawful, will not prevail and the prisoner must be acquitted. How does that decision govern the facts of the present case ? In my opinion *Zilwa vs. Sinno* (1914) 17 N. L. R. 473 has been inadvertently misapplied.

Mr. Chitty, who kindly appeared as *amicus curiae* at the invitation of the Court to assist us, sought to support *Murin Perera vs. Wijeysinghe** (1950) 51 N. L. R. 377 and the connected cases on different grounds.

His first submission is that while we have to look to the Evidence Ordinance in regard to questions of evidence, nevertheless, it is incorrect to say that the principles of "Public Policy" do not form part of our law. Mr. Chitty contends that the power is inherent in the Courts of Justice when it is face to face with, what he calls, conduct which is contrary to public morality or fair dealing for the Courts, despite the strict rules of evidence, to apply to such cases the principles of public policy, and to hold that the admission of that evidence would cause greater harm than its rejection, and therefore to refuse to receive such evidence. He submits that the case we are considering is such a case. Where an excise officer in defiance of the rules laid down by the legislature to protect the subject, without a search warrant or complying with the provisions of section 36 of the Excise Ordinance, makes an illegal raid or search, and thereby discovers evidence against a person which would in strict law be admissible against the person charged, nevertheless this rule of public policy should cause the Courts to say that in such circumstances they will not receive such evidence.

With this submission I am unable to agree. It will be observed that Mr. Chitty has been unable to quote a single authority in support of his proposition. What authority there is appears to be against him. In *Janson vs. Driefontein Consolidated Mines, Ltd.*, (1902) A. C. at p. 491 Lord Halsbury L.C. said :—

> "I do not think the phrase 'against public policy' is one which in a Court of law explains itself. *It does not leave at large to each tribunal to find that a particular contract is against public policy.* If such a principle were admitted, I should very much concur with what Serjeant Marshall said.....a century ago : 'To avow or insinuate that it might, in any case, be proper for a Judge to prevent a party from availing himself of an indisputable principle of law in a Court of Justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall, and has direct tendency to render all law vague and uncertain. *A rule of law, once established, ought to remain the same till it be annulled by the Legislature, which alone has power to decide on the policy or expedience of repealing laws, or suffering them to remain in force.* What politicians call expedience often depends on momentary conjunctures, and is frequently nothing more than the fine-spun speculations of visionary theorists, or the suggestions of party and faction. If expedience, therefore, should ever be set up as a foundation for the judgments of Westminster Hall, the necessary consequence must be that a Judge would be at full liberty to depart tomorrow from the precedent he has himself established today, or to apply the same decision to different, or different decisions to the same circumstances, as his notions of expedience might dictate. *But I do not think the law of England does leave the matter so much at large as seems to be assumed.* In treating of various branches of the law, learned persons have analysed the sources of the law, and have sometimes expressed their view that such and such a provision is bad because it is contrary to public policy ; *but I deny that any Court can invent a new head of public policy.....*".

Lord Davey said (at p. 500) :—

> "Public policy is always an unsafe and treacherous ground for legal decision".

The case of *Fernando vs. Ramanathan* (1913) 16 N. L. R. 337 was not cited to us by either side at the argument. It is a decision of a Divisional Court and the case of *Janson vs. Driefontein Consolidated Mines, Lld.* (1902) A. C. at p. 491 was referred to and considered. The following passage from the judgment of Wood Renton C. J., although it occurs in his dissenting judgment, is relevant : "The case of *Janson vs. Driefontein Consolidated Mines, Ltd.* (1902) A. C. at p. 491 shows that the grounds of 'public policy' *at common law* should not be *extended by the Courts of Justice.* It is no authority against the creation of *statutory* grounds of 'public policy', and the cases that I have examined or cited in the course of this judgment which might be multiplied indefinitely, prove that these may be created *by the Legislature* either expressly or by necessary implication". What Mr. Chitty is inviting us to do now is precisely what Wood Renton C.J. pointed out a Court of Justice could not and must not do, namely, to expand the law of evidence by importing into it certain grounds of public policy to control or modify the statutory rules of evidence laid down by the Evidence Ordinance. This we cannot do as we possess no legislative powers. An examination of the provisions of the Evidence Ordinance shows that the Legislature when drafting the Evidence Ordinance had "public policy" in mind, and legislated in order to give

*43 C. L. W. p 8.

effect to the principles of " public policy " of the kind Mr. Chitty refers to in certain cases. Thus the admission of confessions against persons accused of crimes was confined within very strict limits. The rules of evidence relating to privilege and the admission of privileged communications is another example of the Legislature giving effect to certain principles of public policy. The prohibition that the prisoner's spouse should be called as a witness for the prosecution save in very exceptional cases furnishes another example. I am, therefore, unable to agree with Mr. Chitty that, over and above this, there exists a nebulous and undefined residual power in the Courts to admit or reject admissible evidence brought before it by legally competent and compellable witnesses on grounds of " public policy ". Section 100 of the Evidence Ordinance provides that in the case of any *casus omissus* we are to have recourse, not to Scottish or American law, but to the principles of the English law alone. As I have pointed out, under English Law, relevant evidence which has been obtained improperly is not rendered inadmissible on that ground alone. If Mr. Chitty's contention is sound, the greatest confusion and uncertainty will be introduced into our law, and the grounds of " public policy " would vary according to the length of each Judge's foot. The following passage from the judgment of Pereira J. in *Fernando vs. Ramanathan* (1913) 16 N. L. R. 337 is therefore apposite : " Public policy," according to an eminent Judge is a very unruly horse, and when once you get astride it, you never know where it will carry you—*Richardson vs. Mellish* 2 Bing 252. It has also been observed that " public policy " does not admit of definition, and is not easily explained. It is a variable quantity, and it must vary with the habits, capacities, and opportunities of the public. There are certain time-honoured purposes which the Courts have always regarded as matters of public policy—such as the encouragement of trade, the repression of vice, immorality and lawlessness, &c., but in the presence of such conflicting opinions as now exist on questions as to what is best for the public good, what can be our guide in an attempt to discover *new matters and things that can be said to be matters of public policy*? ' To allow this ' (public policy) said Parke B.....' to be a ground of judicial decision would lead to the greatest uncertainty and confusion ' ". I respectfully agree. This contention fails, and must be rejected.

The question can also be viewed from another angle. The Ceylon Evidence Ordinance is one to " consolidate, define, and amend the law of evidence ". Consolidation is the reduction into a systematic form of the whole of the statute law relating to a given subject as illustrated or explained by judicial decisions—*Craies on Statute Law*, 3rd edition, p. 301. In *The Bank of England vs. Vagliano Brothers* (1891) A. C. at p. 120

Lord Halsbury L.C. said :—

" I am wholly unable to adopt the view that where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of the code another law prevailed ".

In *Administrator General of Bengal vs. Pram Lal Muttiah* L. R. 22 Indian Appeals at p. 116. Lord Watson said :—

" The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act is passed ".

In *Collector of Gorakhpur vs. Palakdhari Singh* 12 Allahabad at p. 35.

Straight J. said :—

" The rules of evidence which we are bound to administer are contained in the Evidence Act (1 of 1872), and I say so because of the preamble to that enactment which shows that it is not merely a fragmentary enactment, but a consolidating enactment repealing all rules of evidence other than those saved by the last part of section 2 of that enactment."

If, therefore, our Evidence Ordinance contains the whole law and the sole law of evidence, except where the Legislature in other enactments has provided otherwise, I fail to see how, save in the case of a *casus omissus*, we can import into the Evidence Ordinance new principles based on public policy as contended for. I am clearly of opinion that we cannot do that.

Mr. Chitty next argued that altogether apart from the question of public policy, there is another principle of law that an accused person should not be compelled to give or furnish evidence against himself. I agree that it would be immoral and undesirable that *agents provacateur* and others should tempt or abet persons to commit offences ; but it is a question whether it is open to a Court to acquit such persons where the offence is proved, on the sole ground that the evidence was procured by unfair means. Such considerations may induce the trial Judge to disbelieve the evidence, but such evidence is not inadmissible, and, therefore, when the offence charged has been proved, it is the duty of the Judge to convict.

Furthermore, the authorities and the statute law show that a person may under certain

circumstances be compelled to incriminate himself. Section 132 of the Evidence Ordinance shows that a witness is not excused from answering an incriminating question. Section 73 of the Evidence Ordinance entitles a Court to direct a person to supply specimens of his handwriting for purposes of comparison, and this rule has now been extended to finger impressions, palm impression, and foot-prints. Before the law was so amended, where a person was irregularly ordered to supply an impression of his foot, and where without objection he allowed this to be done, it was held that the evidence so obtained was admissible on the question of identity—*R. vs. Carupiyah* (1933) 35 N. L. R. 401. This is an authority which is strongly against the contention now set up.

Finally, Mr. Chitty submitted that the Excise Ordinance, the Evidence Ordinance and the Criminal Procedure Code created a "closed system" in regard to prosecutions under the Excise Ordinance, and that the law was exhaustive and provided what evidence could be used in a prosecution under the Excise Ordinance. While I do not agree that any "closed system" has been created, I agree with Mr. Chitty that the law and procedure regulating a prosecution under the Excise Ordinance must be sought for in those three enactments. The argument may be summarised thus: (*a*) The evidence was obtained in this case by committing a breach of the law; (*b*) therefore that evidence was illegally obtained; (*c*) therefore the evidence is inadmissible. I do not think (*c*) necessarily follows from (*a*) and (*b*). If the provisions of the Evidence Ordinance are to guide us, the evidence, being relevant and having been brought before the Court by a legally competent and compellable witness, cannot be shut out. In order to shut that evidence out on the grounds contended we must fall back on the theory that the Courts have a residual power on grounds of public policy to shut such evidence out. For the reasons I have given, that contention is unsound.

For the reasons given I am of opinion that *Bandarawella vs. Carolis Appu* (1926) 27 N. L. R. 401 and the cases which follow it, and the cases of *Ekanayake vs Deen* (1940) 18 C. L. W. 60, *Hendrick Appuhamy vs. Price Control Inspector* (1947) 48 N. L. R. 521 and *Karalina vs. Excise Inspector, Matara* (1950) 52 N. L. R. 89 lay down the correct principle; and that *Murin Perera vs Wijeysinghe* (1950) 51 N. L. R. 377, *Andiris vs. Wanasinghe* (1950) 52 N. L. R. 83 and *David Appuhamy vs. Weerasooriya* (1950) 52 N. L. R. 87 have been wrongly decided and ought, therefore, to be over-ruled.

In my opinion the Magistrate having wrongly rejected the evidence in this case, the acquittal of the accused is wrong. As on the findings of the Magistrate it is clear that the respondent is guilty, I quash the order of acquittal and convict the respondent of the charge framed against him. The case must, therefore, go back to the Magistrates Court in order that sentence should be passed on him.

I cannot part with this record without condemning in the strongest terms the practice which appears to be prevalent of excise officers in making raids and searches without obtaining a search warrant or complying with the provisions of section 36 of the Excise Ordinance. I approve and adopt the language of my brother Gratiaen in *Karalina vs. Excise Inspector, Matara* (1950) 52 N. L. R. 89 and trust that cases of this kind in the future will be the exception and not the rule.

I wish to record the grateful thanks of the Court to Mr. Chitty and his learned juniors for the Counsel and assistance they so cheerfully rendered us at such short notice.

GUNASEKARA, J.
I agree.

PULLE, J.
I agree.

Acquittal set aside and sent back.

Present: GRATIAEN, J. AND GUNASEKERA, J.

M. KIRI BANDA vs. H. PUNCHIAPPUHAMY *et al*

S. C. No. 7—D. C. Kegalle, No. 5632.

Argued on: July 3rd, 1951.
Decided on: 5th July, 1951.

Fidei commissum—Gift of land by deed to donees with direction at their death, to make over their shares to P/cr P's heirs—Is conveyance by donees to named beneficiaries necessary to effectuate gift?

Where a deed of gift contained the following terms:—
"I hereby.....grant and make over as a gift unto.....my daughters Tikiri Menika and Dingiri Menika..... (the land is then described) *to be possessed by them during their life-time*.....

Further, the said Tikiri Menika and Dingiri Menika shall only possess the said lands and premises allotted to them during their life-time and shall not transfer or make the same outside and the said Tikiri Menika and Dingiri Menika shall at their death make over their shares of the lands and premises allotted to them to no other person than Punchirala or to Punchirala's heirs and shall not alienate the same to any other person whomsoever."

Held : (1) That the donor clearly intended to impress the respective shares in the property donated to each of his daughters with a *fidei commissum*, taking effect on her death, in favour of Punchirala or (should Punchirala predecease her) in favour of Punchirala's heirs.

(2) That the failure of either daughter to obey the direction that she should " make over " her share to her *fidei commissary* did not have the effect of defeating the donor's intention.

Cases referred to : *Dantuwa vs. Setuwa*, (1907) 11 N. L. R. 37.
Sethuhamy vs. Kiribanda, (1922) N. L. R. 376.
Bibile vs. Mahaduraya (1926) 28 N. L. R. 253.
Selvadurai vs. Thambiah, (1934) 36 N. L. R. 105.

H. V. Perera, K.C., with *C. V. Ranawake*, for the plaintiff-appellant.

E. B. Wickremanayake, K.C., with *Cyril E. S. Perera*, for the 9th defendant-respondent.

GRATIAEN, J.

Under a deed of gift dated 21st July, 1877, a man named Ukkurala donated certain properties to his son Punchirala ; he also gifted his interests in the land which is the subject matter of the present action to his daughters Tikiri Menika and Dingiri Menika. The only question which arose for our decision in this appeal was whether the gift of the interests which passed to Tikiri Menika and Dingiri Menika created a valid *fidei commissum* in favour of Punchirala or, in the event of Punchirala's death, of his heirs. It is agreed between the parties that if this question be answered in the affirmative, a decree for partition should be entered allotting shares to the parties on the basis set out in paragraph 14 of the amended plaint dated 10th May, 1949. If, on the other hand, the learned District Judge was right in holding that P1 did not create a valid *fidei commissum*, the judgment appealed from must be affirmed.

Admittedly, the gifts under P1 in favour of Ukkurala's son Punchirala were absolute and unfettered by any conditions. By contrast, the gift in favour of Tikiri Menika and Dingiri Menika is in the following terms :—

" I hereby.....grant and make over as a gift unto.....my daughters Tikiri Menika and Dingiri Menika.....(the land is then described) *to be possessed by them during their life time*.....

Further, the said Tikiri Menika and Dingiri Menika shall only possess the said lands and premises allotted to them *during their life time and shall not transfer or mortgage the same outside and the said Tikiri Menika and Dingiri Menika shall at their death make over their shares of the lands and premises allotted to them to no other person than Punchirala or to Punchirala's heirs and shall not alienate the same to any other person whomsoever* ".

The view taken by the learned District Judge was that, notwithstanding the unambiguous prohibition against alienation or disposition to outsiders, the deed did not clearly designate " who are to get the properties *if Dingiri Menika and Tikiri Menika did not execute a deed in favour of Punchirala or his heirs* ". In that view of the matter he held that P1 did not create a valid *fidei commissum*. In support of this decision the learned Judge purported to follow an unreported judgment of this Court affirming a previous ruling of the same learned Judge with regard to a conveyance containing terms which do not exactly correspond to the language of the deed of gift P1. (*S. C. Minutes of* 28-3-50—501/D.C. *Kegalle* 4831). It suffices to state in this connection that the brief judgment under reference is unhelpful in connection with the present case because its *ratio decidendi is not very clear.*

The point at issue is amply covered by authority. The view had no doubt been held at one stage that no valid *fidei commissum* can be created by a deed of conveyance which merely *directs* the first institute *to convey* the property to the second institute on the happening of a specified event—and that in such a case the property would not pass to the second institute unless the direction was, at the appointed time, specifically carried out by the first institute. Vide *Dantuwa vs. Setuwa* (1907) 11 N. L. R. 37 (per Hutchinson C.J.) where Middleton, J. agreed, but for different reasons, on the assumption, long since discarded , that the Roman Dutch Law principles of *fidei commissum* are inapplicable to the construction of Kandyan deeds of gift.

Later decisions of this Court have however rejected the views expressed by Hutchinson, C.J., in *Danturwa's case*. In *Sethuhamy vs. Kiribanda* (1922) 23 N. L. R. 376, Bertram, C.J. and Schneider, J. considered the effect of a deed of gift where the donee was directed " on the approach of death to divide the property among the three children " of himself and the donor, who was his wife. Bertram, C.J. pointed out that " a positive act by the donee " *i.e.*, a distribution of the property *in specie* among the three children—was indicated. Nevertheless, the Court took the view that a valid *fidei commissum* was created so as to pass the property automatically to the children without any specific conveyance from their father, on the latter's death. Dealing with *Danturwa's case*, Bertram C.J. said, " I venture to think that, if the history of the law of *fidei commissum* in Professor R. W. Lee's introduction to Roman Dutch Law had been fully considered, the result of that case might have been different ".

The law was finally settled by Garvin, J. and Lyall Grant, J. in *Bibile vs. Mahaduraya* (1926) 28 N. L. R. 253 which held that a valid *fidei commissum* was created, and that *no express deed from the donee was necessary to render it effective*, where a conveyance contained " not a mere request but a direction and an imperative order " requiring the first institute to pass the land to the next set of institutes. With regard to the contention that the *fidei commissum* did not become effective by reason of the absence of a deed of conveyance by the fiduciary in favour of the *fidei-commissaries*, Garvin, J. declared that " if a valid *fidei commissum* has in point of fact been created, then the *fidei commissary* become vested with the property immediately the *fidei commissum* matured by the happening of the contingency, *i.e.*, the death of the donor ". The ruling in *Danturwa's case* was once again expressly rejected.

Learned Counsel have not referred me to any case in which doubts as to the correctness of the decision in *Bibile vs. Mahaduraya* (*ibid*) have been raised since 1926. Indeed, the point seems to have been regarded as so well settled that in *Selvadurai vs. Thambiah* (1934) 36 N. L. R. 105, Counsel of great experience did not challenge the proposition that a deed of gift by way of dowry directing that " if she, the dowry grantee, has issued she shall *cause the properties to reach them* when they come of age " was sufficient to create a *fidei commissum* in favour of the grantee's children notwithstanding the absence of any express indication as to what should happen in the event of the directions to the donee not being carried out.

The principles of law to which Bertram, C.J. and Garvin, J. had referred are now very clearly set out at page 143 of Mr. Nadarajah's Treatise on the Roman Dutch Law of *Fidei Commissum* in the following terms :—

> " In the pre-Justinian Roman Law, the *fidei commissary* did not acquire ownership in the property until " restitution " of it had been made by him to the *fiduciary* at the time prescribed by the testator. But after Justinian had enacted that there was to be no difference between the different kinds of legacies and between legacies and *fidei commissa* and that *fidei commissaries* and legatees equally should have not merely a personal action but also the real action which had formerly been open to legatees per vindicationem, ownership (at any rate in the case of singular *fidei commissa*), passed from *fiduciary* to *fidei commissary*, even without any express restitution, as soon as the gift-over to the latter was expressed to take effect. In the modern law, it would seem that in all cases the transfer of ownership takes place automatically at the time prescribed by the testator for the vesting of the *fidei commissary's* interest, and the *fidei commissary* is entitled from that time to the use and enjoyment of the property and to enforce his claims to the property against the fiduciary, his representatives, or other possessor ".

Applying these principles to the present case, I would hold that there is a very clear indication in the deed P1 of an intention on the part of the donor to impress the respective shares in the property donated to each of his daughters with a *fidei commissum*, taking effect on her death, in favour of Punchirala or (should Punchirala predecease her) in favour of Punchirala's heirs. The failure of either daughter to obey the direction that she should " make over " her share to her *fidei commissary* did not have the effect of defeating the donor's intention.

I would set aside the judgment appealed from and direct the learned District Judge to enter an interlocutory decree for partition, allotting shares to the parties on the basis that the deed of gift P1 operated as a valid *fidei commissum*. The 9th defendant should pay to the plaintiff the costs of this appeal and of the contest in the Court below. The costs of partition will be borne *pro rata*.

GUNASEKARA, J.

I agree.

Appeal allowed.

Present : DIAS, S.P.J. & GUNASEKERA, J.

SILVA vs. THE ATTORNEY-GENERAL

S. C. 301 M—*D. C. (F) Col. No.* 18416 *M*

Argued on : 3rd, 4th, 10th & 11th May, 1951
Decided on : 31st May, 1951

Crown—Liability of—Breach of contract—Service goods lying in Customs premises for long period —Warehouse rent due—Sale of goods by auction by Principal Collector of Customs acting under section 108 *of Customs Ordinance—Purchase by plaintiff—Failure to deliver goods to plaintiff—Action for damages against Attorney-General—Customs Ordinance, sections* 108, 148, 150.

Among other service goods brought into the Island during the last World War, about 11,000 tons of steel plates of assorted sizes were dumped in the Customs premises in Colombo. These goods though free of Customs duty were liable for warehouse charges. After the cessation of hostilities, the Principal Collector of Customs, after notifying all service Heads his intention to dispose of the goods, advertised with the approval of the Chief Secretary by Gazette notice dated 21-2-1947 for sale of the goods by public auction and the plaintiff purchased the goods at the auction.

In the interval the services Disposal Board, a local branch of the Ministry of Supply of the Imperial Government, had sold these goods to another firm, and the delivery of the goods was refused to the plaintiff, who sued the Attorney-General of Ceylon for damages for breach of contract.

The District Judge dismissed his action and on appeal the Crown contended :—

(1) That the goods could not be sold under section 108 of the Customs Ordinance for the reason that they had been imported and left in the warehouse by the Crown and the Crown is not bound by section 108.

(2) That even if the Principal Collector of Customs had authority under section 108 to sell the goods, such sale could not bind the Crown because in acting under section 108 the Principal Collector was acting under a statutory duty and not acting as agent or servant under the Crown.

(3) That no action lay against the Crown in this case as the Customs Ordinance itself (sections 148, 150) provided the remedy available to the plaintiff—namely to proceed against the Principal Collector of Customs.

Held : (1) That the Customs Department of Ceylon is a revenue collecting department of the Crown and when its official head, The Principal Collector of Customs acts under section 108 of Customs Ordinance, he is not acting on his own behalf, but on behalf of the Crown.

(2) That whether the Principal Collector acted under statutory powers or on the express orders of the Government, so long as he acts *bona fide* and within the scope of his authority, he is an agent of the Crown and his acts bind the Crown.

(3) That where the case is one of a mere breach of contract, whether the public servant acted under statutory powers or not, the action must be brought against the Attorney-General, and unless the Crown can show that the public servant acted without authority, actual or ostensible, or that there was no holding out by the Crown that the public servant was its agent, it would be liable.

(4) That sections 148, 150 of the Customs Ordinance do not lay down substantive law and do not create any rights of action against a Customs officer. They merely indicate certain rules of procedure which must be observed if and when such an officer is sued.

H. V. Perera, K.C., with *G. T. Samarawickrema* and *G. L. L. de Silva*, for the plaintiff-appellant.

H. W. R. Weerasooriya, Acting Solicitor-General, with *Walter Jayawardene, Crown Counsel*, for the defendant-respondent.

DIAS, S.P.J.

During the Second World War when Ceylon became a theatre of operations, and eventually the head-quarters of the South East Asia Command, large quantities of service goods from over-seas were brought into the Island and for lack of space were dumped in various parts of the country, including the Customs premises in Colombo. Amongst these goods were about 11,000 tons of steel plates of assorted sizes. This action relates to a part of those goods, estimated as being about 250 or 272 tons.

After the cessation of hostilities, the Colombo Customs authorities required the space occupied by these service goods which had been imported into the Island free of customs duty—see section 22 of the Customs Ordinance (Chapter 185). 517 of the Customs Ordinance and the regulations made thereunder (see Volume 3 of the Subsidiary Legislation of Ceylon, pages 151 to 157) provide for the levying of warehouse rent in respect of "all goods" irrespective of whether they are public or private property. It was conceded by the learned acting Solicitor-General at the argument that these steel plates even though exempted for import or export duty would, nevertheless, be liable to warehouse rent. Section 108 of the Customs Ordinance empowers and authorizes the Principal Collector of Customs after public advertisement to sell goods which are lying in the customs premises for a period longer than three

months in respect of which ware-house rent is due.

The evidence shows that so far back as 1944 the Principal Collector of Customs was inconvenienced by these service goods and he had been trying to ascertain whether he would be justified in selling them under the provisions of section 108—see D2 and D3. He wrote to the Financial Secretary in 1945—D5. On February 25, 1946, he addressed the heads of various service units requesting them to clear the articles claimed by them. On March 6, 1946, the Principal Collector complained to the Financial Secretary that there was no improvement in the position—D7. He said " The continued presence of these packages in the warehouses not only lessens storage essential for other cargo, but also affects the sanitation of the warehouses.....in the circumstances I invite reference to my letter of 10-9-45 and request that the General Officer Commanding's approval may be obtained to dispose of the articles under section 106 or 108 of the Customs Ordinance ". By D9 dated June 26, 1946, the Principal Collector notified all Service heads that he proposed to dispose of these goods under the Customs Ordinance as they " appear to have been abandoned ". By D10 dated November 28, 1946, the Principal Collector informed the Chief Secretary of Ceylon through the Financial Secretary that he proposed advertising these goods for sale. By his letter D11 of December 27, 1946, the Chief Secretary approved the proposal of the Principal Collector to advertise and sell the goods.

Thereupon by Gazette Notice P1 dated February 21, 1947, the Principal Collector intimated that "the undernoted articles which have been lying in the Customs premises will be sold by public auction on Tuesday, March 4, 1947....." The plaintiff having seen this notification attended the auction and purchased the steel plates for the sum of Rs. 1,068. He duly paid his deposit and eventually the balance of the price, but when he tried to take delivery he was prevented from so doing. It appears that in the interval the services Disposals Board which is a local branch of the Ministry of Supply of the Imperial Government had sold these goods to a firm called Maharaja & Co. The plaintiff now sues the Attorney-General of Ceylon, as representing the Crown in Ceylon, for breach of contract claiming Rs. 40,000 as damages. The District Judge dismissed the plaintiff's claim.

The submissions of the learned acting Solicitor-General on behalf of the Crown may be summarised as follows: (*a*) Having regard to the evidence in the case the Solicitor-General was prepared to concede that warehouse rent had become due in respect of these goods; but he contended that they could not be sold under section 108, for the reason that they had been imported into Ceylon and left in the warehouse by the Crown, and the Crown is not bound by section 108. (*b*) He submitted that even if the Principal Collector of Customs had authority under section 108 to sell the goods, such sale could not in law bind the Crown because, in acting under section 108, the Principal Collector was performing a statutory duty and was not acting as the servant or agent of the Crown. (*c*) Counsel further contended that no action lies against the Crown in this case for the further reason that the Customs Ordinance itself (sections 148-150) provided the remedy available to this plaintiff, namely to proceed against the Principal Collector of Customs.

The liability of the goods to be sold depends, however, not on the Crown being bound by section 108 but on the Crown being authorised by that section to sell through its officers goods in respect of which warehouse rent is due. Once it is conceded that these goods, which were left in a warehouse for a longer period than three months, were goods in respect of which warehouse rent was due to the Crown under section 17, they were clearly goods which were liable to be sold under section 108 for the recovery of the debt due to the Crown.

" The Crown " in the various countries forming the British Commonwealth of Nations cannot carry on public business without revenue. The chief sources of revenue of the Government of Ceylon are Income Tax, Estate Duty, Excise duties, Stamp duties, the duties on Salt, the income from the Railway, the Post Office, the Pearl Fisheries, and the Customs duties levied on imports and exports 7 c.—see Walter Pereira's Law of Ceylon P 58. These revenues are collected by the servants of the Crown acting through various departments. " The various Government officers and Departments through the medium of which the general executive administration of the country is carried on, owe their creation and present internal organization largely to the direct exercise of the discretionary authority of the Crown as the head of the executive. But though this is so, the constitution of the more modern departments, and the powers and duties of the various officers and functionaries of whom their staff is composed as well in the modern as in the older departments, are now principally regulated by direct parliamentary enactments or by Orders in Council issued under statutory authority "—6 Laws of England (Hailsham Edition) P 675. In other words " public servants " when carrying out their duties are pre-

cisely what their designation means. They are public agents of the Crown.

The Customs Department of Ceylon is a revenue collecting department of the Crown. It is not an incorporated body, and is therefore not a distinctive legal *persona* which can sue or be sued under its own name. The official head of the Customs Department is the Principal Collector of Customs. He is a public servant remunerated from the public revenue. Therefore, when the Principal Collector acts under section 108 of the Customs Ordinance he is obviously not acting on his own behalf or for his private benefit, but on behalf of someone else. Who is the person? Obviously it is the Crown to whom the warehouse rent was due.

Section 17 and the Regulations made thereunder empower the Principal Collector to levy warehouse rent even on goods which are exempted from import or export duty. The learned Solicitor-General does not dispute this, therefore, warehouse rent was due in regard to the goods in question. That being so, under section 108 the goods were available to be sold for non-payment of warehouse rent. The Solicitor-General argues that under section 108 the Principal Collector does not act as the servant or the agent of the Crown but is acting under statutory powers.

I am unable to accede to this argument. Clearly the Principal Collector when acting under section 108 is not acting for his own benefit, or on behalf of the owner of the goods from whom warehouse rent was due. He is acting solely for and on behalf of the Crown to whom the warehouse rent is due. Section 108 clearly empowers the Principal Collector to enter into contracts to sell goods to another. This action is for a breach of such a contract.

It seems to be irrelevant to consider whether the Principal Collector of Customs was or was not acting under statutory powers. In my view whether the Principal Collector acted under statutory powers or on the express orders of Government, in either case so long as he acts *bona fide* and within the scope of his authority, he is an agent of the Crown and his acts bind the Crown. The documentary evidence supports the view that all his acts were transacted *bona fide* for and on behalf of the Crown. It being conceded that there has been a breach of contract, the question is whether the plaintiff's remedy is against the Principal Collector as contended by the Solicitor-General, or against the Attorney-General?

In Britain the Crown cannot be sued in contract. The procedure to obtain redress against the Crown for a breach of contract is by what is called " a petition of right ". On the other hand in Ceylon the Crown can be sued in contract—*Siman Appu vs. Queen's Advocate* 9 A. C. 571 Privy Council. Therefore, in all cases of alleged breach of contract by the Crown, unless there exists some statutory bar, the action must be instituted against the Attorney-General as representing the Crown.

Does an action lie against a servant of the Crown personally for an alleged breach of contract entered into by him in his official capacity and not for his personal benefit? The law on this point is clear and can thus be summarised: Where a public officer enters into a contract in the *bona fide* exercise of the powers of his office, any action in regard to such act must be against the Attorney-General as representing the Crown, and not against the public officer personally—*Singer Sewing Machine Co. vs. Bowes* (1917) 4 C. W. R. 78 following *Muttupillai vs. Bowes* (1914) 17 N. L. R. 453. If the Crown desires to sue the subject in contract, it is the Attorney-General and not the public officer who entered into the contract on behalf of the Crown, who must sue—*Asst. Government Agent, Chilaw vs. Velappuhamy* (1922) 5 T. L. R. 34. If however, the public servant acted without authority, actual or ostensible or where there has been no holding out by the Crown of that public servant as its agent, the maxim "*respondent superior*" cannot apply, and no action will lie against the Crown in such circumstances—*Arachchille vs. Kira* (1884) 6 S. C. C. 22, *Deen vs. Attorney-General* (1923) 25 N. L. R. 333 *Wijesuriya vs. Attorney-General* (1950) 51 N. L. R. at pp 366-367.

An action will lie against a public officer personally when the action is in tort, where he acts *mala fide* and not in the *bona fide* exercise of his office. Where, however, the case is one of a mere breach of contract, whether the public servant acted under statutory powers or not, the cases cited above show that the action must be brought against the Attorney-General, unless the Crown can show that the public servant acted without authority, actual or ostensible, or that there was no holding out by the Crown that the public servant was its agent. This the Crown cannot do in this case.

Mr. H. V. Perera for the appellant cited certain passages from Robinson on Public Authorities (1925 edition) page 8 *et seq.* The law in England appears to be the same as in Ceylon. Robinson says (at p 8): " As regards contracts entered into by a servant of the Crown in such capacity, he is under no personal responsibility, unless he expressly contracted to be personally liable ". At page 9 he says: " An agent who purports to contract on behalf of a private person may be held liable in an action for breach of an implied

warrant that he had authority so to contract, if in fact he had no authority, or if he exceeded any authority which he had. In *Dunn vs. Macdonald* (1897) 1 Q. B. 555 it was sought to make the defendant, who was a public servant acting on behalf of the Crown, liable on this ground; but it was held that the doctrine was not applicable in the case of public servants acting on behalf of the Crown". The writer points out at page 10: "The principles underlying and justifying the immunity of servants of the Crown was stated as follows by Dallas C.J. "On principles of public policy an action will not lie against persons acting in a public character and situation, which from their very nature would expose them to an infinite multiplicity of actions. The very liability to an unlimited multiplicity of suits would in all probability prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself".

I am, therefore, unable to accede to the argument of the Crown that no action lies against the Crown in this case. If the argument of the Crown is sound then in this case the subject would be without a remedy, for he cannot sue the Crown, and on the authorities, no action will lie against the Principal Collector of Customs!

Finally, it was submitted for the Crown that the plaintiff's remedy in this case was provided by sections 148-150 of the Customs Ordinance. In my opinion these sections do not lay down substantive law, and do not create any rights of action against a Customs officer. They merely indicate certain rules of procedure which must be observed if and when a Customs officer is sued. The law relating to the right to sue a Customs officer personally must be sought for elsewhere. Sections 148-150 do not have the effect of diverting the subject's cause of action from the Crown to the public officer.

I am, therefore, of opinion that the learned District Judge has reached a wrong conclusion, and that his judgment must be set aside. The facts of this case are not in dispute and therefore this Court is in as good a position as the Court of trial to reach a conclusion on the facts and law.

On the question of damages, there is an expert engineer, and a person who made an offer to the plaintiff to buy the goods, who prove that the amount claimed by the plaintiff is not excessive. The learned Solicitor-General did not dispute that in the event of our holding against the Crown these damages are not excessive.

The judgment and decree of the District Court are therefore set aside. Judgment will be entered in favour of the plaintiff appellant for a sum of Rs. 40,000 as prayed for with costs both here and below.

GUNASEKERA, J.

I agree.

Set aside

Present: BASNAYAKE, J.

RAJAPAKSE vs. PERERA

S. C. 135—*C. R. Gampola* 8389

Argued and decided on: 24th November, 1950

Landlord and Tenant—Premises required for a member of landlord's family for trade or business—Landlord's right to eject—Section 13 (1) (*c*), *Rent Restriction Act No.* 29 *of* 1948.

Held: That Section 13 (1) (c) of the Rent Restriction Act No. 29 of 1948 does not give the landlord the right to bring a suit in ejectment in a case where he requires the premises for the purpose of trade or business for a member of his family.

H. W. Jayawardena, for the plaintiff-appellant.

E. B. Wikramanayake, K.C., with *Lekamge*, for the defendant-respondent.

BASNAYAKE, J.

This is an appeal by the plaintiff from a decision of the learned Commissioner of Requests in an action in ejectment.

The plaintiff seeks to have the defendant ejected from premises No. 37, Ambegamuwa Road, Nawalapitiya. It is admitted that the premises are premises to which the Rent Restriction Act applies. The defendant has been a tenant of the premises for about 9 years, and has established a successful business as a tailor. The ejectment is sought both on the ground that the premises are required for the use of the plaintiff's son for the purpose of establishing an oilman-store and on the ground that the defendant has sublet the premises.

The learned Commissioner has rightly dismissed the claim based on the ground that the premises were required for the use of the son of the landlord for the purpose of starting a business. Section 13 (1) (*c*) provides that an action may be instituted by a landlord for the ejectment of a tenant where " the premises are, in the opinion of the Court, reasonably required for the occupation as a residence for the landlord, or any member of the family of the landlord or for the purposes of the trade, business, profession, vocation or employment of the landlord ". It is clear that the section does not give the landlord the right to bring a suit in ejectment in a case where he requires the premises for a member of his family for the purpose of trade or business.

In regard to the other ground on which the ejectment is sought, the plaintiff has not proved to the satisfaction of the Court that the premises have been sublet. There is evidence that a shoemaker and a dental mechanic are carrying on their trades in the premises. The defendant explains their presence by saying that the dental mechanic is a friend of his who has been there because he has nowhere to go and that he did not charge him any rent. In regard to the shoemaker it is stated that the defendant is carrying on the business of shoemaking in addition to tailoring and that the shoemaker is his servant and not sub-tenant.

The appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL APPEAL No. 2 OF 1951

Present : Lord Simonds, The Lord Chief Justice of England (Lord Goddard), Lord Morton of Henryton, Lord MacDermott, Lord Tucker

EBERT SILVA vs. THE KING

FROM THE COURT OF CRIMINAL APPEAL OF CEYLON

Reasons for Report of the Lords of the Judicial Committee of the Privy Council. Delivered the 7th March, 1951

Privy Council—Appellant charged with murder of three persons—Three separate counts—No evidence of corpus delicti *of one of the deceased—Defence that missing person committed the murder—Conviction on all counts—Function of the Court of Criminal Appeal—Court should decide whether sufficient evidence for jury to infer missing person dead and to convict appellant on each count—Not necessary for the Court to consider whether charges have been proved beyond reasonable doubt—Charge fairly put to jury—No misdirection—Joinder of murder charges in the same indictment.*

The appellant was charged in three separate counts with the murder of three persons Muttusamy (count 1), Baby Nona (count 2), Hemalatha (count 3). The Crown could not establish the *corpus delicti* of Muttusamy, but led evidence to prove that the three persons had been murdered by the appellant. The defence of the appellant at the trial was that Muttusamy had committed the murder of Baby Nona and Hemalatha, and had disappeared. The jury found the appellant guilty on all three counts.

On appeal in the Court of Criminal Appeal it was argued by the defence (1) that on count 1 there was no evidence that Muttusamy was dead, and (2) that with regard to counts 2 and 3 as the Crown had put forward as the motive for killing Baby Nona and Hemalatha the fact they were privy to the killing of Muttusamy the conviction on these counts could not stand if Muttusamy was not proved to be dead.

The Court of Criminal Appeal held that the death of Muttusamy was not established beyond reasonable doubt, but that there was sufficient evidence to establish beyond reasonable doubt the charges on counts 2 and 3.

On appeal to the Privy Council the counsel for the appellant argued that the Court of Criminal Appeal had exceeded its function by substituting its own verdict for that of the jury, and that the Commissioner at the trial had failed to direct the jury that if they acquitted the appellant on count 1 for lack of evidence of Muttusamy's death, they should approach counts 2 and 3 on the assumption that Muttusamy was alive, and to point out that this was a matter vital to appellant's defence.

Held : (1) That it was sufficient for the Court of Criminal Appeal merely to have considered whether there was any evidence for the jury to infer that Muttusamy was dead and not to have decided that the death of Muttusamy had not been established beyond all reasonable doubt.

(2) That there was clearly abundant evidence to justify a verdict of guilty on each of the counts 2 and 3' whether Muttusamy was or was not proved to be dead.

(3) That it was sufficient for the Court of Criminal Appeal to have considered whether there was any evidence upon which the jury could find their verdict and not to have enquired whether the evidence established the charges on counts 2 and 3 beyond reasonable doubt.

(4) That the charge as a whole was fairly and squarely put to the jury, and the jury had clearly put before them the issue whether the appellant or Muttusamy was the murderer of Baby Nona and Hemalatha, and there was no misdirection by the Commissioner.
(5) That the evidence in the present case justified the joinder of all three counts for murder in the same indictment.

LORD TUCKER

The appellant was charged oni ndictment in three separate Counts with the murder on 17th October, 1946, of three persons who may for convenience be referred to as Muttusamy (Count 1), Baby Nona (Count 2) and Hemalatha (Count 3). He was tried by a Commissioner of Assize and Jury and on 8th October, 1948, was found guilty on all three Counts and sentenced to death. On appeal to the Ceylon Court of Criminal Appeal his conviction on Count 1 was quashed and his appeal against conviction on Counts 2 and 3 dismissed. The present appeal, which is brought by special leave granted by Order in Council dated 31st May, 1949, is from that portion of the judgment of the Court of Criminal Appeal whereby his appeal against his conviction on Counts 2 and 3 was dismissed.

At the outset of the trial application for separate trials on each Count of the Indictment was made on behalf of the appellant and refused by the Commissioner of Assize in the exercise of his discretion. It appears that, contrary to the practice which prevails in this country in the case of charges of murder, there is no objection to the joinder of more than one Count for murder in the same Indictment in cases where the charges arise out of the same set of facts, subject always to the power of the trial Judge to order separate trials on each Count if he considers that the accused may be prejudiced by the simultaneous trial of two or more charges. In the present Case the evidence led by the prosecution in support of the three Counts would clearly have been admissible even if there had been separate trials on each Count so that no criticism can be made for the manner in which the learned Commissioner exercised his discretion by allowing the three Counts to be tried together.

The appellant was the conductor of an estate of some 50 acres at Porwagama belonging to his uncle Piyadasa de Silva. Muttusamy was an Indian Tamil employee on the estate working under the appellant and living in a hut with Baby Nona who was also employed on the estate. Hemalatha was the child of Baby Nona by another man and was aged about 5 years. The appellant occupied another hut on the estate just over 400 yards distant from Muttusamy's hut. With him in this hut lived his cousin Jayaratha and a boy aged 16 named Wilfred who was his cook. Wilfred and Jayaratha were witnesses for the prosecution.

The case for the prosecution depended largely on the evidence of Wilfred and his father named Banda and may be outlined as follows.

The appellant was on terms of intimacy with Baby Nona and used to visit her at her hut when Muttusamy was away. At the time of her alleged murder on 17th October, 1946, she was pregnant. On the afternoon of that day there had been a quarrel between the appellant and Muttusamy with regard to the latter's treatment of Baby Nona. After his dinner at 7 p.m. the appellant left his hut carrying a gun with four cartridges and a torch. About an hour later the sound of a shot was heard coming from the direction of Muttusamy's hut. When Wilfred got up in the early hours of the next morning the appellant had not returned, but he came in shortly after and said he had shot at a bandicoot but had not felled it, must go out again with his dog. He had tea and left taking his gun and dog. The appellant not having returned by 9 a.m. Wilfred and a man named Samathapala went to look for him. They went to Muttusamy's hut where they noticed a foul smell. On looking round the door they saw a heap of ash and blood and a hole in the back wall opposite the door. There was also a drag mark as if a log had been dragged through the ash from inside the hut. At the back of the hut the appellant's dog was devouring some dark flesh. They proceeded from there into the jungle where they met the appellant. He was wearing a sarong leaving the upper parts of his body bare and showing marks of soot all over his chest and the other exposed parts. He said he had been following a wild boar and had fallen over a heap of burnt logs crushing a quantity of bad smelling insects in his fall which accounted for his condition and the foul smell. Wilfred returned home but the appellant did not come in for his mid-day meal. About 2 p.m. Wilfred went again in search of him. He returned to Muttusamy's hut which he found padlocked. He went on to the place where he had met the appellant earlier in the day and found him digging a large hole in the bed of a drain in the jungle. Wilfred observed two human heads, one larger than the other, blackened by burning, the hand of a grown person, the hand of a child, the trunk of a grown person and two legs. Wilfred asked what the pieces were and the appellant rushed at him saying " It is none of your business, you better go away ". Wilfred went to the house of his father Banda and they returned together to the

spot where the appellant was digging. Banda questioned the appellant who at first denied that he was burying dead bodies but eventually said that Muttusamy had killed his wife and gone away and that he (the appellant) was "covering them up". The appellant returned to his hut about 4 p.m. with his sarong washed.

According to the evidence of Jayaratha at about 9 a.m. in the morning the appellant after having his tea on returning to his hut had told him that Muttusamy and his family had disappeared. Three days later Wilfred and his sister, Jane Nona, at the request of the appellant, helped him to mend Muttusamy's hut. By that time the hole in the wall had been closed.

After the disappearance of Muttusamy and his family Jane Nona, Wilfred's sister, spent a night with the appellant in his hut after which she became the mistress of Jayaratha and lived with him in the hut previously occupied by Muttusamy. Jayaratha gave evidence that about three months after the disappearance of Muttusamy the appellant asked him to cut firewood and then brought from the jungle a gunny bag containing some bones which he ground on a stone and then burnt. In the gunny bag there was also a waistcoat and a pair of blue shorts similar to garments worn by Muttusamy. On this occasion the appellant in answer to Jayaratha's questions said that Muttusamy had bolted after killing his wife and child.

The matter was brought to the notice of the police on 1st February, 1947, by one David Nanayakara, the manager of the Co-Operative Stores at Porwagama, as a result of a statement made to him by Banda. The first complaint by Banda appears to have related only to the appellant's action in giving Jane Nona, Banda's daughter, to Jayaratha as his mistress, and at a later stage the story with regard to the disappearance of Muttusamy and the appellant's connection therewith emerged.

The police found bones buried under a mound on the eastern side of Muttusamy's hut which the expert evidence proved to contain a piece of human adult bone from the head, sex indeterminate, showing signs of charring and burning, the right knee bone of an adult, a small portion of a human face, and the milk tooth of a child under 8 years of age.

When questioned by the police on 4th February, 1947, the appellant said that on the morning of 18th October, 1946, Banda came and told him that Muttusamy and the others had bolted. He went to the house and found it was tied with a coir string. He opened the door and found nothing inside, all the goods had been removed. He kept quiet as Muttusamy used to go like that and return later.

At the trial the appellant gave evidence to the effect that on the night in question he had gone out on his rounds as usual. On reaching Muttusamy's hut he found the door open and called out. He saw Baby Nona lying just inside the doorstep with blood stains on her jacket, the child was nearby with stains of blood on her. There were no signs of Muttusamy. He became frightened and ran back to his hut calling out for Jayaratha. Both Wilfred and Jayaratha came out and asked what was the matter. He told them what he had found. They decided to send for Banda. Next morning Wilfred fetched Banda and they all went to Muttusamy's hut. They found the place in disorder and the two bodies with stab wounds. Banda pointed out that he (the appellant) had been on terms of intimacy with the woman and this might come out and advised that they should eliminate the dead bodies and say all had run away. They all agreed to hide the whole affair. Later a grave was dug by Jayaratha and a man called Edwin who was Jane Nona's brother and the dead bodies were placed in it. Later he arranged for Jayaratha to take Jane Nona as his mistress and put them in Muttusamy's hut. This angered Banda and the appellant became frightened and dug up the bodies and burnt them with the help of Jayaratha and Edwin.

At the trial Counsel for the Defence submitted that there was no evidence fit to be left to the jury that Muttusamy was dead. The learned Commissioner of Assize ruled that there was a case to go to the jury, and the jury after a full and careful summing up found the appellant guilty on all 3 Counts. On appeal in the Court of Criminal Appeal it appears from the judgment in that Court that the two main points argued by the Defence were (1) that on Count 1 there was no evidence that Muttusamy was dead and (2) that with regard to Counts 2 and 3 as the Crown had put forward as the motive for killing Baby Nona and Hemalatha the fact that they were privy to the killing of Muttusamy the convictions on these Counts could not stand if Muttusamy was not proved to be dead.

With regard to the first submission the Court, after considering a number of authorities and discussing the evidence, said "In the present case the death of Muttusamy has not, in our opinion, been established beyond all reasonable doubt." It may be observed with respect that this was not the issue before the Court, the issue was whether there was any evidence fit to be left to the jury from which they might infer that Muttusamy was dead. Their Lordships

will, however, proceed on the assumption that the Court of Criminal Appeal were right in quashing the conviction on Count 1. On this assumption the only question—apart from any misdirection by the Commissioner of Assize—which arises on Counts 2 and 3 is whether there was any evidence upon which a reasonable jury could find a verdict of guilty on each of these Counts.

The answer to this question sufficiently appears from the summary of the evidence set out above. There was clearly abundant evidence to justify a verdict of guilty on each Count whether Muttusamy was or was not proved to be dead. On this issue also the Court of Criminal Appeal do not, however, seem to have posed to themselves the right question. It was sufficient for them to have considered whether there was any evidence upon which the jury could find their verdicts. They, however, enquired whether the evidence established these charges beyond reasonable doubt and after a detailed examination answered the question in the affirmative. Their decision, however, necessarily involves that there was evidence sufficient to support the verdicts of the jury, and in the absence of misdirection no grounds for disturbing those verdicts have been disclosed.

On the present appeal Counsel for the Appellant put in the forefront of his case the contention that the Court of Criminal Appeal had exceeded its function by substituting its own opinion for the verdict of the jury. It soon, however, became clear that he could not make good this submission unless he could show misdirection by the Commissioner in his summing up to the jury. This he sought to do on the basis that it was the duty of the Commissioner to direct the jury that if they acquitted the appellant on Count 1 for lack of evidence of Muttusamy's death they should approach Counts 2 and 3 on the assumption that Muttusamy was alive, and to point out that this was a matter vital to the appellant's defence viz. that Muttusamy had murdered Baby Nona and the child. If this point was raised in the Court of Criminal Appeal it evidently did not figure prominently in the argument as the only passage in the judgment of that Court which could be read as referring to it is the penultimate paragraph which reads " In addition to the points I have mentioned Dr. Colvin de Silva made certain complaints in regard to the learned Commissioner's charge to the jury. Taking the charge as a whole we think that the case was fairly and squarely put to the jury."

Their Lordships take the same view of the summing up. The jury had clearly put before them the issue whether the appellant or, as he said, Muttusamy was the murderer of the woman and child. They were on three separate occasions, twice in the early stages and once at the end of the summing up, directed to consider each Count separately. At line 32 on page 243 of the Record the Commissioner said " It is for the prosecution to prove his guilt beyond reasonable doubt in respect of each of the three charges." At line 18 on page 244 he said " You will consider each Count separately and individually." And 5 lines from the end of his charge on page 259 " It is now for you to say in respect of each of these charges whether it is proved beyond reasonable doubt."

Their Lordships are of opinion that no criticism can properly be directed to the learned Commissioner's charge to the jury which contained a careful and detailed summary of the evidence, a warning against coming to any conclusion on guilt or otherwise of an accused person upon the basis of motive alone, and a proper direction on matters of law. No case of miscarriage of justice justifying the intervention of His Majesty in Council has been established and they have accordingly humbly advised His Majesty that the appeal should be dismissed.

Appeal dismissed.

Present : BASNAYAKE J. & PULLE, J.

SIRISENA vs. DINGIRI & OTHERS

S. C. 172—*D. C. Kandy T.* 330

Argued on : 14th and 15th March, 1951
Decided on : 15th March, 1951
Reasons delivered on : 25th June, 1951

Kandyan Law—Intestate succession—Children of two marriages—Daughters married in deega during lifetime of father—Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938, sections 13, 11.

F, a Kandyan, was married twice. By his first marriage he had one son S and four daughters, and by his second marriage only one child, a daughter. F died intestate on 18th October, 1942 (*after* the commencement of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938), leaving him surviving his widow by the second marriage and the sole child by her, his only son S and two daughters by his first marriage—two of the daughters having predeceased him. All the five daughters were married in *deega* during the lifetime of the deceased. The District Judge held that the daughter by the deceased's second marriage was entitled to a half share of the acquired and inherited immovable property subject to her mother's life interest in her half of the acquired property.

Held : (1) That the rights of S and the sole child by the second marriage, in relation to the immovable property of the deceased, were governed by section 13 of the Kandyan Law Amendment and Declaration Ordinance No. 39 of 1938.

(2) That the four daughters of the deceased by his first marriage and the only daughter by his second marriage were not entitled to inherit the immovable property of the deceased, since they were married in *deega* during the deceased's lifetime.

(3) That S was accordingly entitled to the entirety of the deceased's immovable property, subject to the life-interest of the deceased's widow over one-half of the acquired immovable property.

Per BASNAYAKE, J.—" The effect of the statute is to place the children of two or more marriages on the same footing as if they were children of the same marriage ".

H. V. Perera, K.C., with *H. B. White*, for the appellant.

H. W. Thambiah, for the 1st and 2nd respondents.

BASNAYAKE, J.

At the conclusion of the argument of this case we delivered judgment allowing the appeal and indicated to Counsel that reasons for our decision would be delivered in writing later. We have accordingly set down our reasons.

Shortly the facts are as follows : John Fernando, though he bore a name which is rare among Kandyans, was admittedly a Kandyan. He married twice. By his first marriage he had one son and four daughters. By his second marriage he had one daughter. He died intestate on 18th October, 1942, leaving his widow and the sole child by her, a daughter, his only son and two daughters by his first marriage two of the daughters having predeceased him. He left an estate valued at Rs. 18,764 consisting of both movable and immovable property. All the daughters were married in *deega*. The only son of the deceased, Kandegedera *alias* Pitapatanegedera Sirisena, applied for and was granted letters of administration. In the course of the administration proceedings a dispute arose as to the respective rights of the administrator and the deceased's second wife and daughter in the property left by the deceased. The administrator while admitting that the widow was entitled to a life interest in a half share of the acquired property of the deceased denied that she or her daughter who had married in *deega* was entitled to a share of the estate. He claimed to be the sole heir of the deceased subject to the widow's life interest. The widow's daughter claimed half of the immovable property left by the deceased as she was the only child of the second marriage of the deceased.

The learned District Judge held that the widow and her child and the applicant and his sisters were each entitled to 1/7th share of the movable property. He also held that the daughter by the deceased's second marriage was entitled to a half share of both the acquired and inherited or *paraveni* immovable property of the deceased subject to her mother's life interest in her half of the acquired property.

The finding that the daughter of the deceased by his second marriage is entitled to a half share of his immovable property gets no support either from the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 (hereinafter referred to as the Ordinance) or from the customary laws of the Kandyans. Section 13 of the Ordinance provides that when a man shall die intestate after its commencement leaving him surviving issue by two or more marriages, such issue and the descendants of any predeceased child or children shall inherit *inter se* in all respects as if there had been but one marriage and the estate of the deceased shall not descend *per stirpes* to the issue of each marriage according to the number of marriages.

Under the above enactment the issue of two or more marriages inherit as if there had been but one marriage. In the instant case the four daughters of the deceased by his first marriage and the only daughter by his second marriage married in *deega* during his life time. They are therefore not entitled to inherit the immovable property of the deceased. Under section 11 of the Ordinance the widow is entitled to an estate for life in one half of the acquired property of the deceased or if such is insufficient for her maintenance then to maintenance out of the *paraveni* property. The succession to the deceased's movable property is governed by Part V. of the Ordinance. There is no dispute in regard to that property.

If John Fernando had married only once and had five daughters each of whom married in

deega in his life time they would not inherit his immovable property. The effect of the statute is to place the children of two or more marriages on the same footing as if they were children of the same marriage.

The appellant is therefore entitled to the entirety of the deceased's immovable property subject to the life interest of the deceased's widow over one half of the acquired immovable property.

The appeal is allowed with costs.

Appeal allowed.

PULLE, J.
I agree.

Present : NAGALINGAM, J., GRATIAEN, J. & GUNASEKERA, J.

In re S. V. RANASINGHE

In the matter of an application for re-admission of S. V. Ranasinghe as an advocate of the Supreme Court of the Island of Ceylon. (361)

Argued on : 19th July, 1951
Decided on : 26th July, 1951

Advocate—Conviction of offences involving gross moral turpitude—Name struck off roll of advocates —Redemption of character—Application for re-admission—Principles which apply.

The petitioner, who was an Advocate, was convicted in 1931 of two offences involving gross moral turpitude and was sentenced to terms of imprisonment in respect of both. While he was serving his earlier sentence, the Supreme Court made order that his name should be struck off the roll of Advocates. After his discharge from prison, the petitioner served under various employers in positions involving trust and responsibility. He in 1951 applied for re-admission to the profession on the ground that he had, during the intervening years, qualified himself for re-instatement.

Held : (1) That the petitioner had by his conduct, over a long period of years, proved himself to be a fit and proper person for re-enrolment as a member of the Bar.
(2) That the petitioner had afforded cogent proof that he had redeemed the character which he had once lost.

Per GRATIAEN, J.—"All of them (judicial decisions*) remind us that this Court, in dealing with these applications, must not be influenced either by punitive or by sympathetic considerations. Our duty must be measured by the rights of litigants who may seek advice from a professional man admitted or re-admitted to the Bar by the sanction of the Judges of the Supreme Court. It is also measured by the right of the profession, whose trustees we are, to claim that we shou d satisfy ourselves that re-enrolment will not involve some further risk of degradation to the reputation of the Bar."

Cases referred to : *Ex parte Pyke*, 6 B & 5703 (=122 E. R. 1354).
In *re Moonesinghe* (1917) 4 C. W. R. 370.
Seneviratne's case (1928) 30 N. L. R. 299.
In (1936) 39 N. L. R. 476.

N. K. Choksy, K.C., with *E. S. Amarasinghe*, for the petitioner.

R. R. Crossette Thambiah, Solicitor-General, with *A. C. Alles, Crown Counsel*, for the Attorney-General.

GRATIAEN, J.

The petitioner was enrolled as an advocate of this Court on 9th June, 1927. In 1930, he committed two offences involving gross moral turpitude, and for these offences he was tried and convicted on 9th September, 1931, and 12th November, 1931, respectively. A sentence of three years' rigorous imprisonment was imposed on him in respect of the first conviction, and a sentence of two years' rigorous imprisonment in respect of the second. While he was serving the earlier sentence, this Court, in the exercise of the disciplinary jurisdiction vested in it under the Courts Ordinance, made order that his name should be struck off the roll of advocates. He was discharged from prison on 6th September, 1934, and now applies for readmission to the profession on the ground that he had during the intervening years qualified himself for reinstatement. Over 20 years have elapsed since he offended against the law and brought discredit upon his profession.

I do not propose to refer in any detail to the nature of the offences of which he was found guilty in the past—in one case by the unanimous

* Edd.

verdict of the jury, and in the other, on his own unqualified plea, by a Magistrate exercising the jurisdiction of a District Judge. Suffice it to say that I have given due weight to all those details, as the gravity of the crimes is of great relevancy to the length of the probationary period which must be insisted upon as proof that the crimes have been expiated.

Application such as we have before us cannot be decided by mere "rule of thumb" or by reference to some "tidy formula". There is no principle of law which declares that an advocate who has committed such-and-such an offence is thereby permanently disqualified from seeking re-enrolment. Cockburn, C.J. said in a similar case "I cannot help feeling, both on principle and precedent, that sentences of exclusion from either branch of the profession need not necessarily be exclusions for ever. And when we find that a gentleman has suffered twenty years exclusion, and that the sentence of exclusion, however right, has had the salutory effect of awakening in him a higher sense of honour and duty, we should not be inexorable", *ex parte Pyke*, 6 B. and S. 703 (=122 E. R. 1354). These words which I have quoted were pronounced in 1865. With how much more force can they be repeated now, having regard to the greater emphasis which the modern theory of punishment has laid on the opportunities for rehabilitation which imprisonment is intended to offer to a convicted person?

I have considered with care and with the greatest respect the judicial decisions to which the learned Solicitor-General and Mr. Choksy have drawn our attention. All of them remind us that this Court, in dealing with these applications, must not be influenced either by punitive or by sympathetic considerations. Our duty must be measured by the rights of litigants who may seek advice from a professional man admitted or readmitted to the Bar by the sanction of the Judges of the Supreme Court. It is also measured by the right of the profession, whose trustees we are, to claim that we should satisfy ourselves that re-enrolment will not involve some further risk of degradation to the reputation of the Bar. Bearing these principles in mind, we must now decide whether the applicant's conduct and behaviour during the long probationary period which has elapsed since he was convicted of crimes involving dishonesty afford cogent proof that he has redeemed the character which he then lost. Has he during those long and difficult years pursued a career of honourable life so as to convince us that he now possesses the strength of character to carry out his present resolve to persevere in honourable conduct in the future?

I am much impressed by the evidence regarding the applicant's attitude while he was serving his prison sentence. His discharge certificate dated 6th September, 1934, bears a testimonial in the following terms from the Acting Inspector General of Prisons :—

> "His conduct and industry while in prison has been at all times examplary and his influence over others has always been to the good. He has paid in full the price of his past wrong-doing, and in my opinion, given the chance of proving his worth and undoubted ability, he will make good and take his rightful place in the community as an honourable and useful citizen. From my knowledge of his character while in prison I feel that he deserves every encouragement to enable him to wipe out the past."
>
> (Sgd.) C. C. SCHOKMAN.

One starts then with this early manifestation of a resolve to reconstruct his life. On his release from prison, he must necessarily have faced many difficulties in obtaining honourable employment, and he decided that, in view of his educational qualifications, he should join the teaching profession. He started his new life as a private tutor, and later joined the staff of the Polytechnic Institute. Four years later he joined the tutorial staff of Lorensz College in Gampaha. He was then employed by the Associated Newspapers of Ceylon Ltd., first as Head Reader and later Assistant Manager of the Lake House Book Shop. He has produced from each of his employers a testimonial which speaks well of his trustworthiness and good behaviour during the relevant periods. He is now the Principal of a school in Gampaha in which students are prepared for higher examinations. One cannot but be impressed by the manner in which he has progressively surmounted his early difficulties, and earned the confidence of those who, knowing as they did the history of his past life, were in the best position to judge his character. Throughout this period he has associated himself very closely with the work of his Church. His parish priest, who has known him for several years, speaks of his activities as a religious and welfare worker, and states that he is now held in high esteem by the people in the locality. He is free of debt. He has earned the respect of those with whom he has come in contact over a long period of years, and it seems to me that he can justly claim to have "atoned for the errors of the past by an unbroken subsequent career of honesty and integrity". In *re Moonesinghe* (1917) 4 C. W. R. 370.

Can it be said, as it was said by Schnieder, J. in *Seneviratne's case* (1928) 30 N. L. R. 299 that the present application for reinstatement is premature because, although there is clear evidence that his convictions have had the salutory effect of awakening a higher sense of honour and duty, nevertheless the probationary period is not long enough to guarantee a complete redemption of the past? I do not think so. The applicant left prison at the age of 40. Today he is 57 years old, and, as I have pointed out, his resolve to mend his ways was conceived when he first entered prison in 1931. In all the circumstances of the case, I would adopt, with great respect, the observations of Abrahams, C.J. in (1936) 39 N. L. R. 476 " It is far better that we should do one thing or the other now. We should of course be very careful in admitting to the profession—members of which should observe the highest standard of honour and trustworthiness —a man who has been guilty of a crime of dishonesty. *But that is not to say that character once lost cannot be redeemed.* It therefore follows that if we are of the opinion that the applicant has redeemed the past, it would be unjust to prevent him from once more earning his living in the profession for which he is qualified ". I see no reason why the present intention of the applicant to continue his career as a teacher should stand in his way. We are concerned only with the question whether his conduct over a long period of years has proved him to be a fit and proper person for re-enrolment as a member of the Bar.

In my opinion the application should be allowed, and I would make order that the name of the applicant should be restored to the roll of Advocates of the Supreme Court.

NAGALINGAM, J.
I agree

GUNASEKARA, J.
I agree. *Application allowed.*

Present : BASNAYAKE, J.

PONNUDURAI (S. I. POLICE, PANADURA) vs. JALALDEEN

S. C. 1184—*M. C. Panadura* 14243/A

Argued on : 19th and 22nd January, 1951.
Decided on : 9th July, 1951.

Betting—offence of receiving illegal bets—Accused searched and arrested without warrant—Legality of—Evidence obtained in the course of such search and arrest—Admissibility of—Betting on Horse Racing Ordinance (chapter 36) and No. 55 of 1943—Gaming Ordinance, section 4 (chapter 38)—Police Ordinance, section 69 chapter 43.

Where on evidence obtained through a decoy the accused was apprehended for receiving illegal bets and a police officer thereafter searched the accused without a warrant and arrested him and the evidence thereby obtained was led to convict the accused.

Held : (1) That there was sufficient evidence, apart from the evidence of the police officer, to warrant the conviction of the accused.

(2) That the police officer had no power to arrest and search the accused without a warrant as neither Section 4 of the Gaming Ordinance nor Section 69 of the Police Ordinance apply to an offence under the Betting on Horse Racing Ordinance.

(3) That the evidence obtained in the course of such unlawful search and arrest is legally admissible.

Per BASNAYAKE, J.—" Today as in the past it is necessary to safeguard the sanctity of the citizen's home against unauthorised entry. The fact that laws designed for the welfare of society have made considerable inroads on the liberty of the subject should not lead public officers to think that the fundamental rights of the citizen no longer exist. Let it be clearly understood that the attitude of the Courts towards admission of evidence illegally obtained carries with it no sanction of illegal arrests and searches. The offender's act nevertheless remains as unpardonable as ever—a trespass—, his liability for which is in no way diminished by the reception of evidence.

Cases referred to : *Murin Perera vs. Wijesinghe*, (1950) 51 N. L. R. 377.
Rajapakse vs. Fernando, S. C. 16/M. C. Kegalle 29444 (S. C. Minutes 24th May 1951). 45 C. L. W. 6.
R. vs. Smith, (1791) 4 T. R. 419 ; 100 E. R. 1095.
Morris vs. Mellin, (1827) 6 B & C. 454 ; 108 E. R. 518.
Cape Brandy Syndicate vs. Inland Revenue Commissioners, (1921) 2 K. B. 403, 414.
In *Bishop Atterbury's* case, 16 Howell State Trials 495, 629.
R. vs. Granatelli, 7 State Trials N. S. 979, 987.
Phelps vs. Prew, 3 E. & B. 430, 437, 441.

Rajapakse vs. Fernando, S. C. 16/M. C. Kegalle 29444—S. C. Minutes 24th May, 1951.
Silva vs. Menikrala, (1928) 9 Law Recorder 78.
Bastiansz vs. Punchirala, (1931) 1 C. L. W. 281.
Peter Singho vs. Inspector of Police, Veyangoda, (1949) 42 C. L. W. 15.
Rex vs. Mabuya, (1927) C. P. D. 181.
Rex vs. Uys Uys, (1940) T. P. D. 405.
Com. vs. Dana, 2 Metc. 329.
Boyd vs. U. S., 116 U. S. 616.
Adams vs. New York, (1904) 192 U. S. 585.
Weeks vs. U. S., (1914) 232 U. S. 383.
People vs. Defore, 242 N. Y. 413.
People vs. Adams, 176 N. Y. 351.
Adams vs. People of State of New York, 192 U. S. 585.

T. S. Fernando, Crown Counsel, with *Mahendrarajah, Crown Counsel*, for the Attorney-General, for complainant and appellant.

M. M. Kumarakulasingham, with *J. C. Durairajah*, for the accused-respondent.

Basnayake, J.

At the conclusion of the argument of this appeal I indicated to learned Crown Counsel that I was unable to uphold his submission that the arrest and search of the accused was legal. I also indicated that in view of the conflict between the case of *Murin Perera vs. Wijesinghe* (1950) 51 N. L. R. 377 and the earlier decisions of this Court I proposed to refer the case to My Lord the Chief Justice in order that the question may be submitted to a properly constituted Bench for an authoritative ruling. But upon reading the evidence prior to making the reference it became clear to me that upon the facts the acquittal of the accused was insupportable. The question of law then became purely one of academic interest. While this judgment was being drafted my brother Dias delivered with the concurrence of my brothers Gunasekara and Pulle judgment in the case of *Rajapakse vs. Fernando*, S. C. 16/M. C. Kegalle 29444 (S. C. Minutes 24th May, 1951), 45 C. L. W. 6 in which it has been held that evidence illegally obtained is admissible in a prosecution under the Excise Ordinance. With that view of the law I am in respectful agreement. But as the questions arising herein are important enough to merit a written judgment on the facts and the law, I have decided not to content myself with merely allowing this appeal on the authority of that decision.

This is a prosecution under section 10 of the Betting on Horse-Racing Ordinance (hereinafter referred to as the Betting Ordinance). The accused has been acquited on the ground that he was illegally searched and that the evidence gained thereby is inadmissible.

The material facts shortly are as follows : On information that the accused was receiving illegal bets on the public road near a beef stall Sub-Inspector Ponnudurai laid a trap for him. He sent one Seemon Perera to place a bet with the accused. The bet was placed in the presence of a police sergeant who had been sent in mufti to watch the transaction. His evidence is as follows :—

> " I accompanied the decoy and I followed him. The decoy spoke to the accused something and they both walked towards the meat stall side and then turned into the footpath just between the rail line fence and the meat stall. I also followed and I was on Oruwela Road. There was another young man and he came to meet the accused. The young man had a roll of paper. I saw the decoy handing the betting slips to the accused. The accused took the Rs. 2 note and put it inside his right inner coat pocket. Then I saw the accused placing the all on bet on a race book and writing something in it. Then the accused tore it and handed one portion to the decoy and the other portion he put inside his left inner coat pocket. I also saw the accused putting his right hand into his right lower coat pocket and putting the book he had in his hand inside the pocket. Then the accused took his hand out and gave something to the decoy."

The evidence of the decoy Seemon Perera is as follows :—

> " I told the accused that I had an all on to place. Then the accused took me near the meat stall and behind the meat stall a young boy came from the direction of the bridge. The accused spoke to the boy in Tamil. The boy gave the note to the accused and the accused placed my chit on a book and marked something. The accused gave me a portion and he put the other part in his pocket. The accused put the slip in the inner left coat pocket. I gave the Rs. 2 to the accused and he kept it in the right inner coat pocket. The accused gave me a 50 cent coin like P9 and the chit P4. I put P9 and P4 in my pocket. Then the sergeant came and seized the accused. The sergeant was in civil clothes."

The learned Magistrate has accepted the evidence of these witnesses without reserve. He says: "I have not the slightest hesitation to accept the evidence of the witnesses for the prosecution who appeared to be speaking the truth. I do not believe the evidence of the accused and his witness Perera. Both of them did not impress me favourably."

It is not contended that the evidence of the Police Sergeant and the decoy is inadmissible. The evidence to which exception is taken is that of the Sub-Inspector of Police relating to the arrest and search of the accused. That evidence is as follows:—

> "I then searched the accused who was in the custody of the Police Sergeant and found the marked note P2 amidst cash Rs. 195 which were in currency notes of various denominations. I found the counterpart of the betting slip handed by me marked P3 in the accused's left inner coat pocket along with another betting slip with names of horses. Both P3 and P4 had an initial and a number 100/14 written in pencil. On searching him further I found a trespasser's racing news of 25-5-50 which I produce as P5 and a piece of carbon paper P6, envelope bearing names of horses P7, a pencil P8. P5 and P8 were found in the right lower coat pocket of the accused."

It is clear from the extracts from the evidence I have cited that the evidence to which no exception is taken and which has been believed by the learned Magistrate is sufficient to warrant a conviction of the accused upon the charge laid against him. His acquittal cannot therefore stand and must be set aside.

Learned Crown Counsel canvassed the principle of law adopted by the learned Magistrate on the authority of the case of *Murin Perera vs. Wijesinghe* (*supra*) decided by my brother Nagalingam. At the same time he submitted that the arrest and search were legal. For the latter submission he relied on section 4 of the Gaming Ordinance and section 69 of the Police Ordinance. In support of the former submission he cited a number of decisions of this Court.

I shall first deal with learned Crown Counsel's submission that the arrest and search are legal. Section 4 of the Gaming Ordinance reads:—

> "All headmen and police officers and all Municipal, District Council and Local Board Inspectors are authorised to arrest and to take before the Magistrate's Court having jurisdiction any person whom he shall find committing the offence of unlawful gaming; and if he deem it advisable, to search such person so arrested, and to seize any instruments or appliances of gaming found with him or upon him or near him, and to carry the same before the Magistrate's Court having jurisdiction."

The offence of unlawful gaming is defined in section 22 of that Ordinance. It includes "the act of betting or of playing a game for a stake when practised:—

> (*a*) in or upon any path, street, road or place to which the public have access, whether as of right or not, or
>
> (*b*) in any premises in respect of which a licence has been granted to distil, manufacture, sell, or possess arrack, rum, toddy, or any intoxicating liquor, or
>
> (*c*) in or at a common gaming place as hereinafter defined."

The Gaming Ordinance is an enactment of 1889 while the Betting Ordinance is an enactment of 1930. The offence of unlawful betting under the latter Ordinance was not created till 1943. If unlawful gaming included unlawfu betting in relation to a horse-race, there was no need for the legislation introduced by the Betting on Horse-Racing (Amendment) Ordinance No. 55 of 1943. The introduction of such legislation indicates that in the view of the legislature the offence of unlawful gaming does not include the offence of unlawful betting. It is permissible to compare cognate statutes passed at different times in order to ascertain the meaning attached by the legislature to particular words. Authority for such a course is to be found in the cases of *R. vs. Smith*, (1791) 4 T. R. 419; 100 E. R. 1095 *Morris vs. Mellin*, (1827) 6 B. & C. 454; 108 E. R. 518 and the *Cape Brandy Syndicate vs. Inland Revenue Commissioners* (1921) 2 K. B. 403, 414. The Betting Ordinance proceeds on the assumption that betting on horse-racing was legal at the time of its introduction in order to levy a tax on such betting for which purpose it regulates betting on horse-racing. Such betting cannot be described as unlawful gaming even though the definition of unlawful gaming may be wide enough to take in the offence of unlawful betting as defined in the Betting Ordinance. Apart from that it is inconceivable that the legislature would have gone to the extent of providing special machinery for entry and search of premises under the Betting Ordinance if the Gaming Ordinance contained the powers of search even without a warrant. The power of arrest conferred by section 4 of the Gaming Ordinance is therefore of no avail.

I next come to section 69 of the Police Ordinance. That section reads:—

> "It shall be lawful for any police officer without a warrant to enter and inspect all drinking shops, gaming houses, and other resorts of loose and disorderly

characters, all premises of persons suspected of receiving stolen property, any locality, vessel, boat, or conveyance in any part whereof he shall have just cause to believe that crime has been or is about to be committed, or which he reasonably suspects to contain stolen property, and then and there to take all necessary measures for the effectual prevention and detection of crime, and to take charge of all property reasonably suspected to have been stolen, and of all articles or things which may serve as evidence of the crime supposed to have been committed, and to take charge of all unclaimed property."

The language of the section clearly excludes any power to search and arrest without a warrant a person committing the act of unlawful betting.

I now come to the submission that the evidence of the Sub-Inspector I have quoted is admissible. From what I have said above it is manifest that he had no power to arrest or search the accused without a warrant. Is evidence given by him of facts learnt by him in the course of such unlawful arrest and search irrelevant or inadmissible? Our Evidence Ordinance does not expressly declare that such evidence is inadmissible or irrelevant. In England generally speaking evidence illegally obtained is not excluded on that ground alone. In *Bishop Atterbury's* case 16 Howell State Trials 495, 629 the Crown having obtained treasonable letters, imputed to the defendant, by intercepting the mails under authority of a statute, questions directed to discover whether that authority had been properly followed in so doing were not allowed. In the case of *R. vs. Granatelli* 7 State Trials N. S. 979, 987 documents taken by the Police illegally were admitted and Crompton J. approved the principle in *Phelps vs. Prew* 3 E. & B. 430, 437, 441. This Court too has, till the decision of my brother Nagalingam in *Murin Perera vs. Wijesinghe* (*supra*), consistently held that such evidence is not inadmissible on the mere ground that it has been obtained in the course of an illegal search or arrest. The decisions bearing on this point have been cited by my brother Dias in the case of *Rajapakse vs. Fernando*, S. C. 16/M. C. Kegalle 29444—(S. C. Minutes 24th May, 1951), 45 C. L. W. 6 and it will therefore be sufficient if I refer to just two of the cases which contain the dicta exactly in point. In the case of *Silva vs. Menikrala*, (1928) 9 Law Recorder 78 Garvin J. stated :—

> "Evidence which is legally admissible does not cease to be admissible merely because that evidence was discovered by an Excise Officer who did not comply with the requirements of section 36, when searching premises without a warrant."

In the case of *Bastiansz vs. Punchirala*, (1931) 1 C. L. W. 281 Macdonell C.J. observed :—

> "The fact that the arrest may have been illegal does not make inadmissible evidence of an offence discovered at the time of, or by reason of, that arrest. The two things, improper arrest, presence or absence of evidence showing that an offence has been committed, are not *in pari materia*."

In the case of *Peter Singho vs. Inspector of Police, Veyangoda* (1949) 42 C. L. W. 15 which was argued before me, in expressing the same view, I said :—

> "I agree with him (Counsel for the accused) that it is undesirable in the extreme that persons to whom the function of searching premises has not been entrusted by law should illegally invade the sanctity of a citizen's home. But that is a different matter from saying that evidence gathered in the course of an illegal entry on property is not legal evidence. Evidence gathered in the course of such an entry is admissible if relevant."

It will be highly dangerous to exclude legal evidence on the ground that it has not been obtained in the course of a lawful arrest or search. When examining the question of admissibility of evidence obtained in the course of an unlawful search or arrest a Court should not allow its judgment as to admissibility of the evidence to be influenced by the illegality of the act. Such illegality may in certain circumstances be properly taken into account in assessing the weight to be attached to evidence illegally obtained. It should be remembered that evidence obtained in the course of an illegal search or entry may be given not only by a public officer who has made an illegal arrest or entered and searched premises unlawfully but also by a private citizen who may have gathered very important evidence in the course of an innocent but illegal entry on premises. To shut out such evidence on the ground of illegal entry may result in the course of justice being thwarted.

The view taken by the Courts in South Africa is exactly the same. It is sufficient to refer to the case of *Rex vs. Mabuya* (1927) C. P. D. 181 and *Rex vs. Uys Uys* (1940) T. P. D. 405.

In America the question has been the subject of considerable controversy and the Courts have at times inclined to the view that evidence illegally obtained is inadmissible and at other times to the view that such evidence is admissible. The cases on both sides are summarised in Wigmore on Evidence, section 2183. Wigmore cites the words of Wilde J. in *Com. vs. Dana* 2 Metc. 329 which seem to have a direct bearing on the submission in the instant case.

> "Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint

the warrant issued, or the officer, would be responsible for the wrong done. But this is no good reason for excluding the papers seized, as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence the Court can take no notice how they were obtained—whether lawfully or unlawfully—nor would they form a collateral issue to determine that question."

Till the case of *Boyd vs. U. S.* 116 U. S. 616 in 1885 the accepted view was that evidence illegally obtained was admissible in evidence. That case held that documents obtained by unlawful official search could be excluded from evidence as a consequence of the fourth amendment to the Constitution prohibiting unreasonable search and seizure. Twenty years later the case of *Adams vs. New York* (1904) 192 U. S. 585 virtually repudiated Boyd's case and a decade later (1914) the case of *Weeks vs. U. S.* (1914) 232 U. S. 383 restored the doctrine of Boyd's case but with a modification that the illegality of the search and seizure should first have been directly litigated and established by a motion, made before trial, for the return of the things seized, so that, after such a motion the illegality would be noticed in the main trial and the evidence illegally obtained excluded. Further reference to American decisions would unduly burden this judgment but I find myself unable to refrain from refering to the judgment of Cardozo J. in *People vs. Defore* 242 N. Y. 413 wherein he sets out clearly and effectively the American judicial history of this question and the principles which govern it.

"We must determine whether evidence of criminality, procured by an act of trespass, is to be rejected as incompetent from the misconduct of the trespasser. The question is not a new one. It was put to us more than 20 years ago in *People vs. Adams*, (176 N. Y. 351) and there deliberately answered. A search warrant had been issued against the proprietor of a gambling house for the seizure of gambling implements. The police did not confine themselves to the things stated in the warrant. Without authority of law, they seized the defendant's books and papers. We held that the documents did not cease to be competent evidence against him though the seizure was unlawful. On appeal to the (United States) Supreme Court, the judgment was affirmed. *Adams vs. People of State of New York*, 192 U. S. 585. The ruling thus broadly made is decisive, while it stands, of the case before us now. It is at variance, however, with later judgments of the Supreme Court of the United States. (There follows a discussion of those judgments.)

"No doubt the protection of the statute would be greater from the point of view of the individual whose privacy had been invaded if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the Adams case strikes a balance between opposing interests. We must hold it to be the law until those organs of government by which a change of public policy is normally effected shall give notice to the Courts that the change has come to pass."

From what has been stated above it is clear that both here and in the foreign countries I have referred to the law is that where there is no statutory prohibition against the reception of illegally obtained evidence such evidence is admissible.

In this country we have adopted the English Common Law maxim that "A man's home is his castle." That maxim which has been amplified by Lord Chatham in the following words :—

"The poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the King of England may not enter; all his forces may not cross the threshold of the ruined tenement."

is still sacred. Today as in the past it is necessary to safeguard the sanctity of the citizen's home against unauthorised entry. The fact that laws designed for the welfare of society have made considerable inroads on the liberty of the subject should not lead public officers to think that the fundamental rights of the citizen no longer exist. Let it be clearly understood that the attitude of the Courts towards admission of evidence illegally obtained carries with it no sanction of illegal arrests and searches. The offender's act nevertheless remains as unpardonable as ever—a trespass—, his liability for which is in no way diminished by the reception of evidence.

The executive whose function it is to see that public officers charged with public duties do not transgress the law should be quick to take stern action against the transgressions of its officers. The frequency of illegal searches by public officers charged with the detection of offences in recent times serves as a warning that the safeguards which the law affords the citizen for the protection of his rights against unlawful official intrusion are ineffective or insufficient. The situation is one that demands the immediate attention of the Government in order that better and more effective safeguards may be devised for the protection of the subject.

This appeal is allowed. I set aside the acquittal of the accused and I find him guilty of the offence with which he is charged. I convict him and sentence him to pay a fine of Rs. 500. If he does not pay the fine he should undergo six months' rigorous imprisonment.

Appeal allowed.

Present : GRATIAEN, J.

LANKA ESTATES AGENCY LIMITED vs. W. M. P. COREA

S. C. No. 27—C. R. Kalutara No. 712

Argued on : 14th June, 1951
Decided on : 22nd June, 1951

Landlord and tenant—Rent Restriction Act No. 29 of 1948—Retrospective effect—Action for ejectment pending—Section 6 (3) Interpretation Ordinance—Recognised Agent—Special Agent and General Agent—Section 25 (b), (c), Civil Procedure Code.

Where, during the pendency of an action for ejectment, the provisions of the Rent Restriction Act No. 29 of 1948 were, by proclamation, declared to be applicable to the locality in which the premises in question were situated.

Held : That the coming into operation of the Act after an action for ejectment has already commenced, does not affect the landlord's right to claim ejectment under the common law which governs the relationship of landlord and tenant.

Held further : (1) That an action instituted in the name of the landlord by his attorney, holding a *general* power of attorney from the landlord, was properly constituted.

(2) That a *special* agent is one who has authority to act on his principal's behalf for some special occasion or purpose ; on the other hand, an agency may legitimately be regarded as *general* if, as in the case of a house agent, the person concerned is authorised to act generally on behalf of his principal in relation to that employment.

Per GRATIAEN, J.—Even if it were correct to say that the language of Section 13 may fairly be interpreted as being retrospective, I would say that it might at any rate be interpreted with equal fairness as being prospective only. In that state of things the law requires that the interpretation which preserves the cause of action which has already accrued to the landlord in a pending action should be preferred.

Cases referred to : *Banda vs. Karohamy* (1948) 50 N. L. R. 369.
Hitchcock vs. Way, 6 Ad. and E1.943 (= 112 E. R. 360)
Joseph Suche & Co. (1876) 45 L. J. Ch. 12.
Stevin vs. Fairbrass (1919) L. J. K. B. 1005 ; *Landrigan vs. Simons* (1924) 1 K. B. 509 ; *Brooks vs. Brimecome* (1937) 106 L. J. K. B. 801.
Ismail vs. Herft (1948) 50 N. L. R. 112.
Brady vs. Todd (1861) 9 C. B. N. S. 592 (= E. R. 142, p. 233).
Smith vs McGuire (1858) 3 H. and N. 554 (= 157 E. R. 589).
Venkataramana vs. Narasingha Rao (1913) I. L. R. 38, Mad. 134.

H. V. Perera, K.C., with *S. Walpita*, for the plaintiff-appellant.
E. B. Wikremanayake, K.C., with *E. S. Amarasinghe*, for the defendant-respondent.

GRATIAEN, J.

This action was instituted on 24th March, 1949, by the landlord of a bungalow in the Kalutara District to have his tenant ejected from the premises. Admittedly the tenant had been given due notice to quit, and the provisions of the Rent Restriction Act No. 29 of 1948 did not, at the time when the action commenced, apply to the premises.

The tenant in his pleadings raised certain technical defences to which I shall later refer. The case was fixed for trial on 22nd August, 1949, but was postponed for 1st November, 1949, on the ground of the defendant's ill-health. On that date the case was again postponed for the same reason. The trial eventually took place and was concluded on 21st December, 1949.

In the meantime the provisions of the Rent Restriction Act 1948 were, by proclamation, declared to be applicable, with effect from 2nd December, 1949, to the locality in which the premises were situated. Relying on this circumstance, the defendant's proctor raised an additional issue at the trial contesting the jurisdiction of the Court to grant a decree in favour of the landlord except upon proof of one or other of the conditions specified in section 13 of the Act. This contention was upheld by the learned Commissioner of Requests.

It is apparent that there were no statutory fetters on the landlord's common law right to sue his tenant for ejectment when the action was instituted. The question however arose whether the subsequent proclamation of 2nd December, 1949, could legitimately be regarded as now restricting the accrued rights of the landlord *in the pending action*. The learned Commissioner answered the question in favour of the tenant on the authority of *Banda vs. Karohamy* (1948) 50 N. L. R. 369. With great respect, I do not

see what application that decision, which was concerned with a plea of *res adjudicata*, can possibly have on the present issue.

The general principles upon which a Court must determine whether intervening legislation can be regarded as having retrospective effect so as to interfere with rights in a pending action are clear enough. In *Hitchcock vs. Way*, 6 Ad. and El. 943 (=112 E. R. 360) Lord Denham declared that " in general the law as it existed when an action was commenced must decide the rights of the parties in the suit unless the Legislature express a clear intention to vary the relation of litigant parties to each other ". It was similarly held that " when the Legislature alters the rights of parties by taking away from them, or conferring upon them, any right of action, *its enactments, unless in express terms they apply to pending actions, do not affect them at all* ". Vide also *re Joseph Suche and Co.* (1876) 45 L. J. Ch. 12. This principle is recognised in section 6 (3) of the Interpretation Ordinance, although the language of the section does not strictly apply to the present action.

I have endeavoured, within the time at my disposal, to search for precedents where the English Courts have considered whether analogous legislation (affecting the rights of landlord and tenant) were retrospective in effect. The *ratio decidendi* of all the decisions which I have traced seems to me that it is necessary in each case to examine the language of the particular enactment, and that only a clear intention on the part of the legislature to affect rights in a pending action could rebut the general presumption to which I have already referred. *Stevin vs. Fairbrass* (1919) L. J. K. B. 1005 ; *Landrigan vs. Simons* (1924) 1 K. B. 509 ; *Brooks vs. Brimecome* (1937) 106 L. J. K. B. 801. In the last mentioned decision Lord Du Parcq (then Du Parcq J.) adopted an earlier ruling that " no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. *If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only* ".

I shall now proceed to examine the provisions of the Rent Restriction Act in the light of these principles. Section 13 (1) seems to me very clearly to relate to a point of time immediately preceding the commencement of an action for ejectment. It precludes the landlord of premises to which the Act applies from instituting such an action without prior authorisation in writing from the Rent Control Board unless one or other of the conditions specified in the proviso has been satisfied. It therefore follows that section 13 (1) could have had no application when the present action commenced and after the Act first applied to the premises the time for obtaining the Board's authority to *institute* the action which was pending had long since passed. No doubt, as Windham J. pointed out in *Ismail vs. Herft* (1948) 50 N. L. R. 112 the requirement in proviso (c) that " the premises are reasonably required for the occupation of the landlord " connotes, a continuity of the requirement until the decree for ejectment is executed, but the other parts of section 13 all relate to a point of time prior to the commencement of the proceedings. I would therefore hold that the coming into operation of the Act after an action for ejectment has already commenced do not affect the landlord's accrued right to claim ejectment under the common law which governs the relationship of landlord and tenant. Even if it were correct to say that the language of section 13 may fairly be interpreted as being retrospective, I would say that it might at any rate be interpreted with equal fairness as being prospective only. In that state of things the law requires that the interpretation which preserves the cause of action which has already accrued to the landlord in a pending action should be preferred. I would therefore hold that the plaintiff was not deprived of his right to claim ejectment in these proceedings.

The only other objection on which the tenant relied was that the action was not properly instituted in the name of the landlord by his attorney, The Lanka Estate Agency Limited. The plaintiff was admittedly residing outside the jurisdiction of the Court at all relevant times, and the Company could therefore make appearances and applications on his behalf as his recognised agent, if, in terms of section 25 (b) of the Civil Procedure Code, the Company held " a general power of attorney from (the plaintiff) authorising the Company to make such appearances and applications on his behalf ".

The power of attorney in favour of the Company has been filed of record. It authorises the Company to manage the property which is the subject matter of this action, to collect the rent and income thereof, to give notice to any tenant terminating the tenancy, to appear for the plaintiff in any Court of law, and to grant proxies on his behalf in favour of any proctor or proctors. The right of representation is of course limited

in this context to proceedings affecting the property which the Company was empowered to manage.

The learned Commissioner has taken the view that the power of attorney was a special power of attorney and not a general power within the meaning of section 25 (b) of the Code. I cannot agree. A *special agent* is one who has authority only to act on his principal's behalf for some special occasion or purpose. *Brady vs. Todd* (1861) 9 C. B. N. S. 592 (= E. R. 142—p. 233); on the other hand, any agency may legitimately be regarded as *general* if, as in the case of a house agent, the person concerned is authorised to act generally on behalf of his principal in relation to that employment. *Smith vs. McGuire* (1858) 3 H and N 554 (=157 E. R. 589). I do not think that section 25 (b) of the Civil Procedure Code was intended to refer only to persons who hold general powers of attorney authorising them to represent the principal in every conceivable kind of transaction and in connection with every kind of legal proceeding. This is apparent, I think, because the words " where no other agent is expressly authorised to make such appearances" in section 25 (c) presupposes that a person with a special authority to represent the principal in matters *in connection with a particular trade or business* is a recognised agent within the meaning of section 25 (b).

I find that section 37 of the original Civil Procedure Code of India contained language similar to section 25 (b) of our present Code. In *Venkataramana vs. Narasingha Rao* (1913) I. L. R. 38 Mad. 134 it was held that the section was satisfied so as to constitute a general agency where there is " a delegation to do all acts connected with a *particular* trade, business or employment '. Applying this ruling I have taken the view that the plaintiff's action was properly constituted.

I set aside the judgment appealed from, and enter decree in favour of the plaintiff as prayed for with costs, subject to the proviso that damages should be awarded against the defendant at the rate of Rs. 50 per mensem. The plaintiff is also entitled to the costs of this appeal.

Set aside.

Present : BASNAYAKE, J. & GUNASEKERA, J.

IBRAHIM vs. ALAGAMMAH & OTHERS

S. C. 351—*D. C. Batticaloa* 515/*L*

Argued on : 4th December, 1950
Decided on : 27th April, 1951

Donation—Deed of gift subject to conditions—Property to devolve on donee's brothers—Devolution—Does jus accrescendi *apply ?—Wills Ordinance, section 7—Civil Procedure Code, section* 247.

Where under a deed property is gifted to a person prohibiting alienation and subject to certain conditions, and the deed contained a direction that in the event of the donee dying issueless, the property was to devolve on the donee's brothers, subject to the said conditions, and where, after the death of such donee, an action under section 247 of the Civil Procedure Code was instituted to have a share of the property declared liable to be sold in execution of a decree on the ground that at the time of death of one of the brothers, his share devolved on his heirs and not on his other brothers.

Held : (1) That the rule of *jus accrescendi* did not apply.
(2) That the gift was valid and as the prohibition in the deed of gift was good and did not extend beyond the life-time of each of the donor's sons, the share of each son would pass to his heirs on his death free of all obligations and restrictions and could therefore be sold in execution against them.

Per BASNAYAKE, J.— "Questions of *jus accrescendi* can arise only where property is bequeathed to certain legatees or heirs jointly and one of them dies in the *lifetime* of the testator. Once interests under a will vest there is no room for the *jus accrescendi*."

Authorities cited : Burge, Colonial & Foreign Laws, Vol 2, p. 150.
Sande on Restraints, p. 168.
Voet, Book XXXIX, Tit, 5, Sec. 14.
Massdorp's Grotius—Schorer's Notes CLII, CLXIII.
Van Leeuven Censura Forensis, Book 3-5-17.
Van Leeuven Book III, Ch. IV, Sec. 4.
Smuts N. O. vs. Smit N. O., 1928, C. P. D. 474.
Usoof vs. Rahimath (1918) 20 N. L. R. 225 at 233.

S. Nadesan, for the plaintiff-appellant.
P. Navaratnarajah with *Sharvananda*, for the defendant-respondents.

BASNAYAKE, J.

This is an action under section 247 of the Civil Procedure Code by the asignee of a decree in favour of one Mylvaganam Ponnammah to have one-third share of a land called Kovil Adi Valavu bearing Lot No. 1648 at Kommathurai in Eravur Pattu (hereinafter referred to as the land) declared liable to be sold in execution of a decree against the second, third and fourth defendants and one Abdul Majeed Abdul Jaleel.

There are four defendants to this action. The first Marimuttu Alagamma is the person who objected to the seizure under the decree. The second, third and fourth are the heirs of one Abdul Majeed who the plaintiff asserts was at the time of his death entitled to a third share of the land.

The point that arises for decision in this action is whether Abdul Majeed was at the time of his death entitled to a third share of the land. The material facts shortly are as follows :

The original owner of the land was Mohamaduthambylevvai Maraicair Mohideen Abdul Careem Udayar. He gifted the land to his son Abdul Samath by deed No. 8056 of 19th September, 1929, subject to certain conditions. Abdul Samath being a minor the gift was accepted on his behalf by his mother. Samath died without issue in October, 1933, and in terms of the deed the land went to his three brothers, Abdul Majeed, Abdul Salam, and Abdul Hameed. Two of them sold two-thirds of the land to Vyramuttu Peter Arumugam who by deed No. 10898 of 27th October, 1945, sold that share to the first defendant Marimuttu Alagamma, who also purchased the remaining one-third. In 1940 Abdul Majeed died, and the question that arises for decision is whether on his death his interests went to the other two brothers or devolved on his heirs.

The learned District Judge has held that on Abdul Majeed's death his interests went under the deed of gift to his brothers. This appeal is from that judgment.

In order to resolve the matter in dispute the meaning and effect of the deed of gift No. 8056 has to be ascertained. The material portion of that deed, which is in Tamil, according to the official translation reads :—

"I Mohamaduthambylevvai Marikar Muhaiyadeen Abdulcareem Udayar.....in consideration of the love and affection which I bear unto my son Muhaideen Abdul Carcem Udayar Abdul Samath of the same division and place aforesaid do hereby set over and assure unto him the property described in the schedule hereto, which is valued at Rs. 4,000 so as to possess and enjoy the same as donation in the manner mentioned below.

"I do hereby declare that the said M. A. U. Abdul Samath shall without encumbering and alienating the said property for any reason whatever take only the produce thereof and out of it after spending for kerosene oil to be used for the Meerapalli Mosque at Division 1, Kattankudy, daily and for the three meals of Musafars daily shall take the balance for herself, that as the said Abdul Samath is at present a minor, of his brothers Muhaiyadeen Abdulcareem Udayar Abdul Majeed, Muhaiyadeen Abdulcareem Udayar Abdul Salam and Muhaiyadeen Abdulcareem Udayar Abdul Hameed those who are majors shall for and on his behalf manage and take the produce of the said property and out of the produce thereof after spending for the abovesaid two charitable purposes shall give over the balance to the said Abdul Samath, that should he die issueless the said property shall subject to these conditions devolve on the abovesaid three persons who shall perform the abovesaid acts. Thus declaring and binding them I have executed this deed."

The deed in question is clearly a deed of gift. Certain obligations and restrictions attach to the gift. The obligations are to carry out the charitable purposes the donor has in mind. The restrictions are that the land cannot be alienated and that it does not pass to the donee's heirs on his death intestate and without children.

A donor may when making a gift make it subject to conditions, Burge, Colonial and Foreign Laws, Vol. 2, p. 150. The gift is therefore a valid gift. Is the prohibition against alienation equally valid ? A prohibition against alienation is not valid if it is based upon no apparent reason and where there is no one to benefit upon its breach, Sande on Restraints, p. 168. But in the instant case the object of the donor is to benefit the charity mentioned in the deed during the lifetime of his sons. The prohibition is good and they are therefore not free to alienate the property. But as the prohibition does not extend beyond the lifetime of each of them the share of each son would pass to his heirs on his death.

In the instant case Majeed's share would pass to his heirs free of all the obligations and restrictions and can be sold in execution against them. The learned District Judge is wrong when he applies the rule of *jus accrescendi* to this gift. That rule has no application to gifts, Voet, Book XXXIX, Tit. 5, Sec. 14. The *jus accrescendi* or right of accrual is a rule of Roman Law. Under that Law if one of several instituted heirs died in the testator's lifetime, or failed for

any reason to become heir, his share went to his co-heirs. This arose from the rule of Roman Law that no one could die partly testate and partly intestate. Under the Roman Dutch Law that rule became obsolete and consequently the right of accretion except where the testator in his will indicated that the *jus accrescendi* should apply, Massdorp's Grotius—Schorer's Notes CLII, CLXIII.

Van Leeuven observes, Censura Forensis, Book 3.5.17 "for since by usage one may die partly testate and partly intestate, that rule as to accrual, which by virtue of law used to apply in that case, has, as we have said, been abrogated by custom," In his commentaries Van Leeuven states the legal position still more clearly, Book III, Ch, IV, Sec. 4. "But as regards the rule of accretion if any one has been instituted heir, without co-heirs in the other shares, the subtlety of the Roman Law has no application among us, and we understand that in such a case the other portions to which no heir has been appointed, do not accrue to the instituted heir, but remain and devolve *ab intestato* upon those who are nearest in blood to the testator."

Questions of *jus accrescendi* can arise only where property is bequeathed to certain legatees or heirs jointly and one of them dies in the *lifetime* of the testator. Once interests under a will vest there is no room for the *jus accrescendi Smuts N. O. vs. Smit N. O.*, (1928) C. P. D. 474.

I have referred to the Roman Dutch Law because the learned District Judge has rested his decision on a statement in Wille's Principles of South African Law at page 270 (2nd Edn.). That passage applies to a case where a legatee or heir under a will dies in the lifetime of the testator and has no application to a case such as the one under consideration. I do not therefore propose to discuss that citation more especially as our law on the subject of accrual is very clearly set out in section 7 of the Wills Ordinance. That section reads :—

> "And for the avoiding of all doubts and questions as to the respective rights of persons jointly holding landed property situated within certain districts of this Island, it is further enacted and declared that all landed property situated in this Island which shall belong to two or more persons jointly, whether the same shall have come to them by grant, purchase, descent, or otherwise, is and shall be deemed and taken to be held by them in common, and upon the decease of any of such persons the said property so jointly possessed shall not remain or belong to the survivor, but all the right, share, and interest of the person so dying in and to the property so jointly possessed as aforesaid shall form part of his estate; and the person or persons to whom the same shall by him be devised or bequeathed, or to whom it shall devolve, shall thereupon become and be co-proprietors with the survivor in the said property, in the proportion and according to the share of such deceased person therein, unless the instrument under which the said property is jointly held and possessed, or any agreement mutually entered into between them, shall expressly provide that the survivor, upon such decease, shall become entitled to the whole estate."

The appellant is entitled to succeed. The appeal is allowed with costs both here and below.

Gunasekara, J.

The quotation from Wille's Principles of South African Law upon which the learned District Judge's decision is based is as follows :—

> "In the absence of any indication in the will as to the testator's intention, *jus accrescendi* takes place where the beneficiaries have been appointed jointly or *re et verbis* but not where they have been appointed to separate shares or *verbis tantum*."

It has no application to the present case which concerns a deed of gift and not a last will.

Upon the death of Samath the property vested finally in Majeed, Salam and Hameed, subject only to the condition that they should continue to pay for the oil used in the mosque and for the *musafar's* meals. The *jus accrescendi* has no application when the shares of the objects of the liberality have once vested (per Bertram C.J. in *Usoof vs. Rahimath*) (1918) 20 N. L. R. 225 at 233 and there is nothing to suggest that the donor intended an accrual in respect of these interests.

I agree that the appeal should be allowed with costs in both Courts.

Appeal allowed with costs.

Present : GRATIAEN, J. & GUNASEKERA, J.

MOHAMMADO CASSIM vs. MAHMOOD LEBBE *et al.*

S. C. No. 436—D. C. Kandy No. 2610

Argued on : 11th 12th & 13th June, 1951
Decided on : 20th June, 1951

Damages—Sale of land to two purchasers—Action by third party against one of them—Eviction—Right of other purchaser to sue vendor—Actio de evictione—*Ingredients of.*

Where one of two joint-purchasers of a land was evicted by a third party under a decree against him and the two purchasers jointly claimed damages from the vendor for breach of warranty against eviction.

Held : (1) That no cause of action to sue the vendor accrued to the purchaser who was not bound by the decree and who was therefore not judicially evicted from the land.
(2) That in an *actio de evictione* the plaintiff must prove that " the whole or part of the property of which he was placed in possession under a contract of sale had been recovered from him by a third party *by judicial process per judicem facta recuperatio.*"

Authorities referred to : *Spencer vs. Williams* (1871) L. R. 2 P and D. 230 (40 L. J. P. and M. 45).
Wytcherley vs. Andrews (1871) 40 L. J. P. 57.
Ch. Gur Narayan et al vs. Sheolal Singh et al, A. I. R. (1918) P. C. 140.
Lingangowda Dod-Basangowda Patil et al vs. Basangowda Bistangowda Patil et al, A. I. R. (1927) P. C. 56.
Alagiawanna vs. Don Hendrick (1910) 13 N. L. R. 225.
Jamis vs. Suppa Umma (1913) 17 N. L. R. 33.
Norman's Purchase and Sale in South Africa (2nd edition) at page 301.
Grotius 3-15-4 and *Van Leeuwen* (Cens. For. 1-4-19-11).
Numan vs. Meyer (1905) 22 S. C. 203.

N. E. Weerasooriya, K.C., with *H. W. Thambiah* and *J. W. Subasinghe*, for the defendant-appellant.

C. Thiagalingam, K.C., with *V. Arulambalam*, for the plaintiffs-respondents.

GRATIAEN, J.

On 26th March, 1943, plaintiffs, who are brothers, jointly purchased from the defendant a land called Gurugama Kumbura for a consideration of Rs. 3,000. The transaction was admittedly implemented by the plaintiffs being placed in possession of the property, and, by arrangement between the brothers, the 1st plaintiff occupied the property for their joint benefit. Six months later, however, two persons named Rabiya Umma and Mohamed Lebbe successfully sued the 1st plaintiff (but not the 2nd plaintiff) in D. C. Kandy, No. L.1116 for a declaration that they were the lawful owners of a portion of the property. The 1st plaintiff unsuccessfully contested the action, having given due notice to the defendant to warrant and defend the title conveyed to him. Decree was in due course entered against the 1st plaintiff declaring Rubiya Umma and Mohamed Lebbe entitled to the extent in dispute. He was also condemned in damages and costs. The 1st plaintiff was ejected under this decree. The 2nd plaintiff was not a party to that action and his interests in the disputed extent, though precisely similar to those of his brother, were not adjudicated upon. Since the date of this decree both plaintiffs have enjoyed possession of only that part of the property conveyed to them by the defendant which was not affected by the decision in favour of the successful parties in D. C. Kandy, L.1116.

The plaintiffs have jointly sued the defendant in the present action for a breach of his express covenant under the deed of conveyance to guarantee them against eviction from the property. This covenant is not a warranty *of title* but is in effect only a warranty *against eviction* which is implied in contracts for the sale of land. After trial the learned District Judge entered judgment in favour of both plaintiffs for the sum of Rs. 2,051. Of this sum Rs. 1,222·35 represents the value of the joint interests of the plaintiffs in the extent which is now in the possession of Rubiya Umma and Mohamed Lebbe. The additional sum awarded represents the damages awarded against the 1st plaintiff and the costs incurred by him in the earlier action.

After some argument Mr. Weerasooriya, who argued the defendant's appeal, conceded that the judgment, in so far as it affected the interests of the 1st plaintiff, could not be challenged. The 1st plaintiff was judicially evicted from a part of

the land in proceedings of which the defendant had due notice. On that basis the damages payable to the 1st plaintiff on his own account in the present action would amount to Rs. 1,440·63½ —the value of his half share in the extent from which he was evicted being only Rs. 611·17½ and not Rs. 1,222·35.

Mr. Weerasooriya argues that no cause of action accrued to the 2nd plaintiff to sue the defendant in these proceedings because he was not a party to the earlier action and therefore suffered no *judicial eviction* from any part of the property conveyed to him. Mr. Thiagalingam has submitted in reply that (1) the 2nd plaintiff was in effect judicially evicted under the decree in the earlier action and (2) that in the alternative no judicial eviction need be proved having regard to the circumstances of this particular case. I shall consider each of Mr. Thiagalingam's submissions in turn.

In regard to the first proposition, it is conceded that the 2nd plaintiff cannot be regarded as having been judicially evicted in the earlier action to which he was not a party unless the decree entered against his brother operated as *res adjudicata* against him as well. The general principle is that "if parties litigate a question in a Court of competent jurisdiction, such parties *or those claiming through them*, cannot afterwards reopen the same question in another Court. *This restriction does not extend to other persons whose interest is almost identical with that of one of the parties to the first suit if they do not actually claim through some party*". Vide *Spencer vs. Williams* (1871) L. R. 2 P and D. 230 40 L. J. P. and M. 45, where Lord Penzance said "every man is the guardian of, and is entitled to litigate, his own right, and it is the commonest principle of justice that a man should not be robbed of his right by the fact that another, insisting upon the same right for his own purposes, has entered upon a litigation which has ended unfavourably for him". The 2nd plaintiff's title, which was not derived from the 1st plaintiff but from their common purchaser, was not adjudicated upon and was never in jeopardy in the earlier action. Indeed, if one applies the test of mutuality which is legitimate in such cases, I do not see how, if the result of the other action had been the other way, Rabiya Umma and Mohamed Lebbe could have been confronted with a plea of *res adjudicata* if they sued the 2nd plaintiff for a declaration of their rights in the property as against him. *Wytcherley vs. Andrews* (1871) 40 L. J. P. 57 and the decisions of the Privy Council in *Ch. Gur Narayan et al vs. Sheolal Singh et al*, A. I. R. (1918) P. C. 140 and *Lingangowda Dod-Basangowda Patil et al vs. Basangowda Bistangowda Patil et al*, A. I. R. (1927) P. C. 56 relied on by Mr. Thiagalingam stand on a different footing, because in each of these cases the unsuccessful party to the earlier litigation was held, for one reason or another, to have represented not only himself but also the person who was seeking to re-agitate the same issue in a subsequent action.

There remains the question whether, in applying the Roman-Dutch Law which governs the case, it is open to a party to rely on any form of eviction other than eviction *by judicial process* under a decree to which he was bound.

As far as I have been able to discover, it has always been assumed in this Island that, for the purposes of an *actio de evictione*, the plaintiff is required to prove that "the whole or part of the property of which he was placed in possession under a contract of sale had been recovered from him by a third party *by judicial process per judicem facta recuperatio*". Voet 21-2-1. It is only necessary in this connection to refer to the Full Bench decisions of this Court in *Alagiawanna vs. Don Hendrick* (1910) 13 N. L. R. 225 and *Jamis vs. Suppa Umma* (1913) 17 N. L. R. 33.

After the argument was concluded Mr. Thiagalingam submitted to me in chambers a passage from *Norman's Purchase and Sale in South Africa* (2nd edition) at page 301 which indicates that, according to *Grotius* 3-15-4 and *Van Leeuwen* (Cens. For. 1-4-19-11) a purchaser can, without resorting to litigation, give up the property and claim damages in an *actio de evictione* against his vendor "where it is clear that the claimant's right is a good one". I have examined the authority referred to in this text book, and find that the Courts in South Africa have recognised this principle and to that extent taken a view which goes beyond the rulings of our Courts. In *Numan vs. Meyer* (1905) 22 S. C. 203, de Villiers C.J. held that the purchaser need not wait till his title is judicially interfered with if he undertakes to prove beyond doubt that the right of the claimant to whom he handed over possession was obvious. If, the purchaser succeeds in establishing such proof, says the learned Judge "it would to my mind, be a needless formality to insist upon two actions being brought". It is sufficient to say that, even if this principle did apply in Ceylon, the 2nd plaintiff has not raised any issue or led any evidence upon which the Court could properly

hold that the title of Rabiya Umma and Mohamed Lebbe was without doubt superior to his title. Indeed, the action was based *upon the assumption that both the plaintiffs had been judicially evicted in the earlier action.* In any event it is not competent to this Court to refuse to follow the earlier Full Bench decisions to which I have referred. In my opinion, therefore, the 2nd plaintiff has no cause of action against the defendant.

I would make order amending the decree by ordering the defendant to pay to the 1st plaintiff only a sum of Rs. 1,440·63½. The 1st plaintiff is entitled to his costs in the lower Court, and the 2nd plaintiff will bear his own costs. I also think that in the circumstances of the case there should be no order as to the costs of this appeal.

GUNASEKARA, J.

I agree.

Decree amended.

Present : BASNAYAKE, J.

MADASAMY vs. AMINA

S. C. 125—*C. R. Gampola* 7642

Argued on : 31st October, 1950
Decided on : 28th May, 1951

Arbitration—Reference to, without complying with provisions of Civil Procedure Code—Section 676.

Held : That a reference to arbitration which does not strictly comply with the provisions of section 676 of the Civil Procedure Code is bad, and that an award made under such a reference is invalid.

Per BASNAYAKE, J.—"It is clear from the provisions of Chapter LI of the Civil Procedure Code that a *lis* may be taken away from the jurisdiction of the Courts to an arbitrator only in strict conformity with the prescribed procedure. But there appears to be a good deal of laxity in the trial Courts in the matter of reference to arbitration. It is eminently necessary that Judges and pleaders alike should consult the Code when taking any step thereunder."

Cases referred to : (1949) A. I. R. Privy Council 143.

H. W. Jayawardena, for the plaintiff-appellant.
G. T. Samarawickrema, for the defendant-respondent.

BASNAYAKE, J.

The plaintiff-appellant instituted this action against the defendant-respondent for rent and ejectment. At the close of the plaintiff's case the parties agreed that the matters in difference should be referred to arbitration. The relevant journal entry reads :—

"**26-7-49.**

Mr. Jonklaas for plaintiff.
Mr. Gunaratne for defendant.
Mr. Jonklaas closes his case reading in evidence P1 to P3.
Defendant's case.
At this stage the parties agree to abide by the award to be given by Mr. M. W. R. de Silva, Crown Proctor, as arbitrator without the right of appeal, on all matters in dispute. Fees Rs. 31.50 each side. Reference by plaintiff on 9/8. Any party defaulting in the payment of fees, will, of consent, have judgment entered against him or her. Fees are payable on or before 8-8.
We consent.
Plaintiff. (Sgd.) K. R. MADASAMY.
Defendant. Left thumb impression of Amina Umma."

The arbitrator in due course made his award after hearing the parties who were represented by their respective proctors. After the award was filed the plaintiff, who had by then retained another proctor, made an application to set aside the award. That application was refused by the Commissioner of Requests. The present appeal is from that order.

One of the grounds urged in support of the application to set aside the award is that section 676 of the Civil Procedure Code has not been complied with. The material portions of that section read :—

"(1) If all the parties to an action desire that any matter in difference between them in the action be referred to arbitration, they may at any time before judgment is pronounced apply, in person or by their respective proctors, specially authorised in writing in this behalf, to the Court for an order of reference.

"(2) Every such application shall be in writing, and shall state the particular matters sought to be referred, and the written authority of the proctor to make it shall refer to it, and shall be filed in Court at the time

when the application is made, and shall be distinct from any power to compromise or to refer to arbitration which may appear in the proxy constituting the proctor's general authority to represent his client in the action."

In the instant case there was no application in writing as contemplated by sub-section (2), nor did the proctors have a special authority in writing as required by sub-section (1). It is clear from the provisions of Chapter LI. of the Civil Procedure Code that a *lis* may be taken away from the jurisdiction of the Courts to an arbitrator only in strict conformity with the prescribed procedure. But there appears to be a good deal of laxity in the trial Courts in the matter of reference to arbitration. It is eminently necessary that Judges and pleaders alike should consult the Code when taking any step thereunder. Had that precaution been taken in the instant case the present situation would not have arisen. The fact that the parties signed the journal entry which records the consent to refer to arbitration, a step which the Code does not require, does not amount to compliance with section 676. The appellant's objection to the award is therefore entitled to succeed as the prescribed procedure has not been observed. Provisions of Civil Procedure are imperative (1949) A. I. R. Privy Council 143 and proceedings taken in disregard of such provisions are liable to be set aside.

The appeal is therefore allowed. In regard to costs I am of opinion that this is a case in which the appellant should not be allowed costs. He was a consenting party to the irregular proceedings in which he participated without objection till he discovered that the award was not entirely in his favour.

As the learned Commissioner of Requests who heard the case is no longer at the same station I order a fresh trial with liberty to the parties, should they so desire, to make a proper application under section 676 tor reference to arbitration.

Fresh trial ordered.

Present : Gratiaen, J. & Gunasekera, J.

P. THANGAVELAUTHAM vs. S. SAVERIMUTTU *et al.*

S. C. No. 174—*D. C. Point Pedro No.* 2761

Argued on : 16th & 17th July, 1951

Decided on : 26th July, 1951

Trust—Sale of land by defendants—Subsequent lease to them—Purchase of land by plaintiff after expiry of lease—Plaintiff's action to eject defendants—Defence that land held in trust by plaintiff's vendor on informal agreement to reconvey—Prevention of Frauds Ordinance section 2 (*Chap.* 57).

The defendants sold by deed for valuable consideration a land to one I, who thereafter notarially leased it to them, and after the expiration of the lease sold it to the plaintiff.

In an action for ejectment by the plaintiff, the defendants successfully contended in the District Court that they had conveyed the property to I " in trust " and subject to the terms of an informal agreement whereby I had undertaken to reconvey the land to them within eight years on payment of Rs. 2,000.

Held : (1) That the conveyance of land by the defendants to I by deed was clearly a sale and the facts in the case establish that there was no trust in favour of the defendants.

(2) That an informal agreement to reconvey land is of no avail as it is obnoxious to the provisions of section 2 of the Prevention of Frauds Ordinance.

Per Gratiaen, J.—In this context Lord Atkinson in connection with a contemporaneous transaction made certain observations which seem to be very appropriate to the present case. " It is certainly a novel application of the equitable doctrine of resulting trusts ", he remarked, " that where an owner of property..... sells and conveys it to a *purchaser who pays him the purchase price*, all which the deeds recite in the case to have been done or to be done, the purchaser is converted into a trustee for the vendor whom he has paid ".

Cases referred to : *Valliammai Atchi vs. Abdul Majeed* (1947) 48 N. L. R. 289 P. C.
Perera vs. Fernando (1914) 17 N. L. R. 486.
Saminathan Chetty vs. Vanderpoorten (1932) 34 N. L. R. 287.
Adicappa Chetty vs. Caruppen Chetty (1921) 22 N. L. R. 417.
Carthelis Appuhamy vs. Saiya Nona (1945) 46 N. L. R. 313.

N. E. Weerasooriya, K.C., with *H. W. Thambiah*, for the plaintiff-appellant.
H. W. Jayawardene, for the 1st defendant-respondent.
C. Chellappah with *S. Sharvananda*, for the 2nd and 7th defendants-respondents.

GRATIAEN, J.

The 1st defendant and his wife Annamah were admittedly the owners until 12th November, 1937, of the land which is the subject matter of this action. Annamah died before these proceedings commenced, and the 2nd to the 8th defendants are her legal heirs.

By a deed of conveyance P1 of 12th November, 1937, attested by S. Sivagnanam, Notary Public, the 1st defendant and Annamah purported to sell the land in dispute, as well as two other properties, to K. Iyadurai for a consideration of Rs. 2,000 which was stated to be the full balance amount due by the vendors to the vendee under the mortgage decree in favour of the latter in D. C. Jaffna No. 265. Satisfaction of the decree was duly certified of record. On the face of it, the deed is an out and out transfer.

Iyadurai was apparently arranging to leave for Malaya at this time, and immediately after the execution of P1 he leased the property to the vendors for a period of six years at an agreed rental by D3 of the same date. Here again, the terms of the lease afforded intrinsic evidence that the legal title as well as the beneficial interest was acknowledged to be in Iyadurai. The deed contains the usual covenants such as the covenant to keep the property in good repair. On the face of the documents P1 and D3, and by reason of the satisfaction of the decree in D. C. Jaffna 265, the relationship of Iyadurai and the 1st defendant had been converted from that of creditor and debtor to that of lessor and lessee.

Some years after the expiry of the lease Iyadurai sold the land in dispute to the plaintiff by the deed of conveyance P4 dated 24th June, 1946. The plaintiff then instituted this action complaining that the defendants were in wrongful possession of the property. He asked for a declaration that he was the lawful owner, and for ejectment and damages.

The defence is that, notwithstanding the unequivocal terms of the deed of conveyance P1, the 1st defendant and Annamah had retained the beneficial interest in the property. Their position is that they had merely conveyed the property to Iyadurai "in trust", and subject to the terms of an *informal agreement* whereby Iyadurai had undertaken to re-convey the land to them within eight years on payment by them of Rs. 2,000 with interest calculated at the rate of 12% from the date of P1. This defence was upheld by the learned District Judge, who dismissed the plaintiff's action with costs.

There can be no doubt that, if one considers the claim of the defendants apart from the alleged trust, the informal agreement relied on is by itself of no avail to them. It is obnoxious to the clear provisions of section 2 of The Prevention of Frauds Ordinance, and besides, the period of 8 years within which a reconveyance could have been demanded, on payment of the stipulated consideration, had long since elapsed. The only question which therefore remains for consideration is whether the creation of the alleged "trust" has been substantiated. I shall assume, although I do not hold, that the evidence of the informal agreement is admissible for the purpose of establishing such a trust.

The case for the defendants is that before P1 was executed Iyadurai had for some time been pressing the 1st defendant and Annamah for repayment of the balance sum due to him under the mortgage decree in his favour. Finally, according to the 1st defendant's version, he induced them to convey the properties, which were bound and executable under the decree, to him "in trust" and on a promise that if they at any time within 8 years paid him the same consideration, *i.e.*, Rs. 2,000 with interest, he would re-convey the property to them. No explanation has been forthcoming either in the pleadings or in the evidence of the 1st defendant as to what precisely the parties intended or understood to be the object or the purpose of this vague and nebulous "trust" which is alleged to have been created. If there was any trust at all, it was, presumably, an *express trust*, and I concede that section 5 (3) permits parole evidence to be led if its exclusion would otherwise operate so as to effectuate a fraud. *Valliammai Atchi vs. Abdul Majeed* (1947) 48 N. L. R. 289 P. C. Certainly the transaction as it has been explained by the 1st defendant does not introduce the notion of any resulting or constructive trust such as I understand these terms. This is not a case, for instance, where A. conveys property to B. for a consideration provided by C. in circumstances which indicate that the beneficial interest was to vest in C. Nor is it a case where A. purports to convey his property to B. for a non-existent or fictitious consideration with a clear intention that only the legal estate but not the beneficial interest should pass to the transferee. On the contrary, the facts here establish that the 1st defendant and his wife

sold the property to Iyadurai for *valuable consideration* which he himself provided—namely, the full satisfaction of the decree which he held and was entitled to execute against his vendors. The 1st defendant suggests that the consideration was in fact inadequate. Even if that were true, it must be remembered that he was at the time in no position to strike an advantageous bargain, and his remedy, if at all, would have been to claim relief under some other legal principle unconnected with the law of trusts. But in truth there is to my mind little substance in his suggestion that the consideration was inadequate. In his plaint in D. C. Jaffna 2625 instituted on 11th March, 1946, he valued all the properties conveyed in 1937 by P1 at Rs. 7,000 (*vide* P18). He admitted in evidence that the value of immovable property in this locality had since 1942 gone up " even by 10 or 12 times ". It cannot therefore be said that the consideration of Rs. 2,000 paid in November, 1937, was too low.

It seems to me that in recent years many litigants have, through a misunderstanding of the judgment of the Privy Council in *Valliammai Atchi's case*, been encouraged to import some vague element of a " trust " into perfectly normal transactions of purchase and sale. That case dealt with a conveyance to a transferee for the purpose *inter alia* of applying the income of the property in settlement of the transferor's creditors including the transferee himself. This transaction, said Sir John Beaumont, created an express trust, and parole evidence could be led to establish it so as to meet a fraudulent attempt on the part of the transferee to repudiate the trust and claim the property as his own. The present case is entirely different.

I pointed out to Mr. Jayawardene that, if the defendants contention could be sustained, Iyadurai's position seemed, after accepting the position of a trustee with nebulous obligations imposed on him, to be very much worse than it had previously been. He had, upon the execution of P1, discharged the debt due to him under the mortgage decree. Had Iyadurai, I asked, any remedy to claim either his money or the beneficial interest in the property after the 8 years period covered by the agreement to reconvey had elapsed? I understood Mr. Jayawardene to reply that some kind of mortgage was in truth created by P1, and that it would have been open to Iyadurai to enforce this so-called mortgage if the transferors did not claim a reconveyance within the stipulated time. This seems to me an impossible contention. I am not aware of any principle of interpretation by which an instrument which is in terms a *sale* can be construed as a *hypothecation* of immovable property. In *Perera vs. Fernando* (1914) 17 N. L. R. 486, Ennis J. and Sampayo J. held that " where a person transferred a land to another by a notarial deed, purporting on the face of it to sell the land, it is not open to the transferor to prove by oral evidence that the transaction was in reality a mortgage, and that the transferee agreed to reconvey the property on payment of the money advanced ". Their Lordships decided in the same context that the alleged agreement, if enforceable, to reconvey the property was " not a trust but a mere contract for the purchase and sale of immovable property ". The decision of the Privy Council in *Saminathan Chetty vs. Vanderpoorten* (1932) 34 N. L. R. 287 is another authority of the Judicial Committee which litigants should not misunderstand. That case was concerned with the interpretation of two contemporaneous *notarial* instruments the effect of which, *read together*, was to create " a security for moneys advanced which, *in certain events*, imposed upon the creditor duties and obligations in the nature of trusts ".

There is one further ruling of the Privy Council to which I desire to refer, because it distinguishes, in clear and unambiguous terms, the facts of the present case from the type of case where a transaction creates either a trust or " something resembling a mortgage or pledge ". This authority is *Adicappa Chetty vs. Caruppen Chetty* (1921) 22 N. L. R. 417. Stated shortly, it was alleged that A. had arranged for the purchase of a land from B. with money provided by C. The transfer from B. was however executed in the name of the money lender C. as the ostensible purchaser, but in *fact* (so A. alleged) as security for the repayment by him of the consideration, upon which repayment C. was to transfer the property to A. Their Lordships held that parole evidence was inadmissible to prove an agreement of this kind. " Such an agreement ", said Lord Atkinson, " created something much more resembling a mortgage or a pledge than a trust ", and was of no force or avail in law if it contravened the provisions of The Prevention of Frauds Ordinance. In this context Lord Atkinson in connection with a contemporaneous transaction made certain observations which seem to be very appropriate to the present case. " It is certainly a novel application of the equitable doctrine of resulting trusts ", he remarked, " that where an owner of property.....sells and conveys it to a *purchaser who pays him the purchase price*, all which the deeds recite in the case to have been done or to be done, the purchaser is converted into a trustee for the vendor whom he has paid ". This

observation perfectly fits the present transaction whereby, under P1, Iyadurai paid the consideration for the conveyance in his favour by releasing his vendors from their pressing obligation to pay the judgment debt in D. C. Jaffna No. 265.

I need not refer specifically to the many decisions of this Court in which a trust has been held to be established by parole evidence. The facts with which they were concerned are readily distinguishable. Indeed, even if full effect were to be given to the parole evidence tendered by the 1st defendant, no trust of any kind could in my opinion have been proved. This case is on all fours with *Carthelis Appuhamy vs. Saiya Nona* (1945) 46 N. L. R. 313 and I would respectfully follow the opinion there expressed by Keuneman J. with whom Soertsz J. agreed.

I would set aside the judgment appealed from, and enter a decree in favour of the plaintiff in terms of paragraphs (1) and (2) of the prayer of the plaint. Unfortunately, the learned Judge has not answered the issue as to damages. The case must therefore be remitted to the Court below so that the present District Judge of Point Pedro may, after hearing evidence, award damages to the plaintiff against the defendants for their wrongful possession of the property from 4th September, 1946, until date of ejectment. The writ of ejectment should, however, be issued forthwith.

The plaintiff is entitled to the costs of this appeal and of the trial in the Court below. The other questions which were argued before us do not arise for consideration.

GUNASEKARA, J.

I agree.

Appeal allowed.

Present : BASNAYAKE J.

HENRY vs. HAMIDOON HADJIAR

S. C. 204—*C. R. Colombo* 27531

Argued on : 31st January, 1951
Decided on : 8th May, 1951

Landlord and tenant—Co-owners—Premises reasonably required for residence for one co-owner—Rent Restriction Act No. 29 *of* 1948—*Section* 13 (1) (*c*).

Held : That section 13 (1) (*c*) of the Rent Restriction Act No. 29 of 1948 does not enable one of several co-landlords to sue a tenant in ejectment on the ground that he requires the premises for his occupation as a residence.

H. W. Jayawardena, for the defendant-appellant.
A. H. C. de Silva, for the plaintiff-respondent.

BASNAYAKE, J.

This is an appeal by the tenant of premises No. 88 Silversmith Street against whom a decree for ejectment has been entered. The respondent to this appeal is a person who claims to be the landlord of the premises. The appellant has been the tenant of these premises for the last ten years, during which period it has changed hands several times. One Letchumanan Chettiar was the original owner, from whom the respondent's mother and aunt purchased the premises in 1947. The respondent, acted on their behalf and collected the rents of not only these premises but of a row of fourteen tenements which belonged to them. The respondent's mother died in 1949 whereupon he and his sister succeeded to her property. The respondent is the owner of two-thirds of a half share of the premises. The other third of that half share is owned by his sister. His aunt owns the remaining half share. The respondent, his sister, who is married, and his aunt, are in occupation of premises No. 180/9 Grandpass Road. The respondent who at the date of this action was a bachelor, 24 years of age, is carrying on business as a jeweller in Fort in partnership with one Jawar. The respondent's case is that a marriage has been arranged for him and that he requires the premises for occupation by him as a residence on his marriage.

The question that arises for consideration in this case is whether one only of three co-owners of any premises is entitled to bring an action

in ejectment on the ground that he requires the premises for occupation as a residence. The question has not been raised in that form in the issues framed at the trial, but issue No. 6 is wide enough. It reads : " Can the plaintiff in any event maintain this action for ejectment ? " Even when no specific issue is raised I think the Court is justified in seeing whether the conditions of the Rent Restriction Act are satisfied before decree in ejectment is granted.

Section 13 (1) (c) of the Rent Restriction Act No. 29 of 1948 on which the respondent relies, permits a landlord to sue a tenant in ejectment when the premises are required for his occupation as a residence or for the occupation of any member of the family of the landlord. The section does not enable one of several co-landlords to sue a tenant in ejectment on the ground that he requires the premises for his occupation as a residence. The respondent is therefore not entitled to maintain this action as section 13 (1) prohibits the institution of any action in ejectment which does not fall within the proviso to that section except in a case where the authorisation of the Rent Control Board has been obtained.

The appeal is allowed with costs.

Appeal allowed with costs.

Present : Gratiaen, J. & Gunasekara, J.

K. VELUPILLAI *et al* vs. S. R. PULENDRA & T. M. SABARATNAM *et al.*

S. C. No. 462—*D. C. Vavuniya No.* 831

Argued on : 20th July, 1951
Decided on : 26th July, 1951

Thesawalamai—Right of pre-emption—Sale without notice in derogation of pre-emptor's right—Time within which right could be exercised.

Under the Thesawalamai, where a person having the right of pre-emption of a land complained that his parents, in derogation of his right, had sold the property to strangers without notice to him, and alleged that he had always been ready and willing to buy the land at its market value, had the purchasers been willing to sell it.

Held : (1) That such a person is in law, entitled to reasonable notice of his parents' intention to sell the property.
(2) That it is incumbent on him to establish by positive proof that, had he in fact received the requisite notice, he would and could have purchased the property himself within a reasonable time, rather than permit it to be sold to a stranger.
(3) That the burden of such proof lay on the person seeking to exercise the right of pre-emption.
(4) That a would-be pre-emptor cannot claim to be in a better position by not receiving notice of the intended sale than he would have been if he had received such notice.

Case referred to : *Suppiah vs. Thambiah* (1904) 7 N. L. R. 151.

C. Suntheralingam with *C. Renganathan* and *V. K. Balasuntheram*, for the 1st and 2nd defendants-appellants.

E. B. Wikremanayake, K.C., with *T. Arulanantham*, for the plaintiff-respondent.

Gratiaen, J.

The plaintiff, who is a young Jaffna Tamil, is the son of the 3rd and the 4th defendants, and was sent by his parents to England in 1945 to study engineering. He is not possessed of independent means and his father has throughout maintained him and paid for his education. Before the plaintiff completed his studies in England, his parents arranged a marriage for him with a young lady of their community in Jaffna. The date fixed for the marriage was 15th September, 1947, and his father remitted the necessary funds to enable him to sail for Ceylon by s.s. " Worcestershire " on 29th July. He arrived in Ceylon about 20th August, and his marriage was solemnized on the appointed date. Shortly afterwards he returned by air to England, unaccompanied by his bride, on 8th October, 1947. His wife joined him later, and when this action was filed on 17th May, 1948, he was still in England.

The bride's parents gave their daughter a cash dowry of Rs. 50,000 which they deposited in her name in a Ceylon Bank. The plaintiff continued at all material times to be supported by his father.

It is now necessary to examine the financial position during the relevant period of the 3rd defendant, Mr. T. M. Sabaratnam, who is a proctor of the Supreme Court. He needed funds to meet the expenses of his son's wedding He was also actively engaged in standing as a candidate for Parliament The polling date was 9th September, 1947, shortly after the plaintiff had temporarily returned to the Island He possessed some immovable property in the district, and a series of documents produced at the trial made it clear that he was compelled from time to time to dispose of them in order to meet his urgent commitments. The present action relates to one of these transactions.

On 12th July, 1947, he and his wife the 4th defendant sold the property in dispute to the 1st defendant and the 2nd defendant for Rs. 3,500 in terms of the deed of conveyance 1D1. Whether he required this money in connection with the expenses of the forthcoming wedding or of the impending elections or for both purposes is not quite clear. It is significant, however, that a remittance of £75 which he sent to the plaintiff in England about this time was acknowledged by the letter P4 shortly before sailing for Colombo.

The consideration of Rs. 3,500 does not seem to have proved sufficient to meet the 3rd defendant's immediate difficulties. On 29th September, 1947, he and his wife sold another land for Rs. 3,000 to a person outside his family. This transaction took place between the date of the wedding and the date of the plaintiff's return by air to England at a cost of £120 (vide P6 of 10th August, 1947). In 1948, two further lands were sold to strangers for an aggregate cost of only Rs. 1,000.

The plaintiff instituted this action on 17th May, 1948, (*i.e.* over 10 months after the transaction took place) to exercise his right of pre-emption under the Thesawalamai in respect of the land conveyed to the 1st and 2nd defendants by his parents on 10th July, 1947. He complains that his parents, in derogation of his rights as an "heir", had sold the property to "strangers" without notice to him, and that he only became aware of the transaction "about two months after the execution of the deed"—*i.e.* about the date of his wedding. He pleads that he "*had always been ready and willing* to buy the said land at its market value in the event of the 3rd and 4th defendants wishing to sell it". He accordingly deposited in Court Rs. 3,500, being the agreed market value of the property, and asked for a decree that the property should be conveyed to him.

After trial the learned District Judge entered a decree in favour of the plaintiff.

I shall assume for the purposes of this appeal that, although the plaintiff has not given evidence on his own behalf, the learned Judge was right in holding that he had no notice and was not otherwise aware of the execution of 1D1 at the time when it took place. In the result, there has been at least a technical violation of his right of pre-emption under the Thesawalamai. But that does not conclude the matter. He was in law entitled to *reasonable notice* of his parents desire to sell the property, *Suppiah vs. Thambiah* (1904) 7 N. L. R. 151, and it cannot be suggested that, having failed to receive such notice, he could *at any time thereafter* exercise the right of pre-emption. On the contrary, it is fundamental to the cause of action such as is alleged to have arisen in this case that the pre-emptor should establish by positive proof that, had he in fact received the requisite notice, he would and could have purchased the property himself within a reasonable time rather than permit it to be sold to a stranger. Indeed, the burden of proving this fact was rightly undertaken by the plaintiff when his Counsel agreed to the following issue being framed at the trial :—

> "(2) Even if issue (1) is answered in the negative, was the plaintiff ready and willing to purchase the said land ?"

A would-be pre-emptor cannot claim to be in a better position by not receiving notice of the intended sale than he would have been if he had received such notice.

I have considered the evidence on this issue with care, and I am satisfied that the plaintiff has not discharged the burden which he undertook. As I have already pointed out, the plaintiff himself gave no evidence on his own behalf. The 3rd defendant supported the case of his son. He admitted however that on 10th July, 1947, the plaintiff had no independent means, and that he "did not entertain the idea that his son would pre-empt any of the lands which he had sold". When he was asked to explain how, in these circumstances, a formal notice of the intended sale could have achieved any *practical* results, he merely expressed the opinion that "his aunt or his grandmother would have advanced moneys to him if he asked for it". If this was true, it would have been a simple matter for the plaintiff to have called one of these ladies to prove that this opinion was justified. And even then, there is no proof that it would have occurred to the plaintiff to apply to either of them for the necessary funds to enable him to purchase this property.

The 3rd defendant's suggestion, if tested, does not seem to me to bear examination. The plaintiff according to his pleadings, had notice of the impugned sale about 10th September, 1947. He was in Ceylon at the time, and he had access to his aunt and to his grandmother. Can it be doubted that, if he genuinely desired to pre-empt at that time, he would have protested against the transaction and tendered the money provided by his accommodating relations so as to secure the property himself? On the contrary, he seems to have been well content to permit his impecunious father to dispose of yet another ancestral property on 27th September, 1947, when a sum of £120 was needed to send him back to England to continue his studies there. It was only several months later that the sum of Rs. 3,500 became available to qualify him for the roll of an injured heir who desired to pre-empt a portion of the family estate. It must be remembered in this connection that the *reasonableness* of the notice to which he was entitled must be measured by the urgency of his father's need for funds at the relevant time. Placed as Mr. Sabaratnam was in July, 1947, with the combined demands which the forthcoming marriage and the political campaign were making upon his very slender resources, time was surely of the essence of the pre-emptor's claim to supersede a stranger.

In my opinion issue 2 should have been answered in the negative, and I would set aside the judgment appealed from. The plaintiff's action must be dismissed with costs, payable jointly and severally by the plaintiff and by the 3rd and 4th defendants to the 1st and 2nd defendants.

Gunasekara, J.

I agree.

Appeal allowed.

Present : Basnayake J. & Gunasekera, J.

ROMANIS FERNANDO vs. WIMALASIRI THERO

S. C. 91—*D. C. Colombo* 18161

Argued on : 7th and 8th February, 1951
Decided on : 13th June, 1951

Buddhist Temporalities Ordinance—Section 20—Plaintif, Chief Bhikku residing on land dedicated to Sangha—Permanent buildings erected thereon—Defendant in possession of money collected for preaching hall and vihare—Plaintiff's right to recover money—Meaning of " controlling viharadhipati ", " temple ".

The plaintiff, a Bhikku, as the first incumbent resided on a land dedicated to the Sangha, where subsequently permanent living quarters were erected. Thereafter money collected from lay Buddhists for a preaching hall and vihare was entrusted to the defendant as Treasurer of a Society whose object was to put up buildings for Buddhist worship.

Held : (1) That the plaintiff's place of residence was a " temple " within the meaning of section 20 of the Buddhist Temporalities Ordinance, and that no particular type of buildings were necessary to constitute a temple.

(2) That the plaintiff, was the principal Bhikku of the temple, and there being no trustee, was the controlling viharadhipati within the meaning of section 20 of the Ordinance, and could therefore recover the money from the defendant.

H. V. Perera, K.C., with *K. Herat*, for the appellant.

N. E. Weerasooria. K.C., with *S. P. Wijewickrema* and *T. B. Dissanayake*, for the respondent.

Basnayake, J.

On the facts this appeal has no merit whatsoever. The only question that need be considered is whether the plaintiff is the " controlling viharadhipati " of a " temple " within the contemplation of those expressions in section 20 of the Buddhist Temporalities Ordinance. It is contended for the appellant that the place in respect of which the plaintiff brings this action is not a temple.

I shall state the facts only so far as they are relevant to the consideration of the above question. The plaintiff is a bhikkhu of several years' standing. Till 1942 he was living in Colombo. Shortly after the Japanese air raid on Ceylon in that year, the plaintiff took up residence in a place called Polpitimukalana near Kelaniya. At first he found temporary accommodation in a small avasa. This he had to vacate before long. One E. D. R. Fernando, who had known the plaintiff for a long time, helped him with the aid of other lay followers to secure a place of residence. A quarter acre block of land was purchased for Rs. 500 with money provided by Fernando. At first a small hut was erected thereon with the assistance both in cash and in services provided by the *dayakas*. Thereafter permanent living quarters of cabook

and brick were constructed. These too were erected by the *dayakas*. The land was formally donated by Fernando to the *Sangha* in the customary manner on the date of the occupation of the new avasa. Thereafter the *dayakas* held *pinkamas* for the purpose of inviting the lay Buddhists to subscribe towards the erection of a preaching hall and an image room or vihare. The subscriptions so collected from time to time amounted to Rs. 2,879. They were handed to the defendant, who was the Treasurer of the Society formed with the object of putting up other buildings associated with a place of Buddhist religious worship. This action is to recover that sum of money which the defendant is unlawfully withholding.

The expression "temple" is thus defined in the Buddhist Temporalities Ordinances :—

> "'temple' means vihare, dagoba, dewale, kovila, avasa, or any place of Buddhist worship, and includes the Dalada Maligawa, the Sripadasthana, and the Atamasthana of Anuradhapura."

No particular type of building or buildings are necessary to constitute a temple. The definition is very wide. The plaintiff's avasa is a temple. There is overwhelming evidence that the money claimed from the defendant were offerings made for the use of the temple by devout lay supporters. By virtue of section 20 of the Buddhist Temporalities Ordinance they vest in the trustee or the controlling viharadhipati of the temple. The place in question has no trustee. The plaintiff who is undoubtedly the principal bhikkhu of the temple and therefore its viharadhipati within the meaning of that expression as used in the Ordinance is by virtue of section 4 (2) its controlling viharadhipati. He is therefore entitled to recover the money from the defendant.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Present : BASNAYAKE, J. & PULLE, J.

GUNATILAKA AND OTHERS vs. DE ZOYSA

S. C. 110/*M*—*D. C. Balapitiya MB*/64

Argued on : 12th October, 1950
Decided on : 18th May, 1951

Mortgage Bond—Rate of interest agreed on in bond—What is recoverable—Money-Lending Ordinance—Civil Law Ordinance.

Where on a mortgage bond the rate of interest agreed on was 30% there is no justification for the trial Judge's view that only 20% is recoverable.

The rates prescribed in section 4 of the Money-Lending Ordinance are not maximum rates of interest. In a mortgage bond action which is not a proceeding under the Money Lending Ordinance the plaintiff can recover interest at the agreed rate, provided of course the interest recovered does not exceed the principal.

C. Thiagalingam, K.C., for the defendant-appellants.

N. E. Weerasooriya, K.C., with *A. H. C. de Silva*, for the plaintiff-respondent.

BASNAYAKE, J.

This is an action for the recovery of the capital sum and interest due on a mortgage bond. The defendant denies that the full sum claimed is due. The amount of the loan is Rs. 590. In lieu of the interest on Rs. 375 of that sum, the plaintiff was allowed to enjoy the produce of 83 coconut trees. Interest at 30 per cent. per annum was payable on the balance sum of Rs. 215. The defendants paid a sum of Rs. 247·25. The only question for decision is what is the amount due to the plaintiff.

The learned District Judge holds that though 30 per cent. is the stipulated interest the plaintiff is entitled to recover only 20 per cent. per annum. I can find no justification in law for that view. Our law does not limit the rate of interest that may be charged on a loan of money. The rates prescribed in section 4 of the Money Lending Ordinance are not maximum rates of interest that may be charged on loans of money. Those rates are to be taken into account in considering whether in any proceeding under the Money Lending Ordinance the return to be received by the creditor is excessive or reasonable. Rates in excess of those prescribed are to be deemed to be unreasonable in any such proceeding. The instant case is not a proceeding under the Money Lending Ordinance and the plaintiff is entitled to recover interest at the agreed rate but in view of section 5 of the Civil Law Ordinance the amount recoverable on account of interest or arrears of interest cannot exceed the principal.

The learned District Judge has entered judgment in Rs. 805. The appellants have not succeeded in convincing me that the judgment is wrong.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Present : JAYETILEKE, C.J., PULLE, J. & SWAN, J.

MUDANAYAKE, ASST. REGISTERING OFFICER vs. SIVAGNANASUNDRAM REVISING OFFICER *et al.*

VIRASINGHE COMMISSIONER PARLIAMENTARY ELECTIONS vs. SIVAGNANASUNDRAM REVISING OFFICER *et al.*

Applications 368 *and* 369

Application for a Mandate in the Nature of a Writ of Certiorari *under Section* 42 *of the Courts Ordinance by P. B. Mudanayake, Assistant Registering Officer, Electoral District No.* 84 *(Ruwanwella) and by V. L. Wirasinghe, Commissioner of Parliamentary Elections, Colombo, on* (1) *N. Sivagnanasunderam, Revising Officer for Electoral District No.* 84 *(Ruwanwella) and* (2) *G. S. N. Kodakan Pillai.*

Argued on : August 28th, 29th, 30th and 31st, 1951, and September 3rd, 4th, 5th and 6th, 1951.
Decided on : 28th September, 1951.

Certiorari—*Writ of—Ceylon (Parliamentary Elections) Order-in-Council,* 1946—*Application to have claimant's name entered in the register of voters—Decision by Registering Officer that claimant not a citizen of Ceylon, therefore not entitled to be registered—Appeal to Revising Officer under section* 13 *of Order-in-Council—Reversal of decision by Revising Officer on ground that Ceylon Parliamentary Elections (Amendment) Act, No.* 48 *of* 1949 *and Citizenship Act No.* 18 *of* 1948 *invalid as offending against section* 29 *of Ceylon (Constitution and Independence) Orders-in-Council* 1946 *and* 1947.

Can Revising Officer's decision be reviewed by certiorari—*Section* 13 (3) *of the Order—Final and conclusive—Effect of—When* certiorari *lies—Affidavits to supplement evidence on record—When admissible—Relevancy of such affidavits—Interpretation of statutes—When permissible to travel outside to ascertain scope and purpose—Validity of Citizenship Act and Ceylon Parliamentary Elections (Amendment) Act.*

The second respondent made a claim to the Assistant Registering Officer of his district, to have his name inserted in the Register of Electors prepared under section 11 of the Ceylon (Parliamentary Elections) Order in Council 1946, and supported it by an affidavit, which stated that he possessed the requisite residential qualification, that he was domiciled in Ceylon, and that he was qualified to be an elector under the Order.

The Registering Officer, after inquiry, disallowed the claim on the ground that the second respondent was not a citizen of Ceylon within the meaning of the Citizenship Act No. 18 of 1948.

On appeal under section 13 of the said Order-in-Council, the first respondent as revising officer, after considering the evidence placed before him and the arguments adduced, held that the Ceylon Parliamentary Elections (Amendment) Act No. 48 of 1949, which prescribed citizenship of Ceylon as a necessary qualification of an elector, and the Citizenship Act No. 18 of 1948 were invalid as offending against section 29 (2) of the Ceylon (Constitution and Independence) Orders in Council 1946 and 1947, and that the operative law was that contained in the Ceylon (Parliamentary Elections) Order-in-Council 1946, as it stood before the Amending Act.

He, accordingly, held that the second respondent was a duly qualified elector, and directed his name to be included in the Register of Electors. By section 13 (3) of the said Order, the decision of the first respondent is final and conclusive.

The Crown, therefore, made two applications for writs of certiorari, one in the name of the Assistant Registering Officer, and, the other in the name of the Commissioner of Parliamentary Elections, (as there was a doubt as to the proper party who should make the application,) to have the decision of the first respondent reviewed by the Supreme Court.

At the hearing of the applications, the learned Counsel for the second respondent conceded that the said decision was subject to review by the Supreme Court by means of a writ of certiorari, and moved the Supreme Court to produce in support of the order, three affidavits from three (other) persons containing statistics relating to Indian Tamils.

Held : (1) That the first respondent acted outside his jurisdiction, when he proceeded to decide as a preliminary issue the question as to what is the law which lays down the qualification of voters, when the jurisdiction invested in him, was to decide the question whether the second respondent was qualified to be a voter under the law.

(2) That the affidavits sought to be produced by the second respondent, are irrelevant to the question that arose in the application for certiorari, namely, whether the first respondent's decision, as to what is the law that lays down the qualification of voters in general, is erroneous.

(3) That if the affidavits are relevant to supplement the affidavit already on record, such evidence could and should have been placed before the first respondent, at the hearing of the appeal.
(4) That the affidavits will not be admitted at this stage, as an adjudication on them would amount to re-trying the case.
(5) That sections 4 and 5 of the Citizenship Act No. 18 of 1948 and section 3 (1) (*a*) of the Ceylon (Parliamentary Elections) (Amendment) Act No. 48 of 1949, are not rendered void under section 29 (2) of the Ceylon (Constitution) Order-in-Council, as the disabilities and restrictions imposed by the two former Acts, do not, from the language used, attach to persons of any one community, but applies to all communities.
(6) That the fact that a large section of Indians now residing in Ceylon are disqualified by the impugned Acts, is irrelevant, for the reason that it is not the necessary legal effect which flows from the language of the Act.
(7) That where the words in an enactment are clear and unambiguous, it is not legitimate to travel outside the enactment, to ascertain its scope and purpose.

Per CURIAM.—(*a*) "To embark on an inquiry, every time the validity of an enactment is in question, into the extent of its incidence, whether for evil or for good, on the various communities tied together by race, religion, or caste would be mischievous in the extreme and throw the administration of Acts of the legislature into confusion."

(*b*) "The Parliament of Ceylon has the power to alter the electoral law in any manner it pleases if it thinks it necessary to do so for the good government of the country subject to the narrow limitation in section 29. It has the power to widen or to narrow the franchise. If it widens the franchise the more advanced communities may feel that they are affected, on the other hand if it narrows the franchise the less advanced communities may also feel that they are adversely affected. If it is open to a person to say that as a result of the alteration the voting strength of his community has been reduced, as the Attorney-General remarked Parliament will only have the power to pass legislation as to what the polling hours or the polling colours should be."

Authorities referred to : 9 Halsbury 2nd ed. s. 1420.
Walsall Overseers Ltd. vs. London and North-Western Railway Co. (1878 4 A. C. 30.
R. vs. Nat Bell Liquors Ltd. (1922) 2 A. C. 128. at p. 160, 155.
R. vs. Northumberland Tribunal (1951) 1 All E. R. 268.
Estate and Trust Agencies vs. Singapore Improvement Trust (1937) 3 All E. R. 324.
Commonwealth of Australia and others vs. Bank of New South Wales and others (1949) 2 All E. R. 769.
Attorney-General of Alberta vs. Attorney-General of Canada and others (1939) A. C. 117..
Solomon vs. Solomon & Co. (1897) A. C. 38.
James vs. Cowan (43 C. L. R. 409
Union Colliery Co. of British Columbia Ltd. vs. Bryden (1899) A. C. 580.
Attorney-General for Ontario vs. Reciprocal Insurers and others (1924) A. C. 328.
Prafulla Kumar vs. Bank of Commerce, Khulna (1947) 34 A. I. R. 60.
Frank Guinn and J. J. Beal vs. United States 238 U. S. 347 : 59 Lawyers' Edition 1340
Myerv vs. Anderson 238 U. S. 367 : Lawyers' Edition 1349.
Yick Wo vs. Hopkins 118 U. S. 256 : 30 Lawyers' Edition 220.
Williams vs. State of Mississippi 170 U. S. 214 : 42 Lawyers' Edition 1012.
Brophy vs. The Attorney-General of Manitoba (1895) A. C. 202.
Lane vs. Wilson 307 U. S. 268 : 83 Lawyers' Edition 1281.

Sir Alan Rose, K.C., Attorney-General, with *T. S. Fernando, Crown Counsel,* and *Walter Jayewardene, Crown Counsel,* for the petitioners.

No appearance for the 1st respondent.

S. J. V. Chelvanayakam, K.C., with *S. Nadesan, C. Vanniasingham, S. Canagarayer* and *E. R. S. R. Coomaraswamy,* for the 2nd respondent.

The following is the judgment of the Court :—

There are two applications by the Crown before us Nos. 368 and 369 for Writs of *Certiorari* to bring up into this Court the order dated July 2, 1951, made by the 1st respondent in order that it should be examined. They raise a constitutional question of great importance.

In application No. 368 the petitioner is the Assistant Registering Officer for the Electoral District No. 84 (Ruwanwella) and in Application No. 369 the Commissioner for Parliamentary Elections. In both applications the 1st respondent is the revising officer for the Electoral District No. 84 (Ruwanwella) Kegalle appointed under s. 9 of the Ceylon (Parliamentary Elections) Order in Council 1946, and the 2nd respondent is a claimant to have his name entered in the register of voters prepared under s. 11 of the Order. The Attorney-General informed us that two petitions were filed as there was a doubt as to who was the proper party to make the application. The two applications were, by consent of the parties represented at the hearing, consolidated and heard together.

On January 22, 1951, the 2nd respondent made a claim to the Registering Officer of the Electoral District No. 84 to have his name

inserted in the register of electors. He alleged in his affidavit that he possessed the requisite residential qualification, that he was domiciled in Ceylon, and that he was qualified to be an elector under the Order.

On February 26, 1951, the Assistant Registering Officer for the District inquired into the said claim and decided that the 2nd respondent was not entitled to have his name inserted in the register, as he was not a citizen of Ceylon within the meaning of The Citizenship Act, No. 18 of 1948.

On March 8, 1951, the 2nd respondent appealed to the 1st respondent against the said decision under s. 13 of the Order. The 1st respondent, after considering the statement made by the 2nd respondent at the inquiry before the Assistant Registering Officer and an affidavit made by the 2nd respondent, and, after hearing argument, held that the Ceylon Parliamentary Elections (Amendment) Act, No. 48 of 1949, which prescribed citizenship of Ceylon as a necessary qualification of an elector, and the Citizenship Act, No. 18 of 1948, were invalid as offending against s. 29 (2) of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947, and that the operative law was that contained in the Ceylon (Parliamentary Elections) Order in Council, 1946, as it stood before it was amended by the Amending Act. He, accordingly, held that the 2nd respondent was a duly qualified elector, and directed his name to be included in the register of electors. The determination of the appeal by the revising officer is made final and conclusive by s. 13 (3) of the Order. Therefore, no appeal lies to this Court from the order made by the 1st respondent. The mere fact that the decision of the revising officer is made final and conclusive by s. 13 (3) will not by itself exclude *certiorari*.

It is unnecessary for us to consider whether the decision of the 1st respondent is subject to review by means of *Certiorari* because learned Counsel for the 2nd respondent conceded that it is. We would, however, say a few words about the tests applicable to *Certiorari*, as the question whether *Certiorari* lies on a ground other than defect of jurisdiction arises, incidentally, in connection with a motion made by the 2nd respondent at the hearing before us to produce three affidavits severally made by Mr. Peri Sunderam, Mr. V. E. K. R. S. Thondaman and Mr. S. M. Subbiah which contain certain statistics relating to the Indian Tamils.

Certiorari is a prerogative writ obtainable either in civil or criminal proceedings and its object is " to give relief from some inconvenience supposed, in the particular case, to arise from a matter being disposed of before an inferior Court less capable than the High Court of rendering complete and effectual justice " 9 Halsbury 2nd ed. s. 1420. It is clear from the judgment of Earl Cairns, L.C. in *Walsall Overseers Ltd. vs. London & North Western Railway Co.* (1878) 4 A. C. 30 that *certiorari* lies not only where the inferior Court has acted without or in excess of its jurisdiction but also where the inferior Court has stated on the face of the order the grounds on which it had made it and it appears that in law those grounds are not such as to warrant the decision to which it had come. The principle laid down in this case was applied in *R. vs. Nat Bell Liquors Ltd.* (1922) 2 A. C. 128 and *R. vs. Northumberland Tribunal* (1951) 1 All E. R. 268.

The present applications were supported on both grounds. The defect of jurisdiction seems to arise in this way. The jurisdiction of the Revising Officer is to decide the question whether the claimant is qualified to be a voter under the law. The matters in respect of which he is given jurisdiction are matters of law or of fact applicable to the concrete case he is called upon to decide. If a question arises as to what is the law which lays down the qualification of voters in general, such a question is not incidental to the concrete case, but a question as to what his jurisdiction is, because such a question arises antecedently to the exercise of jurisdiction. It is a preliminary question which arises as to what is the precise question that he has to decide in the concrete case. When he decides that preliminary question, he merely formulates the question he has to decide, and, if his decision on the preliminary question is wrong, then his error relates to the scope of his jurisdiction and is not an error in the exercise of his jurisdiction. When he, thereafter, proceeds to decide the particular case before him on the footing of the erroneous decision on the preliminary question as to what is the law which lays down the qualification of voters he acts outside his jurisdiction. This view is supported by the judgment of the Privy Council in *Estate and Trust Agencies vs. Singapore Improvement Trust* (1937) 3 All E. R. 324. The headnote of that case adequately sums up the position. It reads :—

> " The respondent trust, a corporate body constituted by the Singapore Improvement Ordinance, 1927, made a declaration that a house owned by the appellant company was insanitary within the meaning of section 57 of the Ordinance. After hearing objections to the declaration by the appellant company, the respondent trust submitted the declaration to the Governor in Council for approval in accordance with the provisions of section 59 of the Ordinance. The appellant company applied for a writ of prohibition, prohibiting the res-

pondent trust from further proceeding in respect of the declaration, on the ground that its action was *ultra vires*—

Held : (i) in deciding whether, after considering the objections raised against the declaration being a true and fair representation of the construction and condition of the dwelling, the declaration should be revoked or submitted to the Governor in Council, the respondent trust must be regarded as exercising quasi judicial functions.

(ii) the respondent trust had applied a wrong and inadmissible test in making the declaration, and in deciding to submit it to the Governor in Council. It was therefore acting beyond its powers, and the declaration was not enforceable.

(iii) after the submission of the declaration for the approval of the Governor in Council, the respondent trust was still charged with the performance of certain duties, to which a writ of prohibition could apply. It was not *functus officio* and a writ of prohibition might issue."

We shall now proceed to deal with the 2nd respondent's motion to produce the affidavits. The learned Attorney-General objected to their admission on two grounds, (1) that the evidence was irrelevant, (2) that in *certiorari* matters affidavits or any other kind of evidence is receivable only when there is an objection as to jurisdiction. He relied on the following passages in the judgment of Lord Sumner in *R. vs. Nat Bell Liquors Ltd.* (1922) 2 A. C. 128 at page 160.

"The matter has often been discussed as if the true point was one relating to the admissibility of evidence and the question has seemed to be whether or not affidavits and new testimony were admissible in the Supreme Court. This is really an accidental aspect of the subject. Where it is contended that there are grounds for holding that a decision has been given without jurisdiction, this can only be made apparent on new evidence brought *ad hoc* before the superior Court. How is it ever to appear within the four corners of the record that the members of the inferior Court were unqualified, or were biassed, or were interested in the subject matter? On the other hand to show error in the conclusion of the Court below is not even to review the decision: it is to retry the case,"

and at page 155,

"If justices state more than they are bound to state, it may, so to speak, be used against them, and out of their own mouths they may be condemned, but there is no suggestion that apart from questions of jurisdiction, a party may state further matters to the Court, either by new affidavits or by producing anything that is not on or part of the record.".

In *R. vs. Northumberland Tribunal* (1951) 1 All E. R. 268 Lord Goddard said :—

"Observe that that is saying that evidence cannot be produced to supplement that which is not in the record. The Court is confined to that which is on the record."

We inquired from 2nd respondent's Counsel whether the affidavits were intended to supplement the evidence adduced by affidavit by the 2nd respondent before the 1st respondent and his reply to the question was in the affirmative. In view of the first objection by the Attorney-General we deferred our order on the motion till we heard argument on all the questions raised on the applications before us. In the course of his address Counsel for 2nd respondent reverted to the motion to produce the affidavits and sought to support it on the observations of Lord Sumner quoted above that where there is an objection as to jurisdiction further evidence can be led. He contended that the basis of the applications made by the Crown is that the 1st respondent acted in excess of jurisdiction in coming to an erroneous decision on the law, and the 2nd respondent is, therefore, entitled to place further evidence to show that the decision of the 1st respondent on the law is not erroneous. It seems to us that the argument is based on a misapprehension of the judgment of Lord Sumner which states very clearly that if the defect of jurisdiction arises because of disqualification of a justice, or on the ground of bias or some other reason, the Court, could not know of it unless evidence was brought before it, and, therefore, the Court could admit evidence by affidavit to show the defect of jurisdiction. In the present case the 2nd respondent placed certain materials before the 1st respondent on which he invited the 1st respondent to hold that the provision of law which was applicable to the question he had to decide was not s. 3 (1) (*a*) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, but s. 4 of the Ceylon (Parliamentary Elections) Order in Council 1946. Even if the evidence which the 2nd respondent now seeks to place before us by way of supplementing the affidavit P1 is relevant to the question before us we are of opinion that it could and it should have been placed before the 1st respondent at the hearing of the appeal by summoning the officers who were in charge of the registers. If we admit the evidence, we will have to adjudicate on it, which will amount to re-trying the case. We are of opinion that the affidavits are inadmissible and cannot be justified as falling under any of the heads stated by Lord Sumner. However that may be, we are of opinion that they are not relevant to the question that arises for decision in this case for the reasons given below. We would, accordingly, refuse the motion.

The first question we have to decide is whether the 1st respondent's decision as to what is the law which lays down the qualification of voters

in general is *ex facie* erroneous. In order to decide this question it is necessary to examine the relevant legislative provisions. The Ceylon (Constitution) Order in Council 1946, popularly called the Soulbury Constitution, which was published in the Government Gazette on May 17, 1946, conferred on Ceylon a comparatively large extension of self-government. The sections to which reference need be made are 29 and 37. They read as follows :—

29. (1) Subject to the provisions of the Order, Parliament shall have power to make laws for the peace order and good government of the Island.

(2) No such law shall—

(*a*) *prohibit or restrict the free exercise of any religion* ; or

(*b*) *make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable* ; or

(*c*) *confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions* ; or

(*d*) alter the constitution of any religious body except with the consent of the governing authority of that body :

Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body.

(3) *Any law made in contravention of subsection* (2) *of this section shall, to the extent of such contravention, be void.*

(4) In the exercise of its powers under this section Parliament may—

amend or suspend any of the provisions of any Order in Council in force in the Island on the date of the first meeting of the House of Representatives, other than an order made under the provisions of an Act of Parliament of the United Kingdom, or amend or suspend the operation of any of the provisions of this Order :

Provided that no Bill for the amendment or suspension of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House (including those not present) ; every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any Court of law.

37. (1) *Subject to the provision of sub-section* (2) *of this section, the Governor shall reserve for the signification of His Majesty's pleasure any Bill which in his opinion—*

(*a*) relates to the provision, construction, maintenances, security, staffing, manning and the use of such defence, equipment, establishments and communications as may be necessary for the Naval, Military or Air security of any part of His Majesty's Dominion (including the Island) or any territory under His Majesty's protection, or any territory in which His Majesty has from time to time jurisdiction ;

(*b*) is repugnant to or inconsistent with any provison of any Order in Council relating to or affecting—

(i) the defence of any part of His Majesty's Dominion (including the Island) or any territory in which His Majesty has from time to time jurisdiction ; or

(ii) the relations between the Island and any foreign country or any other part of His Majesty's Dominions or any territory as aforesaid or any provision of any instrument made under any such Order in Council ;

(*c*) affects the relations between the Island and any foreign country or any other part of His Majesty's Dominions or any territory under His Majesty's protection or any territory in which His Majesty has from time to time jurisdiction ;

(*d*) affects the currency of the Island or relates to the issue of bank notes ;

(*e*) is of an extraordinary nature and importance whereby the Royal Prerogative, or the rights or property of British subjects not residing in the Island, or the trade or transport or communications of any part of His Majesty's Dominions or any territory under His Majesty's protection or any territory in which His Majesty has from time to time jurisdiction may be prejudiced.

(*f*) contains any provision which has evoked serious opposition by any racial or religious community and which is likely to involve oppression or serious injustice to any such community ;

(*g*) amends or suspends the operation of any of the provisions of this Order or it otherwise repugnant to or inconsistent with any such provision.

(2) *Nothing in sub-section* (1) *of this section shall be deemed to require the Governor to reserve for His Majesty's Assent any Bill to which the Governor has been authorised by His Majesty to assent or any Bill which in the opinion of the Governor falls within any of the following classes that is to say—*

(*a*) any Bill relating solely to and conforming with any trade agreement concluded with the approval of a Secretary of State between the Government of the Island and the Government of any part of His Majesty's Dominions or of any territory under His Majesty's protection or of any territory in which His Majesty has from time to time jurisdiction ;

(*b*) any Bill relating solely to the prohibition or restriction of immigration into the Island ; and not containing any provision, relating to the re-entry into the Island of persons normally resident in the Island at the date of the passing of such Bill, which in the opinion of the Governor is unfair or unreasonable ;

(*c*) *any Bill relating solely to the franchise or to the law of elections* ;

(*d*) any Bill relating solely to the prohibition or restriction of the importation of, or the imposition of import duties upon, any class of goods, and not containing any provision whereby goods from different countries are subject to differential treatment ;

(*e*) any Bill relating solely to the establishment of shipping services or the regulation of shipping and not containing any provision whereby the shipping of any part of His Majesty's Dominions or of any territory under His Majesty's protection or of any territory in which His Majesty has from time to time jurisdiction, may be subjected to differential treatment ;

(3) A Bill reserved for His Majesty's assent shall not take effect as an Act of Parliament unless and until His Majesty has given his assent thereto, and the Governor has signified such assent by proclamation.

It will be seen that any Bill relating solely to the franchise was not regarded as coming within the category of Bills which the Governor is instructed to reserve for the signification of His Majesty's pleasure. Such a Bill can be passed by Parliament by a bare majority.

The Ceylon Independence Act 1947 which was passed on December 10, 1947 and brought into operation on February 4, 1948, made provision for the attainment by Ceylon of fully responsible status within the British Commonwealth of Nations. This Act was followed by the Ceylon Independence Order in Council, 1947, which was brought into operation on February 4, 1948, by the Ceylon Independence (Commencement) Order in Council, 1947. In order to give effect to the Ceylon Independence Act, 1947, the Ceylon (Constitution) Order in Council, 1946, was amended and the Ceylon Independence Order in Council, 1947, was passed on December 19, 1947, which, together with the principal order and the amending order, form now the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947. It retained s. 29 (2) and revoked certain sections including s. 37 of the Ceylon (Constitution) Order in Council, 1946. Under it Parliament has the power to pass legislation in regard to any matter subject to the limitations contained in s. 29.

The Citizenship Act, No. 18 of 1948, was passed on August 20, 1948, in order to make provision for citizenship of Ceylon and for matters connected therewith. Sections 2, 4 and 5 as follows :—

2. (1) With effect from the appointed date, there shall be a status to be known as " the status of a citizen of Ceylon ".

(2) A person shall be or become entitled to the status of a citizen of Ceylon in one of the following ways only ;

(*a*) by right of descent as provided by this Act ;

(*b*) by virtue of registration as provided by this Act or by any other Act authorising the grant of such status by registration in any special case of a specified description.

(3) Every person who is possessed of the aforesaid status is hereinafter referred to as a " citizen of Ceylon ". In any context in which a distinction is drawn according as that status is based on descent or registration, a citizen of Ceylon is referred to as " citizen by descent " or " citizen by registration "; and the status of such citizen is in the like context referred to as " citizenship by descent " or " citizenship by registration ".

(4) (1) Subject to the other provisions of this Part *a person born in Ceylon before the appointed date shall have the status of a citizen of Ceylon by descent, if—*

(*a*) *his father was born in Ceylon, or*

(*b*) *his paternal grandfather and paternal great grandfather were born in Ceylon.*

(2) Subject to the other provisions of this Part *a person born outside Ceylon before the appointed date shall have the status of a citizen of Ceylon by descent if—*

(*a*) *his father and paternal grandfather were born in Ceylon ; or*

(*b*) *his paternal grandfather and paternal great grandfather were born in Ceylon.*

(5) (1) Subject to the other provisions of this Part *a person born in Ceylon on or after the appointed date shall have the status of a citizen of Ceylon by descent if at the time of his birth his father is a citizen of Ceylon.*

(2) Subject to the other provisions of this Part, *a person born outside Ceylon on or after the appointed date shall have the status of a citizen of Ceylon by descent if at the time of his birth his father is a citizen of Ceylon and if, within one year from the date of birth, the birth is registered in the prescribed manner—*

(*a*) at the office of a consular officer of Ceylon in the country of birth, or

(*b*) where there is no such officer, at the appropriate embassy or consulate in that country or at the office of the Minister in Ceylon.

The Ceylon (Parliamentary Elections) Order in Council, 1946, was published in the Government Gazette on September 26, 1946. Sections 4 (1), 5 and 7 (1) read as follows :—

(4) (1) *No person shall be qualified to have his name entered or retained in any register of electors in any year if such person—*

(*a*) *is not a British subject*, or is by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign Power or State ; or

(*b*) was less than twenty-one years of age on the first day of June in that year ; or

(*c*) has not, for a continuous period of six months in the eighteen months immediately prior to the first day of June in that year, resided in the electoral district to which the register relates ; or

(*d*) is serving a sentence of imprisonment (by whatever named called) imposed by any Court in any part of his Majesty's Dominions or in any territory under His Majesty's protection or in any territory in which His Majesty has from time to time jurisdiction, for an offence punishable with imprisonment for a term exceeding twelve months, or is under sentence of death imposed by any such Court, or is serving a sentence of imprisonment awarded in lieu of execution of any such sentence ; or

(*e*) is, under any law in force in the Island found or declared to be of unsound mind ; or

(*f*) is incapable of being registered as an elector by reason of his conviction of an offence under section 52 of this Order ; or

(*g*) would have been incapable of being registered as a voter by reason of his conviction of a corrupt or illegal practice if the Ceylon (State Council Elections) Order in Council, 1931, had remained in force.

5. *Any person not otherwise disqualified shall be qualified to have his name entered in the register of electors if he is domiciled in the Island or if he is qualified in accordance with section 6 or section 7 of this Order ;*

Provided that, except in the case of persons possessing Ceylon domicile of origin, domicile shall not be deemed to have been acquired for the purpose of qualifying for registration as an elector by any person who has not resided in the Island for a total period of or exceeding five years.

7. (1) Any person not otherwise disqualified shall be qualified to have his name entered in a register of

electors if he is possession of a certificate of permanent settlement granted to him—

(*a*) in accordance with the provisions of the Ceylon (State Council Elections) Order in Council, 1931, or

(*b*) in accordance with this section by the Government Agent of the province or by the Assistant Government Agent of the district in which he resides or by any other officer of the Government authorise in writing by the Government Agent or Assistant Government Agent aforesaid in accordance with such general or special directions as may be issued by the Governor.

This was amended by the Ceylon (Parliamentary Elections) Amendment Act No. 48 of 1949 which came into operation on May 26, 1950. Section 3 (1) (*a*) read as follows :—

3. Section 4 of the principal Order is hereby amended in sub-section (1) thereof, as follows :

(1) by the substitution for paragraph (*a*), of the following paragraph :—

"(*a*) is not a citizen of Ceylon, or if he is by virtue of his own act, under an acknowledgement of allegiance, obedience or adherence to any foreign Power or State which is not a member of the Commonwealth."

The substantial question we have to decide is whether section 3 (1) (*a*) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, read with the Citizenship Act, No. 18 of 1948, is void as offending against s. 29 of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947. The answer to this question turns on the interpretation of these provisions, primarily s. 29. Till we discover exactly what s. 29 means it is not possible for us to reach a decision as to whether the impugned Act is in conflict with it. The rule of interpretation that is applicable is laid down in several English cases of high authority. It is sufficient for us to refer to the recent judgment of the Privy Council in *Commonwealth of Australia and others vs. Bank of New South Wales and others* (1949) 2 All E. R. 769. The question that arose in that case was whether Section 46 of the Australian Banking Act, 1947, offended against section 92 of the Commonwealth of Australia Act, 1900. It is similar to the question that has arisen in this case. Lord Porter who delivered the judgment of the Board said :—

"In whatever sense the word 'object' or 'intention' may be used in reference to a Minister exercising a Statutory power, in relation to an Act of Parliament it can be ascertained in one way only, which can best be stated in the words of Lord Watson in *Solomon vs. Solomon & Co.* (1897) A. C. 38 :

'In a Court of Law or Equity what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact either in express words of by reasonable and necessary implication.'

The same idea is felicitously expressed in an opinion of the English Law Officers Sir Roundell Palmer and Sir Robert Collier cited by Isaacs J. in *James vs. Cowan* 43 C. L. R. 409 :

'It must be presumed that a legislative body intends that which is a necessary effect of its enactments; the object, the purpose and the intention of the enactment is the same'.

Isaacs J., adds (ibid) :

'By the necessary effect', it need scarcely be said, those learned jurists meant the necessary legal effect, not the ulterior effect economically or socially' ".

It appears to us to be fairly clear from the English decisions that the scope and effect of a legislative measure must be ascertained by an examination of its actual provisions and it is only when expressions used in it are ambiguous that reference can be made to extraneous materials.

Relying on certain Canadian and American decisions Counsel for the 2nd respondent contended

(*a*) that in order to ascertain the scope and purpose of s. 29 it is legitimate to call in and the history of political events which led to the enactment of that section and to examine the Soulbury Commission's report and the connected sessional papers in order to satisfy ourselves whether s. 29 was intended to be a safeguard for minorities alone;

(*b*) that for the purpose of determining whether the two impugned Acts violate s. 29 it is permissible to adduce evidence to demonstrate the practical effects produced in the course of the administration of the two Acts.

The first Canadian case was *Attorney-General of Alberta vs. Attorney-General of Canada and others* (1939) A. C. 117. The question for determination in that case was whether a Bill passed by the Legislature of the Province of Alberta entitled "An Act respecting the Taxation of Banks" was *intra vires* that Legislature. The Bill imposed on every Bank, other than the Bank of Canada, transacting business in the Province an additional tax of ½ per cent. on the paid up capital and 1 per cent. on the reserve fund and undivided profits. The Bill was sought to be justified as falling under head (2) of section 92 of the British North America Act, 1867, which empowers a Provincial Legislature exclusively to make laws for "Direct taxation within the Province in order to the raising of a revenue for Provincial purposes." On behalf of the Dominion it was contended that the Bill amounted to a trespass on the exclusive legislative authority of the Parliament of Canada to make laws in respect of "banking" and "saving banks" falling under heads (15) and (16) respectively of section 91 of the Act. Counsel relied very

strongly on the following passage in the judgment of Lord Maugham :—

> "The next step in a case of difficulty will be to examine the effect of the legislation : *Union Colliery Co. of British Columbia Ltd. vs. Bryden* (1899) A. C. 580 For that purpose the Court must take into account any public general knowledge of which the Court will take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be."

This passage occurs in a context where their Lordships refer to various tests to be applied for the purpose of determining whether a piece of legislation, fairly considered, falls *prima facie* within section 91 rather than within section 92. The judgment leaves no room for the suggestion that where the language of the statute speaks clearly for itself one is permitted to rely on extraneous evidence in support of an interpretation which the words of the statute do not warrant. It is important to note that the passage in question is prefaced by the words, "The next step in a case of difficulty will be to examine the effect of the legislation."

In the course of examining the effect of the legislation their Lordships referred to the fact that if the Bill became operative the yield from taxation of banks carrying on business in the Province would increase from 140,000 dollars to 2,081,925 dollars per annum. Their Lordships were again applying a test to find whether a piece of legislation which on the face of it imposed a direct tax on banks was not one which properly came within the subject of banks and savings banks assigned exclusively to the Parliament of Canada. The difficulty was apparent on the face of the Bill and upon a consideration of the provisions of sections 91 and 92. It was to find a solution to this difficulty that extraneous evidence was permitted.

The second Canadian case on which reliance was placed was *Attorney-General for Ontario vs. Reciprocal Insurers and others* (1924) A. C. 328. In that case the Province of Ontario passed in 1922 an Act which authorised any person to exchange, through the medium of an attorney, with persons, whether in Ontario or elsewhere, reciprocal contracts of insurance. Under a Dominion Act of 1917 it was an indictable offence for any person to solicit or accept any insurance risk except on behalf of a company or association licensed under the Insurance Act of the Dominion of 1917. The conflict arose in this manner. Contracts of insurance constituted a subject peculiarly within the legislative authority of the Province, just as much as criminal law was within the exclusive competence of the Dominion Parliament. The effect of the Dominion statute was to render nugatory the exercise of Provincial Legislative suthority within its own sphere. To determine which of the conflicting statutes prevailed the principle laid down was that one should ascertain the "true nature and character" of the enactment and its "pith and substance". At p. 377 their Lordships stated,

> "But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purposes of determining what it is that the Legislature is really doing."

We do not think that these cases assist the 2nd respondent. Unlike in Canada we do not have for purposes of comparison conflicting statutes, the pith and substance of which has first to be extracted to determine on which side of the legislative boundary the subject matter of the impugned statute falls. Nor do we have enumerated lists of subjects capable of analysis and comparison dividing the permitted and prohibited fields of legislation. We would not question that the pith and substance or the true nature and character of any Act of Parliament attacked on the ground of violating section 29 should be examined. The fundamental error in our opinion is that one should search, far afield in State papers and other political documents, for the substance of the true nature and character of the impugned statute without permitting the language of the statute to speak for itself, where such language is clear and unambiguous.

It would be wrong for us to say that the Canadian cases have no relevancy whatever to the matters that we have to decide. In so far as they illustrate legal principles they are of the highest authority but we cannot overlook that the problems that had to be solved in those cases were basically of a different character. When the occasion arises in Canada to impugn a statute passed either by the Central or the Provincial Legislature, it is found that the language of both sections 91 and 92 of the British North America Act, 1867, appears to attract the subject matter of the statute. Naturally in those circumstances the extent of the encroachment becomes one of degree and a solution is reached by determining whether the statute falls more within the specific words of one section than under the general words of the other.

In this connection we would adopt the words of Sir Maurice Gwyer, C. J., quoted with approval by Lord Porter in delivering the judgment of the

Privy Council in *Prafulla Kumar vs. Bank of Commerce, Khulna*, (1947) 34 A. I. R. 60 :

> "It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list, touches also upon a subject in another list, and the different provisions of the enactment may be so closely interwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its pith and substance or its true nature and character for the purpose of determining whether it is legislation with respect to matters in this list or in that."

Three decisions of the Supreme Court of the United States were cited both before the 1st respondent and before us to show that State laws passed with the object of circumventing the fundamental rights assured to the citizens of the United States, and even aliens residing there, by the Constitution were declared to be void and that evidence was taken to prove the manner and the extent of the infringement of those rights.

The first case was *Frank Guinn and J. J. Beal vs. United States* 238 U. S. 347 : 59 Lawyers' Edition 1340 which was a prosecution of certain election officials of the State of Oklahoma for conspiring to deprive negro citizens of their right to veto. The statute which was attacked as invalid was an amendment in 1910 of the Oklahoma Constitution which provided that no person was to be registered as an elector or be allowed to vote, unless he was able to read and write any section of the Constitution of the State of Oklahoma. The amendment proceeded further to provide.

> "But no person who was, on January 1st, 1866, or at any time prior thereto, entitled to vote under any form of government or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution."

The substantial question for determination was whether the amendment discriminated against the negroes in such a manner as to constitute an infringement of the 15th Amendment of the American Constitution. Although the impugned statute contained no express words of exclusion the learned Chief Justice, having regard to the significance of the date January 1st, 1866, had no difficulty in reading into it a provision to impose on negroes a disability by reason of their colour and condition of servitude contrary to the express terms of the 15th Amendment. The Chief Justice states, "we are unable to discover how, unless the prohibitions of the 15th Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the 15th Amendment. Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the 15th Amendment was in view." It would thus be seen that the decision rested on ascertaining the true intention of the statute hidden, as it were, behind the words "January 1st, 1866."

A similar statute enacted by the State of Maryland for the purpose of fixing the qualification of voters at municipal elections in Annapolis was declared in the second case that was cited, namely, *Myer vs. Anderson* 238 U. S. 367 : Lawyers' Edition 1349 to be an infringement of the 15th Amendment. The date selected to keep the negroes out of the vote was January 1st, 1868. Another provision in that statute which was alleged to be discriminatory was that which gave the franchise to any taxpayer, without distinction of race or colour, who was assessed on the city books for at least 500 dollars. It is interesting to note that in dealing with this aspect of the argument, the Chief Justice stated :—

> "We put all questions of the constitutionality of this standard out of view as it contains no express discrimination repugnant to the 15th Amendment, and it is not susceptible of being assailed on account of an alleged wrongful motive on the part of the lawmaker or the mere possibilities of its future operation in practice, and because, as there is a reason other than discrimination on account of race or colour discernible upon which the standard may rest, there is no room for the conclusion that it must be assumed, because of the impossibility of finding any other reason for its enactment, to rest alone upon a purpose to violate the 15th Amendment."

The third case was *Yick Wo vs. Hopkins* 118 U. S. 256 : 30 Lawyers' Edition 220. The proceedings there arose on a writ of *habeas corpus* by which the petitioner challenged the validity of certain Ordinances passed by the City and County of San Francisco making it unlawful for any person to carry on a laundry "without having first obtained the consent of the Board of Supervisors, except the same be located in a building constructed either of brick or stone." It was submitted that the ordinances were void on their face and, in the alternative, that they

were void because they were applied and administered so as to make unjust discriminations against a particular class of person carrying on the laundry business, of whom a very large majority were nationals of China. The enactment was held to be void on both grounds. As a matter of interpretation the Supreme Court of the United States did not concur in the opinion of the Supreme Court of California that the enactments did nothing more than vest a discretion in the Board of Supervisors to be exercised for the protection of the public and held that they were repugnant to the 14th Amendment. Matthews, J., said :—

> "They seem intended to confer, and actually to confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places but also as to persons".

In a later passage he said :—

> "For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

We are unable to see in what respects the 2nd respondent can derive any assistance from the principles governing the decisions in the American cases. The statutes in question were interpreted by the Supreme Court of the Untied States according to the language used. Having given a meaning to the statute, after applying the ordinary canons of interpretation, the Court had next to find whether the statute had the effect of taking away a fundamental right guaranteed by the Constitution to a citizen or an alien, as the case may be. Undoubtedly, in the case of *Yick Wo vs. Hopkins* 118 U. S. 256 : 30 Lawyers' Edition 220 evidence was taken of the number of Chinese who were affected by the Ordinances of the City of San Francisco. That was not for the purpose of interpreting the impugned ordinances but as evidence to sustain the allegations that, even if the ordinances were not bad on their face, they were administered so oppressively as to infringe a fundamental right given by the Constitution.

Before leaving the American decisions we wish to refer to the case of *Williams vs. State of Mississippi* 170 U. S. 214 : 42 Lawyers' Edition 1012 on which the Attorney-General relied in support of his argument that one must look at the statute to see whether on the face of it the legislation is discriminatory. The question for decision was whether the laws of the State of Mississippi by which the grand jury selected to try Williams, who was a negro, on a charge of murder were repugnant to the 14th Amendment of the Constitution of the United States.

The right to be a grand or petit juror was linked to the right to vote in the State of Mississippi. The words of the section are :—

> "No person shall be a grand or petit juror unless a qualified elector and able to read and write ; but the want of any such qualification in any juror shall not vitiate any indictment or verdict. The legislature shall provide by law for procuring a list of persons so qualified, and the drawing therefrom of grand and petit jurors for each term of the circuit court".

The law by which an addition was made to the qualifications provided :—

> "On and after the first day of January, 1892, every elector shall in addition to the foregoing qualifications, be able to read any section of the Constitution of this State ; or he shall be able to understand the same when read to him or give a reasonable interpretation thereof....."

It was urged against the validity of the laws governing the franchise that, under the section last quoted, it was left solely to an administrative officer to judge who was qualified, and that it was open to him arbitrarily to judge that a person was not qualified, though in fact he was.

While there was an allegation that certain election officers in making up lists of electors exercised their discretion against negroes as such, the actual position was that jurors were not selected from any lists furnished by such election officers.

It was held that the laws in question were not invalid for the reason stated succinctly in the concluding words of the judgment :—

> "They do not on their face discriminate between the races and it has not been shown that their actual administration was evil, only that evil was possible under them."

In our opinion the decisions in the three cases relied on by Counsel do not support the proposition for which he contended, namely, that it is proper to travel outside the language of the impugned enactments and to take evidence as to whether or not, in their ultimate effect, they are of a discriminatory character. After a careful consideration of all these authorities we have come to the conclusion that if s. 3 (1) (*a*) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, read with the Citizenship Act, No. 18 of 1948, does not offend against s. 29 of the Ceylon (Constitution and Independence)

Orders in Council, 1946 and 1947, it does not matter what effects they produce in their actual operation.

We shall now proceed to examine the two impugned Acts and to see whether they violate the provisions of s. 29. The Citizenship Act No. 18 of 1948 was enacted after various Commonwealth conferences in which representatives of Canada, Australia, New Zealand, Southern Rhodesia, India, Pakistan and Ceylon took part. Among the most significant features of the Citizenship Act is one that provides a definition of a citizen of Ceylon. S. 4 (1) says that a person born before the appointed date, that is November 15, 1948, the date on which the Act came into operation, shall have the status of a citizen of Ceylon by descent if

(*a*) his father was born in Ceylon or

(*b*) his paternal grandfather and paternal great grandfather were born in Ceylon.

S. 4 (2) says that a person born outside Ceylon before the appointed date shall have the status of a citizen of Ceylon by descent if

(*a*) his father and paternal grandfather were born in Ceylon or

(*b*) his paternal grandfather and paternal great grandfather were born in Ceylon.

Section 5 (1) says that a person born in Ceylon on or after the appointed date shall have the status of a citizen of Ceylon by descent if at the time of his birth his father is a citizen of Ceylon.

It is not disputed that these sections confer a "privilege" or an "advantage" on those who are or became citizens of Ceylon within the meaning of s. 29 (2) (*c*) of the Constitution.

When the language of sections 4 and 5 is examined it is tolerably clear that the object of the legislature was to confer the status of citizenship only on persons who were in some way intimately connected with the country for a substantial period of time. With the policy of the Act we are not concerned, but we cannot help observing that it is a perfectly natural and legitimate function of the legislature of a sovereign country to determine the composition of its nationals. Section 3 (1) (*a*) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, links up with the Citizenship Act and says that anyone who is not a citizen or has not become a citizen is not qualified to have his name entered or retained in the register. It restricts the franchise to citizens. Can it be said that these two provisions, the words of which cannot in any shape or form be regarded as imposing a communal restriction or conferring a communal advantage, conflicts with the prohibition in s. 29 of the Constitution? This is the simple question for our decision. In approaching the decision of this question it is essential that we should bear in mind that the language of both provisions is free from ambiguity and therefore their practical effect and the motive for their enactment are irrelevant. What we have to ascertain is the necessary legal effect of the statutes and not the ulterior effect economically, socially or politically.

Section 29 (2) was enacted for the first time in the Ceylon (Constitution) Order in Council, 1946. The Attorney-General conceded, we think rightly, that the Indians are a contemplated community and that citizenship and the franchise are contemplated benefits. The language of the section is clear and precise and it is, therefore, not permissible for us to travel outside it to ascertain the object of the legislature in enacting it. We are of opinion that, even if it was the intention of the Soulbury Commission to make s. 29 (2) a safeguard for minorities alone, such intention has not been manifested in the words chosen by the legislature. In *Brophy vs. The Attorney-General of Manitoba* (1895) A. C. 202 the Lord Chancellor said :—

> "The question is not what may be supposed to have been intended but what has been said."

Section 29 (3) declares any law made by Parliament void if it makes

> (1) persons of any community liable to disabilities or restrictions;
> (2) to which persons of other communities are not made liable.

The conditions for the avoidance of a law under this provision are both (1) and (2). If (1) is satisfied in any particular case but not (2) the law is not void. Both conditions must exist to render the law void. If a law imposing disabilities and restrictions expressly or by necessary implication applies to persons of a particular community or communities and not to others, then such a law would undoubtedly be void, because in such a case both conditions (1) and (2) would be satisfied. If, however, a law imposes disabilities and restrictions when certain facts exist (or certain facts do not exist) and these disabilities and restrictions attach to persons of all communities when these facts exist (or do not exist as the case may be) then condition (2) is not satisfied for the reason that the disabilities and restrictions are imposed on persons of all communities. The same reasoning applies to s. 29 (2) (*c*) if the law is regarded as conferring privileges or advantages on persons of any community or communities because the law confers privileges and advantages on persons of

any other community in the same circumstances. We think it is irrelevant to urge as a fact that a large section of Indians now resident in Ceylon are disqualified because it is not the necessary legal effect which flows from the language of the Act. Hence condition (1) is not satisfied. Even if this argument can be urged, it is clear to us that persons of other communities would be similarly affected, because the facts which qualify or disqualify a person to be a citizen or a voter have no relation to a community as such but they relate to his place of birth and to the place of birth of his father, grandfather or great grandfather which would equally apply to persons of any community. Hence condition (2) is not satisfied.

The 1st respondent has made a fundamenta error in travelling outside the language of the statutes to ascertain their meaning. He appears to have considered that the proper mode of approach was to gather the intention of the legislature in passing the impugned statutes by first reading the minds of the Commissioners appointed to recommend constitutional changes rather than by examining the language of the statutes and what its plain meaning conveys. He says :—

> " In order to answer the questions arising in this case it is necessary to see what has been the development of the franchise law in this country. As stated by Lord Sumner in Attorney-General for *Alberta vs. Attorney-General* for Canada, ' It is quite legitimate to look at the legislative history as leading up to the measure in question ' ".

It seems to us that the inherent power of a sovereign state to determine who its citizens should be and what qualifications they should possess to exercise the franchise was a consideration more germane to the issues before him than a perilous expedition to the political controversies of the past. After reading the Soulbury Commission Report and the connected Sessional papers he seems to have formed the opinion that s. 29 was intended to be a safeguard for minorities. He then appears to have examined the affidavit P1 made by the 2nd respondent and to have been influenced by the statement in it that thousands of Indians domiciled in Ceylon have had their names deleted from the register of electors " by the simple expedient of deleting practically all non-Sinhalese names " and regarded the action of the registering officers as part of the legislative plan to discriminate against the Indians. It is important to note that no materials were placed before him, assuming that such materials were relevant to the issues which he had to try, as to how many of the persons whose names were arbitrarily expunged were entitled to be restored to the register. He has overlooked the fact that when an enactment is put into force one community may be affected by it more adversely than another. A high income or property qualification may affect more adversely the voting strength of one community than another. Would that be discrimination ? If the effects of a controversial piece of legislation are weighed in a fine balance not much ingenuity would be needed to demonstrate how, in its administration, one community may suffer more disadvantages than another. To embark on an inquiry, every time the validity of an enactment is in question, into the extent of its incidence, whether for evil or for good, on the various communities tied together by race, religion, or caste would be mischievous in the extreme and throw the administration of Acts of the legislature into confusion. The 1st respondent appears to hold the view that the Indians who were qualified for the franchise under the laws prior to the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, had acquired a vested right to continue to exercise the franchise and that if any legislation, in its administration, had the effect of taking away the franchise from large sections of the community, such legislation would for that reason be discriminatory. This view cannot be supported. The Parliament of Ceylon has the power to alter the electoral law in any manner it pleases if it thinks it necessary to do so for the good government of the country subject to the narrow limitation in s. 29. It has the power to widen or to narrow the franchise. If it widens the franchise the more advanced communities may feel that they are affected, on the other hand if it narrows the franchise the less advanced communities may also feel they are adversely affected. If it is open to a person to say that as a result of the alteration the voting strength of his community has been reduced, as the Attorney-General remarked Parliament will only have the power to pass legislation as to what the polling hours or the polling colours should be.

The 1st respondent has relied on a passage in the judgment of Frankfurter, J., in *Lane vs. Wilson* 307 U. S. 268 : 83 Lawyers' Edition 1281 as showing that the Citizenship Act on which the franchise was made to depend was as objectionable as the " grandfather clause " which was declared in *Frank Guinn and J. J. Beal vs. United States* 238 U.S. 347 : 59 Lawyers' Edition 1340 to be a violation of the 15th Amendment of the Constitution. We think that the com-

parison between the Oklahoma legislation and the Citizenship Act is ill-founded. The provision in the Oklahoma Constitution which was attacked in *Lane vs. Wilson* 307 U.S. 268 ; 83 Lawyers' Edition 1281 had a tainted history and, besides, manifested on its face an intention to nullify the consequences of the decision in *Frank Guinn and J. J. Beal vs. The United States* 238 U.S. 347 : 59 Lawyers' Edition 1340. The Oklahoma Statute and the Citizenship Act present different problems of interpretation, having regard to both the language used in Statutes and the fundamental rights assured by the Constitution of the United States which have no place in our Constitution.

For these reasons we are of opinion that ss. 4 and 5 of the Citizenship Act, No. 18 of 1948, and s. 3 (1) (*a*) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, are not invalid and that the latter enactment contains the law relating to the qualification of voters.

In conclusion we would wish to express our appreciation of the assistance given to us by learned Counsel who argued the case before us.

We quash the order made by the 1st respondent on July 2, 1951 and remit the record to him so that he may make a fresh determination on the basis that neither sections 4 and 5 of the Citizenship Act, No. 18 of 1948, nor s. 3 (1) (*a*) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, is void under s. 29 (3) of The Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947.

The 2nd respondent will pay the petitioners one set of costs in this Court.

Order of Revising Officer quashed.

Present : BASNAYAKE, J. & GUNASEKARA, J.

KANDAPPU vs. VEERAGATHY AND ANOTHER

S. C. 125—*D. C. Point Pedro* 3460

Argued on : 6th and 7th December, 1950
Decided on : 6th June, 1951

Thesawalamai—Dowried daughters—Gift after marriage, not dowry—Married daughters under the Thesawalamai, who have been dowried at the time of their marriage, can prefer a claim to the estate of their parents, only if there are no other children.

Held : That a gift of lands made after marriage is not a *doty* or *doty ola.*

Cases referred to : *Eliyavan vs. Velan et al* (1929) 31 N. L. R. 356 at 358.
Tambapillai et al vs. Chinnatamby et al (1915) 18 N. L. R. 348.

S. J. V. Chelvanayagam, K.C., with *V. Arulambalam*, for the defendant-appellant.
C. Thiagalingam, K.C., with *H. W. Thambiah* and *Nagaratnam*, for the respondents.

BASNAYAKE, J.

In this action the plaintiff seeks to obtain a decree declaring him entitled to an undivided half-share of the land Kottikoil described in the plaint. He claims to be entitled thereto by virtue of deed No. 2780 of 14th May, 1939, whereby one Velupillai Arumugam transferred to him certain lands including the subject-matter of this action. Velupillai Arumugam's title rests on a deed of gift executed by his mother Wallipillai, daughter of Ledchumy.

The case of the defendants is that Wallipillai was not entitled to the land in question. They contend that she had been given a dowry on her marriage and had therefore no right to inherit her mother Ledchumy's property. Each party also made a claim based on prescriptive possession.

It is admitted that Ledchumy was the original owner of the land in dispute and that on her death she was survived by her husband, her daughter Wallipillai and son Kandar Alvar. It is also admitted that Wallipillai was married and that Velupillai Arumugam is her son.

The learned District Judge has held in favour of the plaintiff both on the question of title and on the question of prescriptive possession.

Learned Counsel for the appellant confined his argument to the question whether Wallipillai was entitled to inherit property from her mother. He submitted that she was not. He cited in support the following passage from section 3, Part I, of the Thesawalamai :—

"The daughters must content themselves with the dowry given them by the act or *doty ola*, and are not at liberty to make any further claim on the estate after the death of their parents, unless there be no more children, in which case the daughters succeed to the whole estate."

The above statement is by no means precise. I understand it to mean that the married daughters to whom a dowry has been given may make a claim to the estate of their parents only if there are no other children, viz., sons and unmarried daughters. This view of the law has been accepted by this Court and has been thus stated by Lyall-Grant, J. in the case of *Eliyavan vs. Velan et al* (1929) 31 N. L. R. 356 at 358: "The admitted principle of the *Thesawalamai* is that if a daughter is dowried she loses her rights to her parents' inheritance."

The evidence in the instant case does not establish either the date of Ledchumy's death or of Wallipillai's marriage. Nor is there evidence of a *doty ola* or that dowry was given on Wallipillai's marriage. There is evidence that, in June, 1904, after Wallipillai's marriage and after Ledchumy's death, Wallipillai's father, brother and uncle gave her a gift of a number of lands including a portion of the land Kottikoil. But I am unable to hold that the deed of gift is a *doty ola*. The sense in which the expression dowry is used in the Thesawalamai in my opinion excludes a gift made after the marriage.

In *Tambapillai et al vs. Chinnatamby et al* (1915) 18 N. L. R. 348 this Court held that under the Thesawalamai dowry may be given before the marriage. Although that question does not arise here that decision is likely to create difficulty in a case where the donee dies after the gift but before the marriage. The gift cannot in that event be called dowry. There can be no dower without a marriage. Dowry is primarily a gift given at the time of marriage. The expression does not, in my opinion, admit of any other meaning in the Thesawalamai.

It is clear from the Thesawalamai that the granting of the "*doty*" or "*doty ola*" is an act performed at the time of the marriage and not during the marriage. The deed of June, 1904, in favour of Wallipillai cannot therefore operate as "the act or *doty ola*" for the purposes of section 3, Part I, and does not prevent her from inheriting her mother's property.

The appellant is therefore not entitled to succeed.

The appeal is dismissed with costs.

GUNASEKERE, J.

I agree.

Appeal dismissed.

Present : GRATIAEN, J.

SALIH BIN AHMED vs. N. M. HOWTH

S. C. No. 1142—*M. C. Jaffna No.* 18967

Argued on : 14th March, 1951
Decided on : 21st March, 1951

Penal Code—Section 398—*Cheating—Cheque issued without sufficient funds in bank—Reasonable grounds for believing that cheque would be met—Intention to defraud.*

Held : That where a person, being aware that he has not sufficient funds in his bank to meet the full amount of a cheque, nevertheless issues such cheque in the honest belief that it would be met on presentation, he cannot be held guilty of cheating as he had no intention to defraud.

Per GRATIAEN, J.—The position would be different, of course, if at the time when the cheque is given the accused has nothing but a hope (as opposed to a genuine and reasonable belief) that sufficient money would be paid into his bank to meet the cheque.

Case referred to.—*R. vs. Oster-Ritter* (32 C. A. R. 191).

A. B. Perera, for the accused-appellant.

H. A. Wijemanne, Crown Counsel, for the complainant-respondent.

GRATIAEN, J.

This is an appeal from a conviction on a charge of cheating in respect of a cheque for Rs. 1,000. The case for the prosecution is that when the accused, who is a trader in Colombo, paid a visit to Jaffna in 1950 he asked an acquaintance Mohideen Hadjiar to assist him to have a cheque drawn on a Colombo bank cashed for Rs. 1,000. Mohideen Hadjiar instructed his brother Howth, who was his partner in business, to assist the accused by cashing his cheque for this amount, and accordingly on 13th May, 1950, Howth gave the accused Rs. 1,000 in exchange for a cheque drawn on a Colombo bank.

A few days later the cheque was presented for payment in Colombo but was dishonoured. Criminal proceedings were instituted against the accused on a private plaint on 24th May, but a few days later the accused paid up the amount and, in addition, the expenses incurred by Howth in recovering his money in full. Thereafter, as so often happens, Howth lost serious interest in the prosecution, but an application to compound the alleged offence was refused by the learned Magistrate. In the result the case against the accused seems to have been somewhat half heartedly presented in the Court below. The question for my decision is whether the evidence in the case was sufficient to justify the accused's conviction on the charge of cheating.

The defence was that the accused had only Rs. 500 to the credit of his account with the bank concerned before he left Colombo for Jaffna, but that he had instructed his business associates in Colombo to deposit further sums out of business profits to his credit during his absence. He says that he accordingly cashed the cheque on 15th May at Jaffna *in the honest belief that, on presentation, it would be met.* The learned Magistrate appears to have accepted this version, but assumed that this circumstance afforded no defence to the charge " because when the accused drew his cheque for Rs. 1,000 he was fully aware that there were no funds sufficient to meet it ".

In my opinion the learned Magistrate has misdirected himself on the law relating to the offence of cheating by issuing cheques which, on presentation, are proved to be worthless. " If a person gives a cheque for a sum of money, knowing that he has no money in his bank to meet it, *but believing on reasonable grounds, that somebody is going to pay in a further amount to his credit so that at the time the cheque is presented it will be met*, then he has not an intent to defraud ". *R. vs. Oster-Ritter*, 32 C. A. R. 191. The position would be different, of course, if, at the time when the cheque is given, the accused has *nothing but a hope* (as opposed to a genuine and reasonable belief) that sufficient money would be paid into his bank to meet the cheque.

It may well be that, if the case for the prosecution had been presented more thoroughly and with more enthusiasm, there would have been sufficient evidence to justify a conviction. For instance, there is a suggestion (which, however, falls short of proof) that the accused's banking account was closed very shortly after the cheque was issued and before it was presented for payment. This circumstance would, of course, have been very material to the case if it had been fully investigated and established by admissible evidence. No officer of the Bank concerned was called, however, for the prosecution, and a mere endorsement bearing the words " account closed " purporting to have been made by a bank official is not proof of the fact alleged by the complainant.

In the state of the admissible evidence on record, I think that the guilt of the accused has not been established beyond reasonable doubt, and I accordingly quash the conviction.

Conviction quashed.

Present : GRATIAEN, J. & PULLE, J.

E. A. WIJESINGHE vs. D. H. SONNADARA

S. C. No. 569—*D. C. Matara, No.* 19243

Argued on : 16th May, 1951

Decided on : 29th May, 1951

Transfer pending partition—Final decree—Suit for cancellation of deed of transfer—Failure of consideration.

Sale—Undivided land—Contingent interest in transfer pending partition suit, together with another land—Allocation of a smaller interest by final decree—Action by vendee to cancel sale—Failure of consideration—Conventio rei speratae—*Impossibility of performance—Roman Dutch Law.*

By deed, the plaintiff bought from the defendant for Rs. 5,000, two lands :—(*a*) an undivided one hundred acres of a land called " Shand's Land ", in extent 4,000 acres, together with the share which may be allotted to him under the final decree in the partition case then pending ; (*b*) an undivided paddy field in " Shand's Land."

There were no express covenents in the deed, by which the defendant undertook to indemnify the plaintiff against loss.

In the final decree, the plaintiff was allotted only 13 acres 1 R. 20 P, and he instituted an action to cancel the deed of sale, and for the return of Rs. 5,000, on the ground that there was a total failure of consideration of the contract of sale.

Held : (1) That the express terms of the deed and the facts of the case, show that the sale of the contingent interests in the land under partition, was a contract under which the plaintiff purchased " a chance or expectation that a thing would come into existence ", and was binding on the parties.

(2) That there was no total failure of consideration, as some benefits, even though smaller than the parties had hoped, had accrued to the plaintiff under the partition decree, together with an interest in the paddy land.

(3) That the principles of Roman Dutch Law dealing with " impossibility of performance " in relation to contracts, apply only to " executory contracts ", and did not apply to the contract of this case, which from the moment of its execution, operated as a present sale of a contingent interest in one land, as well as of an existing interest in another.

Per GRATIAEN, J.—"The purchase price of Rs. 5,000 represented a single indivisible consideration for both these interests. In return for this consideration, the plaintiff has no doubt received a good deal less than he had hoped for under that part of the transaction which constituted a *conventio rei speratae*. Nevertheless, that risk, which is necessarily incidental to transactions of this class of contracts, must in the eyes of the law, fall on him."

Case referred to : *Sirisoma vs. Sarnelis Appuhamy* (1950) 51 N. L. R. 337.

H. V. Perera, K.C., with *H. W. Jayawardene* and *J. W. Subasinghe*, for the defendant-appellant.

U. A. Jayasundera, K.C., with *C. G. Weeramantry*, for the plaintiff-respondent.

GRATIAEN, J.

This appeal relates to a dispute which might well have been sensibly adjusted without resorting to litigation. The action was instituted in 1948, and the contract in respect of which the parties have fallen out was entered into nearly 21 years ago. The plaintiff is now 64 years old. Presumably the defendant is about the same age.

The facts with which this appeal is concerned are no longer in dispute. On some date prior to June, 1930, the defendant had instituted a partition action in respect of lots B, C, D and E of a vast tract of land in the Southern Province, known as " Shand's Land ", which is stated to be over 4,000 acres in extent. There is no evidence before us as to the nature or the value of the plantations on the property, or as to the manner in which it had previously been enjoyed by the plaintiff and *425 other persons* whom, at one time or another, he joined as defendants in the action and with whom he had found that " common possession was no longer expedient or impracticable. The present plaintiff was himself a party to those proceedings, but only in the capacity of a planter of some part of the property claiming compensation for the improvements effected by him.

At an early stage of the pendency of the partition action the plaintiff negotiated with the defendant for the purchase of certain interests which the latter claimed in the property. An alienation of any existing undivided rights in the land was of course precluded by Section 17 of the Partition Ordinance, and the proposed transaction was therefore confined to the acquisition by the plaintiff of what might ultimately be allotted to the defendant under the final decree in the action. When such decree would be entered, no man could predict with any confidence. In point of fact, the action seems to have proceeded at a pace which was unusually leisurely for even a partition action in the Southern Province. Final decree was duly entered of record on 15th December, 1947, the interlocutory decree having been passed on the 24th March, 1943.

I must now return to the negotiations which were taking place in 1930. On 17th June of that year the defendant, in consideration of a sum of Rs. 5,000 which was duly paid to him, sold to the plaintiff under a notarial conveyance :—

" 1. All that undivided one hundred acres together with all the rights advantages and disadvantages such as costs compensation *et cetera* thereto appertaining out of the extent and the share in common or severally which may be allotted to the vendor under the finally conclusive decree which may be entered in the partition case No. 2664 of the District Court of Tangalle of the land called Godakogalla (exclusive of the block A partitioned in case No. 1207 in the District Court of Tangalle, the block called Shands land partitioned in case No. 1538 in the District Court of Tangalle and block B and C as per plan in preliminary survey in the District Court case No. 2664 of Tangalle) situate at Koggalla in Magam Pattu of the Hambantota District, Southern Province and bounded on the North by Ridiyagama, East by Wala Kogalla and Koggaluara, South by Koggaluara and Koggalutota, and West by Walawe River containing in extent 4,000 acres.

" 2. All that undivided one amunam and five kurunies of the paddy field of the land called Kodakoggalla.....situate at Koggalla aforesaid and bounded on the North by Ridiyagama, East by Wala Koggalla and Koggaluara, South by Koggaluara and Koggalutota and West by Walawe River containing in extent about 4,000 acres."

The second land sold under this deed was admittedly land the ownership of which was not complicated by the pendency of any partition action, and the deed operated as an immediate conveyance to the plaintiff of the paddy field concerned. The plaintiff therefore became as from that date the owner of this property.

With regard to the other property which was described earlier in the deed, it is clear that the parties had successfully steered clear of the hazard of Section 17 of the Ordinance. In accordance with the recent decision of a Divisional Bench of this Court in *Sirisoma vs. Sarnelis Appuhamy* (1950) 51 N. L. R. 337, the deed operated as a present alienation of a part of the defendant's contingent interest in what might ultimately be allotted to him under the decree in the pending action. If, under that decree, the defendant were to receive one or more divided allotments, whose total acreage exceeded 100 acres, out of lots D or E, the plaintiff would in terms of the conveyance become automatically vested with title to an undivided share in such allotment or allotments in the proportion of 100 to their total acreage. If, however, the defendant were to receive one or more allotments in lots D or E with an aggregate acreage of less than 100 acres, the plaintiff would automatically, and without any further conveyance thereof, become the owner of the entire allotment or allotments. If, finally, the defendant was allotted nothing at all in lots D or E under the partition decree, then nothing would pass to the plaintiff under the first part of the conveyance of 17th June, 1930.

The language of that part of the deed which disposed of the defendant's contingent interests in Shand's land must be interpreted in the light of the common experience of men as to the risks which are necessarily involved in any litigation under the Partition Ordinance, and it must be assumed that both parties to the transaction had those risks in contemplation when the deed was

executed 21 years ago. There were no express covenants under which the defendant, as vendor, undertook that, if any unforeseen contingency arose which they both hoped would not occur, the defendant should indemnify the plaintiff as purchaser against the loss resulting therefrom. Indeed, the outcome of the particular action was by its very nature, attendant with risks and complications of a special kind. For instance, the subject matter of the action was unusually large, and the number of interested parties exceptionally high. There was no reasonable certainty that the Judge, or successive Judges, in control of the proceedings would not decide to exclude from the scope of the action one or more of the allotments of land which taken together comprised " Shand's Land ". Besides, it was expressely stipulated in the conveyance that if the defendant were to receive under the final decree any part of the land falling within lots B and C, these allotments would not pass to the plaintiff, and both parties should have realised that the final scheme of partition was a matter on which the plaintiff could not as of right control the decision of the trial Judge. All these and other considerations, in addition to the express terms of the deed of conveyance, satisfy me that the contract between the parties in respect of the contingent interests in the land under partition was a contract under which the plaintiff purchased " a chance or expectation that a thing would come into existence ", *a conventio spei*, which, under the Roman Dutch Law governing the case, can be the legitimate subject matter of a binding contract.

Wessels tells us in his treatise on the *Law of Contracts* (Vol. 1 paragraphs 393 to 395) that the sale of a chance of expectation (*i.e.* of a contingent interest) may be either *conventio spei simplicis* or a *conventio rei speratae*. " In the former case the object depends entirely on the good fortune of the moment. A fisherman sells the result of the cast of his net. He may catch fish or he may not. The object of the contract is the result of pure chance. If there is a large haul, the fisherman is bound to hand it over ; if there is nothing in the net, the fisherman takes the price for which he sold the chance of a catch. In the case of a *conventio rei speratae* there is more than a mere chance —there is a considerable degree of certainty according to our ordinary experience. Thus, if I sell next year's crop or the next year's lambs of my flock, the purchaser knows from experience that there is more than a mere chance, that there will be a crop or an increase from the flock..... In such a case the law presumes a tacit understanding between the parties that, *if by some unforeseen circumstance there is no crop whatsoever, the obligation will be without an object and therefore there will be no contract. If, however, there is a small crop or still-born lambs, then the contract will be valid and enforceable* ".

In my opinion the sale by a co-owner in land of whatever interests might ultimately be allotted to him under the decree in a pending partition action may fairly be construed as a *conventio rei speratae*. I do not think that the admitted hazards attendant on the outcome of proceedings under the Partition Ordinance are quite sufficient to justify the conclusion that there is on a reasonable degree of certainty that some advantage at least, however small, is likely to pass to the co-owner under the final decree. If this be so, the validity of the sale of the defendant's contingent interests must be determined by reference to the question whether or not some benefits, even to a far smaller extent than the parties had originally hoped for, did accrue to the seller under the partition decree. Applying this test to the contract in the present case,I am of the opinion that the plaintiff could not claim successfully that there was a total failure of consideration even if the sum of Rs. 5,000 paid by him under the deed was solely referable to the purchase of the defendant's contingent interests in the partition proceedings. Admittedly lot E was, by an order of Court in the interlocutory decree of 1943, excluded from the scope of the action. But under the final decree the defendant was in fact allotted 13 acres 1 rood 20 perches in lot D, and, upon the proper construction of the deed of 1930, the plaintiff automatically became the lawful owner of this allotment. In the result, the plaintiff's claim for a cancellation of the deed on the ground that there was a failure of consideration, and for the return of the purchase price, must necessarily fail. Besides, it must be remembered that what was in fact conveyed to the plaintiff in 1930 was not only a contingent interest but, in addition, a present interest in certain paddy lands. The purchase price of Rs. 5,000 represented a single indivisible consideration for both these interests. In return for this consideration, the plaintiff has no doubt received a good deal less than he had hoped for under that part of the transaction which constituted a *conventio rei speratae*. Nevertheless, that risk, which is necessarily incidental to transactions of this class of contracts, must in the eyes of the law, fall on him. By virtue of the contract, he became the lawful owner of the paddy lands in 1930 and of 13 acres 1 rood 20 perches in lot B in 1947. His action for the cancellation of the deed and for the return of the consideration was therefore misconceived. It is not necessary to express an opinion whether he might have succeeded if a claim for relief had been formulated on different grounds.

Mr. Jayasundera invited us to hold that, even if there was no failure of consideration, the plaintiff was entitled to recover the purchase price on the ground that the contract was avoided because it became impossible of performance owing to the final result of the partition action. It seems to me that a claim of this basis would have been equally misconceived. As I understand them, the principles of the Roman Dutch Law dealing with " impossibility of performance " in relation to contracts apply only to *executory* contracts, whereas the present contract, from the moment of its execution, operated as a present sale of a contingent interest in one land as well as of an existing interest in another. Admittedly, one must read into the contract an implied obligation undertaken by the defendant to make his best endeavours to bring the partition case which he had instituted to a successful conclusion. It is not alleged or proved that he did not fulfil this obligation, and even if he had failed in this respect, the plaintiff's appropriate remedy would have been a claim for damages and not a claim for a declaration that the contract was invalid.

In my opinion the judgment of the learned District Judge ordering the defendant to refund to the plaintiff the consideration of Rs. 5,000, with legal interest, must be set aside. I would allow the appeal and enter decree dismissing the plaintiff's action with costs both here and in the Court below.

In conclusion, I desire to point out that, according to the evidence, the defendant made an offer to convey to the plaintiff, by way of compromise, some part of what may ultimately be allotted to him out of lot E, which had been excluded from the scope of the earlier partition action but in respect of which separate proceedings under the Partition Ordinance have since been instituted. It seems to me that this would have been a very reasonable and indeed and honourable adjustment of the present dispute, and it is a pity that the plaintiff did not accept it. I can only hope that some such compromise may even now be effected.

PULLE, J.

I agree.

Judgment set aside.

Present : GRATIAEN, J. & PULLE, J.

J. M. WISMALOMA *et al vs.* E. D. ALAPATHA

S. C. No. 246—*D. C. Ratnapura, No.* 7863

Argued on : 2nd May, 1951
Decided on : 10th May, 1951

Misjoinder of defendants and causes of action—Action for declaration of title—Defendants independently in possession of separate defined blocks—Allegation of concerted action by defendants in plaint—Fundamental question of fact—Discretion of Court in permitting amendment in the case of such a misjoinder—Civil Procedure Code, Sections 14, 17 *and* 22.

The plaintiff in one action sued two sets of defendants for a declaration of title to five lots of land possessed by the defendants separately. In his plaint he alleged that the defendants were acting in concert to deprive him of the entire land comprised of the five lots, but was unable to substantiate it in his evidence. The issue of misjoinder of defendants and causes of action was raised at the commencement of the trial, but the learned District Judge at the conclusion of the trial on all the issues ruled against the defendants on the issue of misjoinder and also failed to discuss this point. The defendants appealed and at the conclusion of the argument in appeal, Counsel for the plaintiff-respondent requested that the plaintiff be allowed to amend his pleadings and restrict his claim against one set of defendants.

Held : (1) That the failure of the plaintiff to establish that the defendants were acting in concert, was fundamental to the recognition of his right to proceed against all the defendants in the same proceedings, and as such, there was a misjoinder of defendants and causes of action.

(2) The discretion of the Court must be judicially exercised, after consideration of all relevant circumstances, such as the conduct of the parties, and the belatedness of the application, and, therefore, the application of the plaintiff to amend his pleadings should not be allowed.

Cases referred to : *Lowe vs. Fernando* (1915) 16 N. L. R. 389.
Ettaman vs. Naraynan (1938) 18 Law Recorded 111.
Abraham Singho vs. Jayaneris (1930) 14 Law Recorder 121 and *Ettaman vs. Naraynan* (*ibid*)
Kanagasapathy vs. Kanagasabai (1923) 25 N. L. R. 173
Sivakamanathan vs. Anthony (1935) 3 C. L. W. 51.
Fernando vs. Fernando (1937) 39 N. L. R. 145.
Thambimuttu vs. Ratnasingham (1938) 40 N. L. R. 253.
Kudhoos vs. Joonoos (1939) 41 N. L. R. 251.
Podihamy vs. Seimon Appu (1946) 47 N. L. R. 503.

H. W. Jayewardene, for the 3rd, 4th and 5th defendants-appellants.
C. V. Ranawake with *B. S. C. Ratwatte,* for the plaintiff-respondent.

GRATIAEN, J.

The question argued before us in this appeal raises a fundamental objection to the constitution of the action in its present form. On 29th June, 1945, the plaintiff, claiming to be the sole owner of an entire land (comprising lots 1, 2, 3, 4 and 5 depicted in the plan P1 filed of record) complained that the defendants, five in number, " acting jointly and in concert " were in forcible and unlawful possession of his property. He accordingly claimed a declaration of title to the entire land as against all the defendants, and to certain consequential relief.

The 1st defendant filed answer denying that he had claimed or possessed any part of the land since December, 1943. His position is that he had never claimed any interests in lots 4 or 5, but that he had been the sole owner of a separate land (comprising only lots 1, 2 and 3) which he sold to the 3rd, 4th and 5th defendants by two conveyances of 21st December, 1943, and that since this date the 3rd, 4th and 5th defendants were in exclusive possession of these allotments. The 3rd, 4th and 5th defendants filed pleadings to the same effect, while the 2nd defendant, in his answer claimed to be in exclusive possession of lots 4 and 5 which formed a separate land, and he disclaimed any interests in the land comprising lots 1, 2 and 3 claimed exclusively by the 3rd, 4th and 5th defendants. All five defendants specifically denied the plaintiff's allegation that they had acted jointly or in concert to dispossess him of the larger land which he claimed to be his. They accordingly pleaded that the action was bad for misjoinder of defendants and of causes of action. An issue of misjoinder was raised at the commencement of the trial. The learned District Judge ruled against the defendants on this issue at the conclusion of the trial on all the issues, but without discussion of the matters which arose for his consideration on this point. Mr. Jayawardene, who argued the appeal of the 3rd, 4th and 5th defendants before us, contended that the plea of misjoinder was entitled to succeed on the admitted facts, and he claimed that this objection was fatal to the plaintiff's action. In my opinion this argument is sound.

Admittedly, the averments in the plaint, if true, would have justified the institution of these proceedings against the defendants based on a single cause of action alleged to have been committed by all of them acting in concert. It is equally apparent that if this averment was found to be untrue, the basis of the action in its present form was destroyed. The fundamental question on the plea of misjoinder was a question of fact. If the truth was that the 2nd defendant, acting quite independently of the other defendants, had entered into possession of lots 4 and 5 (which he claimed in his own right as a separate land)—and that the other defendants had similarly entered into possession of only lots 1, 2 and 3 (which they claimed in their own right as a separate land), it would have been necessary for the plaintiff to vindicate his alleged rights against each group of defendants in separate proceedings based on the single cause of action committed by him or them. Mr. Ranawake contended, however, that, even if the plaintiff could not prove that the defendants had acted in concert to dispossess him, a single action was maintainable because the measure of his rights was his claim to be restored into possession of a single land comprising all the divided allotments possessed by separate groups of defendants. With great respect, I think that this theory has long since been abandoned. I need only refer to the ruling of the majority of the Divisional Court in *Lowe vs. Fernando* (1915) 16 N. L. R. 389, where the plaintiff claimed the entirety of a block of land in a single action against a number of defendants who were severally in possession of separate and defined portions of it. It was held that there was a misjoinder of defendants and of causes of action *in the absence of proof that the defendants had acted in concert in depriving the plaintiff of the possession of the entire block.* It is not sufficient to *aver* but also to *establish* the " acting in concert ". If the plaintiff in such circumstances prefers to institute one case against all the defendants, his action must stand or fall on his success or failure in proving that his alleged dispossession was the result of concerted action on the part of the defendants. The rules relating to a misjoinder of defendants and of causes of action are intended, and particularly in cases dealing with disputes relating to immovable property, to prevent the embarrassment which is necessarily caused when the investigation of a defendant's claim to a particular allotment of land is complicated by a contemporaneous investigation into the dispute concerning some other property in which he has no interest whatsoever. I would respectfully adopt the observations of Hearne, J. in " *Ettaman vs. Naraynan* " (1938) 18 Law Recorder 111, where he asid that " a plaintiff will not be permitted, by a false allegation in his plaint, to make it appear that there is no misjoinder, when in point of fact, on the withdrawal of that allegation, misjoinder at once arises. In other words, he will not be permitted to proceed with a suit which, may be embarrassing by reason of multifariousness merely because by a false allegation in the plaint he has concealed such multifariousness.".

When one examines the evidence of the plaintiff himself, it becomes abundantly clear that his

averment that the defendants had acted in concert could not be substantiated. "The first defendant and his wife and children", he admitted, "claimed lots 1, 2 and 3 separately by themselves as a separate land. They entered the land separately. At a later stage the 2nd defendant entered lots 4 and 5 and he is possessing it separately as a separate land". His correspondence with the parties at various times before the action was instituted proves beyond doubt that he realised that each set of defendants had acted independently of the other in asserting their respective claims. For instance, his proctor's letter P18 of 7th February, 1940, addressed to the 1st defendant and his later letter P16 of 18th January, 1945, addressed to the 2nd defendant negatives entirely the idea of concerted action. As against this, the only attempt (I can hardly call it a serious one) which he made at the trial to prove "concert" was his suggestion, made in re-examination, that the 1st and 2nd defendants were cousins. I do not see what bearing this circumstance by itself can have on the question.

I would hold that the plaintiff has failed entirely to establish the truth of his averment which was fundamental to the recognition of his right to proceed against all the defendants in the same proceedings. The action, in its present form is therefore bad for misjoinder of defendants and of causes of action.

The only question which remains for decision is whether we should make order dismissing the plaintiff's action *in toto* or whether we should accede to Mr. Ranawake's request, made to us at the concluding stages of the argument in appeal that the plaintiff should even now be permitted, by an appropriate amendment of his pleadings, to restrict his action *either* to a claim against the 2nd defendant in respect of lots 4 and 5 only, *or* to a claim against the 3rd, 4th and 5th defendants in respect of lots 1, 2 and 3.

An examination of earlier rulings of this Court indicates that there were two schools of thought as to the procedure which should be adopted where an action is held to be wrongly constituted for misjoinder of causes of action coupled with a misjoinder of defendants. On the one hand there is the view that in such cases the Court has no discretion to discharge one or some of the defendants and to allow the plaintiff to proceed against others. "*Abraham Singho vs. Jayaneris*" (1930) 14 Law Recorder 121 and "*Ettaman vs. Naraynan*" (*ibid*). On the other hand, there is the more lenient view that it is permissible, in appropriate cases, to allow a plaintiff to amend the plaint by restricting his claim. "*Kanagasapathy vs. Kanagasabai*" (1923) 25 N. L. R. 173 and "*Sivakamanathan vs. Anthony*" (1935) 3 C. L. W. 51. It would seem that the latter view has been preferred in more recent years. "*Fernando vs. Fernando*" (1937) 39 N. L. R. 145; "*Thambimuttu vs. Ratnasingham*" (1938) 40 N. L. R. 253; "*Kudhoos vs. Joonoos*" (1939) 41 N. L. R. 251 and "*Podihamy vs. Seimon Appu*" (1946) 47 N. L. R. 503.

My own opinion is that, having regard not only to the more recent decisions of this Court but also to the wide powers vested in the Courts under the Civil Procedure Code to allow an amendment of pleadings at any stage of the proceedings we are not precluded by law (even as an appellate tribunal) from granting the plaintiff's application to be permitted, after appropriate amendments of the pleadings, to restrict his action even at this late stage to a single cause of action against a single group of defendants (the other group being discharged from the action with a suitable order of costs). But it seems to me that the plaintiff cannot claim this privilege *as of right*. On the contrary, the discretion vested in the Court must be judicially exercised after consideration of all relevant circumstances such as the conduct of the parties and the belatedness of the application. If the matter be approached in this way in regard to the present proceedings, it seems to me that it would not be proper to allow the plaintiff to amend his pleadings at this stage and to proceed with his action *de novo* though in a restricted form. The action was instituted nearly 6 years ago. The difficulty in which the plaintiff now finds himself is referable solely to his own persistence in a position which, from the facts within his personal knowledge, he could not reasonably hope to establish. His position was demonstrably untenable when, at a very early stage of the trial, he admitted all the facts which negatived his allegation that the defendants were acting in concert. That was the latest point of time when he should have realised that he should apply to discharge one set of defendants from the action and to proceed only against the others. Instead, he continued to contest the plea of misjoinder even in this Court. To exercise a discretion in his favour now is only to encourage his indefensible attitude of stubborness. I would therefore set aside the judgment appealed from and dismiss the plaintiff's action with costs both here and in the Court below. It will of course be open to the plaintiff, if so advised, to institute separate proceedings against each defendant or group of defendants.

PULLE, J.

I agree.

Set aside.

Present : GRATIAEN, J. & GUNASEKARA, J.

NAGANATHER ARUMUGAM *et al* vs. E. ARUMUGAM

S. C. No. 27—D. C. Jaffna, No. 4635

Argued on : 29th and 30th May, 1951
Decided on : 6th June, 1951

Registration—Sale of land to defendants—Registration in wrong folio—Sale to plaintiff—Registration in correct folio—Valuable consideration—Burden of proof—Fraud and collusion—Section 7 (2) of Registration of Documents Ordinance No. 23 of 1927.

The plaintiff, being aware that a vendor's interests in a certain land had already been sold by him to the defendants, who were in possession thereof, but whose deed was wrongly registered, purchased a portion of the same interest, and instituted an action to partition the land, making the defendants and his vendor, parties to it.

The main contest was between the defendants and the plaintiff as to the superiority of their respective titles. The plaintiff failed to lead sufficient evidence on the issue of valuable consideration on his deed. The learned Judge, too, without recording any specific finding on this issue, proceeded to decide the issue of fraud and collusion, which he held in plaintiff's favour, and gave the interest claimed by him to the plaintiff.

The evidence, however, disclosed that the plaintiff had joined together with the vendor, in order to gain for themselves a mutual advantage against the defendants. The defendants appealed.

Held : (1) That the burden was on the plaintiff, to establish that valuable consideration had passed on his deed, before he could claim the benefit of prior registration.

(2) That in the circumstances outlined above, the plaintiff was guilty of fraud and collusion, as contemplated in section 7 (2) of Ordinance No. 23 of 1927.

Cases referred to : *Abeysundera vs. Ceylon Exports Limited,* 38 N. L. R. 117.
Ferdinando vs. Ferdinando, 23 N. L. R. 143.

C. Thiagalingam, K.C., with *V. Arulambalam* and *P. Somatilakam*, for the defendants-appellants.
C. Renganathan with *S. Sharvananda* for the plaintiff-respondent.

GRATIAEN, J.

This action was instituted on 5th July, 1948, for the partition of a land in which the plaintiff claimed an undivided 1/8 share by right of purchase from the 3rd defendant Thambimuttu under the deed P5 of 1st October, 1947. The main contest at the trial was between the plaintiff on the one hand and the appellants (*i.e.* the 1st and 2nd defendants who are husband and wife) on the other. The case for the appellants was that under the deed 1D2 of 13th November, 1938, they had already purchased Thambimuttu's undivided 1/4 share in the land which represented at that time the entirety of his interests in the property. They claimed that Thambimuttu was therefore vested with no rights which he could pass to the plaintiff under P5. In reply to this contention, the plaintiff claimed the benefit of Section 7 of the Registration of Documents Ordinance (Cap. 101) on the ground that his deed P5, though later in point of time, had been registered in the correct folio whereas the appellants' deed 1D2 had by some long-standing error been registered in the wrong folio. The evidence certainly established that the folio which the plaintiff had selected for the registration of P5 was the earliest folio in which an instrument affecting a share in the *corpus* had been registered.

The appellants disputed the position that P5 was in fact correctly registered, but on this point the finding of the learned District Judge in favour of the plaintiff is, in my opinion, clearly right. The plaintiff could therefore claim priority for his deed if he could satisfy the Court that he had given valuable consideration for the interests which passed to him under P5—unless, of course, the appellants were able to defeat this priority by proving fraud or collusion on the part of the plaintiff either in obtaining his instrument or in securing its prior registration. Issues were raised at the trial for the learned Judge's decision on all these points of contest.

Our task as an appellate tribunal has been made more difficult by reason of the fact that the learned Judge has not recorded in his judgment any specific finding as to whether or not in his opinion consideration had passed on P5. The evidence of the plaintiff on this issue is certainly not so convincing that we could safely infer that it has been accepted by implication by the learned Judge. For instance, the plaintiff had in the first instance stated that *the entire consideration of Rs. 1,000 had been paid to Thambimuttu in the presence of the attesting notary.* It was then pointed out to him in cross-examination that this evidence was in conflict with the terms of the notary's certificate in the attestation clause. In re-examination he gave a different version as to how and when the alleged consideration had been paid. " I paid earlier than the deed of transfer ", he said. " I paid Rs. 500 on the transferring of the land. After arranging the settlement (whatever that might mean) I paid Rs. 300 and on the day of the transfer deed Rs. 200 was paid. *At*

the time the notary attested the deed I did not pay any money". The only other person who gave evidence on this issue was Thambimuttu himself who was represented by counsel at the trial and had presumably been present in Court, in his capacity as the 3rd defendant, when the plaintiff gave his version of the transaction. Thambimuttu was not called as a witness by the plaintiff to support his case. He did give evidence, however, on his own behalf in support of his claim, to be allotted an undivided 1/32 share in the proposed partition. This claim was rightly rejected and his evidence was discredited on many points. It is significant that neither in the course of his examination-in-chief nor of his cross-examination on behalf of the appellant did he testify to the passing of any consideration on the deed P5. After he had been cross-examined by the appellant's counsel, however, he answered certain questions which were put to him on behalf of the plaintiff. He then stated in a single sentence, and without elaboration, that he had "received Rs. 1,000 from the plaintiff for the purchase of his share". It is indeed a matter for surprise that learned counsel who appeared at the trial for the appellants did not ask for an opportunity to cross-examine Thambimuttu once again in order to test this item of evidence which had been introduced at so late a stage. Be that as it may, I consider that unless this appeal can satisfactorily be disposed of on some other ground, the case should be sent back for re-trial upon this issue. The burden was on the plaintiff to establish that valuable consideration had passed on the deed P5 before he could claim the benefit of prior registration. I find it impossible to adjudicate on this point in appeal in the absence of a decision on the point by the trial Judge. It must be borne in mind that the evidence of the plaintiff and of Thambimuttu had not been accepted as truthful on many other important points.

The question whether a re-trial should be ordered depends, therefore, on whether in our opinion the learned Judge was justified in holding in favour of the plaintiff on the outstanding issues of fraud and collusion. As these issues only arise on the assumption that valuable consideration did pass on P5, I shall so assume for the purposes of what follows in my judgment.

The learned Judge has not directed himself properly on the issues of fraud and collusion because he has not given his consideration to the effect of many material matters which were relevant to his decision. Fortunately, however, his findings on some of these relevant questions have been recorded in connection with certain other points of controversy (such as the issue of prescription) and it is for this reason that I find myself in possession of sufficient material upon whch I can form a definite conclusion.

It was important to ascertain whether, at the time when the plaintiff negotiated for the purchase of a share in the land from Thambimuttu, he was aware that the appellants were already the lawful owners in possession of that share. On this point the learned District Judge has expressly accepted the 1st appellant's evidence that he and his wife, who before 13th November, 1938, had been co-owners in possession to the extent of an undivided 1/4, had upon the execution of 1D2 entered into possession of the additional share which they purchased from Thambimuttu. Admittedly, the plaintiff was in a particularly favourable position to know the true facts, because he was a close relative of Thambimuttu and had lived in the immediate neighbourhood since his childhood. He stated in evidence that to his knowledge Thambimuttu had after November, 1938, continued in possession as ostensible owner of the share which had been sold to the appellants. This evidence, as well as that of Thambimuttu which was to the same effect, was disbelieved. Not only did the plaintiff and Thambimuttu attempt to explain away by false testimony facts which were material to the issues of fraud and collusion, but they went further, and impugned the earlier deed in favour of the appellants as having been dishonestly obtained by some improper means. Thambimuttu's evidence on this point was also disbelieved by the learned Judge.

It is unnecessary to examine in detail the other suspicious features of the case which are material to these issues. In my opinion this Court can safely assume, upon the basis of the learned Judge's express findings of fact and of the inferences which necessarily follow from them, that both Thambimuttu and the plaintiff were fully aware of the following circumstances at the time when the plaintiff purported to purchase a share in the land from Thambimuttu on 1st October, 1947 :—

(*a*) that Thambimuttu's interests in the land had already effectively passed to the appellants for valuable consideration on the deed 1D2 of 1938 ;

(*b*) that this transaction had been acted upon by the appellants, and that since 15th November, 1938, the 1st appellant, on behalf of himself and his wife, had enjoyed possession *ut dominus* of that share in its entirety ;

(*c*) that all the parties, namely, Thambimuttu, the appellants and the plaintiff himself were until shortly before October, 1947, under the erroneous impression that the appellants' deed 1D2 and the earlier deed 1D1

under which Thambimuttu had acquired the share which he later sold, had been registered in the correct folio.

The evidence clearly establishes that shortly before 1st October, 1947, if not earlier, Thambimuttu (whose financial condition during that period may be gauged from the circumstance that at the time of the trial he was drawing a charitable allowance from the Ceylon Government) conceived the idea of dishonestly defeating the appellants' rights of ownership by purporting to sell again some part of his interests which were no longer his to dispose of. The plaintiff, with full knowledge of the true position, and fortified by his recent discovery that the earlier conveyance 1D2 had in fact been registered in the wrong folio, agreed to purchase from Thambimuttu a share (which had already been effectively disposed of) in order that he might secure to himself a personal advantage to the appellants' detriment. In pursuance of this common design he secured the execution of the deed 1D2 and promptly caused it to be registered in what he had discovered to be the correct folio. In other words, he entered into a collusive transaction with Thambimuttu and lent himself as a party to the latter's intended fraud on his previous vendors. This thoroughly disreputable transaction took place within a short time of the date on which the appellants' rights under 1D2 would have been strengthened by the acquisition of prescriptive title to the 1/4 share purchased by them in 1938.

On these findings of fact I am satisfied that the plaintiff is not entitled in law to claim the benefit of the provisions of the Registration of Documents Ordinance because he had been guilty of *collusion* with Thambimuttu in obtaining the execution of conveyance 1D2 in order to defeat the appellants' rights of which he was fully aware. This is not a case of a genuine purchaser who was only affected by "*mere notice*" of a prior unregistered instrument which admittedly would not by itself provide sufficient evidence of fraud so as to deprive his deed of the priority conferred by law. On the contrary, this is a case of a person who, with knowledge of the vendor's intended fraud, joined the wrongdoer in a transaction for their mutual benefit. Such conduct amounts to "collusion" which was designed "to defraud the persons entitled to the land under the prior instrument of their lawful rights".—*per Lord Maugham in "Abeysundera vs. Ceylon Exports Limited"* 38 N. L. R. 117. The judgment of the Privy Council to which I have referred upheld the decision of this Court in 35 *N. L. R.* 417 where Dalton, J. held that the defendant in that case was guilty of "collusion" because he knew of the earlier conveyance over which he claimed priority, and "was aware of a great deal more than the existence of a prior and unregistered conveyance" It is unnecessary to discuss the long line of authorities dealing with cases of this nature. It suffices to follow, with respect, the dictum of Bertram, C.J. in *Ferdinando vs. Ferdinando*, 23 N. L. R. 143, that there is "collusion" within the meaning of the Registration of Documents Ordinance whenever the evidence establishes "the joining of two parties in a common trick".

Human ingenuity is such that the categories of fraud and collusion are far too varied to permit of any comprehensive definition which would fit every possible case which might arise for adjudication between competing instruments effecting land under the Registration of Documents Ordinance. The provisions of Section 7 (2) are by no means confined to transactions where some fiduciary relationship exists or where the subsequent purchaser to whom fraud or collusion is imputed is proved to have taken an active part in the earlier sale over which he claims priority. If any person, knowing that his proposed vendor had effectively parted with his interests in a property in favour of someone who has entered into possession of the property as its lawful owner, nevertheless, in the hope of taking advantage of some recently detected flaw in the registration of the earlier deed, purports to purchase from that vendor certain rights in the property which have already been disposed of, he is guilty of "collusion" within the meaning of Section 7 (2) of the Ordinance. The law does not grant the benefit of prior registration to transactions of this kind.

In taking the view that no fraud or collusion had been established against the plaintiff, the learned trial Judge misdirected himself by not taking into account the effect of the incriminating circumstances to which I have referred. For the reasons I have given, I would hold that no title passed to the plaintiff under the deed P5 of 1947, and he therefore possessed no interest in the land which enabled him to institute these proceedings under the Partition Ordinance. I would therefore set aside the judgment appealed from, and dismiss the plaintiff's action. The plaintiff will pay to the appellants their costs both here and in the Court below.

GUNASEKARA, J.

I agree.

Judgment set aside.
Plaintiff's action dismissed with costs in both Courts.

Present : GRATIAEN, J. & GUNASEKARA, J.

HEWAVITHARNA vs. CHANDRAWATHIE *et al*

S. C. No. 575—D. C. Galle No. L. 3738

Argued on : 16th July, 1951
Decided on : 29th August, 1951

Donation—Gift subject to fidei commissum *in favour of donee's children and grand-children—Subsequent revocation—Second gift to donee absolutely subject to donor's life-interest—Sale of gifted property to defendant by donee—Action by first donee's children as* fidei commissaries *for declaration of title—*Quia timet *action—Ingredients of—Discretion—Exercise of by Court—*Fidei commissary *rights in partition action—Partition Act No.* 16 *of* 1951

The donor having gifted by deed a property to the donee subject to a *fidei commissum* in favour of the donee's children and grand-children, revoked it with the consent of the donee, and by another deed donated it to the same donee absolutely reserving to himself a life-interest. The donee sold the property to the defendant.

The plaintiffs, who are children of the donee, brought an action, (the donor and the donee both being alive and no breach of the prohibitions in first deed of gift having occurred,) alleging that the defendant might sell the property to their prejudice or institute a partition action without notice to them. They asked for a declaration of title to the property subject only to the life-interest of the defendant, and contended that the defendant's title to the property was subject to their interests as *fidei commissaries* under the first deed of gift, which by reason of the donee's acceptance could not be validly revoked to their prejudice without their consent.

Held : (1) That no cause of action had arisen entitling the plaintiffs to the relief claimed by them as the facts in the case did not establish an actual or threatened infringement of their alleged *fidei commissary* rights.

(2) That a *fidei commissary* may in certain circumstances legitimately claim a judicial declaration for the protection of his rights, even though such rights can be classified only as future or contingent, provided that he can prove that there is a present risk of their infringement to his ultimate prejudice.

The learned Judge considered it unnecessary and undesirable to decide as to the proper construction of the first deed of gift and as to the validity or otherwise of the purported deed of revocation, as the ultimate beneficiaries under that deed could not at present be ascertained with certainty.

Per GRATIAEN, J.—(*a*) " A Court of law should not exercise its discretion in favour of a plaintiff unless the immediate advantages accruing therefrom would substantially outweigh the unsatisfactory features attendant on premature pronouncements as to the future contingent rights of litigants."

(*b*) " I do not doubt that the introduction of similar statutory provision of this nature * in Ceylon would in appropriate cases provide a simple, inexpensive and beneficial remedy for the solution of concrete disputes regarding the true meaning of wills and other instruments."

Authorities cited : *Atchi Kannu vs. Nagumma*, 9 N. L. R. 282.
John Perera vs. Lebbe Marikar, 6 S. C. C. 138.
Soysa vs. Mohideen, 17 N. L. R. 279.
Abeyasinghe vs. Perera, 18 N. L. R. 222.
Wijetunga vs. Duwalage Rossie, 47 N. L. R. 361.
Carolis vs. Akwis, 45 N. L. R. 156.
Vallipuram vs. Gasperson, 52 N. L. R. 169.
Sitti Kadija's Case, 45 N. L. R. 265, 47 N. L. R. 171.
Pablina vs. Karunaratna, 50 N. L. R. at 171.
Lewis Appu vs. Perera, 51 N. L. R. 81.
In re Grebler (1916) T. P. D. 205.
In re Staples (1916) 1 C. H. 322.
Durban City Council vs. Association of Building Societies (1942) A. D. 27.
Fernando vs. Silva, 1 S. C. C. 27.
Haramanis vs. Haramanis, 10 N. L. R. 335.
Ceylon Land and Produce Co. vs. Malcolmson, 12 N. L. R. 16.
Raki vs. Cassie Lebbe, 14 N. L. R. 441.
De Silva vs. Dheerananda Thero, 28 N. L. R. 257.
Gunasekara vs. Kannangara, 43 N. L. R. 174.
Fletcher vs. Bailey, 28 Ch. D. 688.
Norris vs. Mentz (1930) W. L. W. 160.
Geldenhuys vs. Neetling and Beuthin (1918) A. D. 426.
Abdul Cader vs. Habibu Umma, 28 N. L. R. at p. 95.
Re Freme's Contract (1895) 2 Ch. 256, 778.
Ex Parte Ginsberg (1936) T. P. D. 155.
Van Rensburg vs. Registrar of Deeds (1924) C. P. D. 508.
Mare vs. Grobler (1930) T. P. D. 632.
Voet 2, 15, 8.
Story Equity, pp. 349, 350.
T. Nadarajah, Treatise on the Roman Dutch Law of Fidei Commissa, pp. 186, 101-187 170.

* Order 25 Rule 5 of the Rules of the Supreme Court of England, section 102 of the South African Act No. 46 of 1935.

H. V. Perera, K.C., with M. H. A. *Aziz*, for the defendant-appellant.
E. B. Wikramanayake, K.C., with *Lucian de Alwis*, for the plaintiffs-respondents.

GRATIAEN, J.

Deonis Appuhamy, the maternal uncle of a woman named Jane Nona, had admittedly owned the property which is described in the schedule to the plaint. A marriage between Jane Nona and Hendrick Appuhamy was arranged to take place on 7th June, 1926. In anticipation of this event Deonis, by a notarial conveyance, P4 dated 2nd June, 1926, gifted the property to her subject to the following conditions :—

> " The said Ekanayaka Jane Nona the donee herein shall enjoy and possess the said premises hereby gifted and everything appertaining thereto from the date hereof but cannot sell mortgage or alienate same in any way but she is at liberty to lease the said premises for a term of below two years at a time.
>
> " And I appoint the lawful children of Ekanayakage Jane Nona to be the owners, and they shall not sell mortgage or alienate same in any way but shall reserve same to the children and grandchildren. And I declare that the said premises hereby granted by me are subject to mortgage bond No. 30262 dated 26th February, 1925 attested by J. P. Weerasinghe for Rs. 500 payable with interest thereon at 12 per cent. per annum and the donee shall pay and settle the same."

This gift was accepted by Jane Nona on the face of the deed P4.

The celebration of the marriage between Jane Nona and Hendrick Appuhamy was postponed, for some reason which has not been disclosed, but it eventually took place on 13th August, 1926. In the meantime she and her uncle Deonis purported to take certain steps to have the deed of donation P4, hedged in as it was by the conditions and restrictions recited above, revoked. For this purpose a notarially attested document P5 was executed on 27th July, 1926, whereby Deonis revoked, with Jane's consent, the earlier gift. Her previous acceptance of the gift was thus rescinded by implication. On the same day, by a fresh deed of donation P6, he donated the property to her absolutely to take affect from the date of her marriage with Hendrick, and subject only to a life-interest in himself. The mortgage bond No. 30262 referred to in P4 continued to encumber the property.

About 18 months after Jane Nona and Hendrick's marriage had taken place she, with the concurrence of her husband who joined in the deed, sold the property to the defendant in this action by P7 of 10th April, 1922. Part of the consideration was applied in discharge of the mortgage bond No. 30262. P7 recites Jane Nona's title as having been derived not from P4 but from the later deed of donation P6, and it purported to vest in the defendant full *dominium* free from any encumbrances. The defendant has since then been in possession of the property claiming to be its absolute owner unfettered by any *fidei commissum*.

Jane Nona and Hendrick are still alive. At the time when this action commenced on 23rd September, 1948, seven children had been born to the marriage. Of these, the 1st plaintiff is a major and the 2nd to the 7th plaintiffs were still minors.

The plaintiffs have adopted in these proceedings a form of action which, though well recognised in law, is not frequently resorted to in our Courts. Their complaint against the defendant is that he claims the property absolutely whereas in fact he enjoys only the limited interest which had originally passed to their mother Jane Nona under the earlier deed of donation P4. His title, they contend, is subject to their interests as *fidei commissaries* in terms of P4 which, by reason of Jane Nona's earlier acceptance of the gift, could not validly be revoked to their prejudice without their consent. The alleged cause of action against the defendant is specified in paragraphs 9 and 11 of the plaint as follows :—

> " 9. The plaintiffs fear that the defendant may deal with the property to the prejudice of the plaintiffs by the sale of a portion of it and the institution of a partition action without notice to the plaintiffs.
>
> " 11. A cause of action has arisen to the plaintiffs to sue the defendant *quia timet* to have themselves declared entitled to the premises described in the schedule hereto subject to a life-interest in favour of the defendant abovenamed."

They accordingly asked for a decree " declaring them entitled to the premises.....subject to a life-interest in favour of the defendant—presumably meaning thereby an interest which would terminate on Jane Nona's death.

This case would have presented fewer difficulties if, as the plaint suggests, P4 can legitimately be construed as having passed only an usufructuary life-interest to Jane Nona and, subject to that life-interest, vested the property in the children who would be born to her marriage with Hendrick. In that event the plaintiff's might well have been entitled to relief in a *quia timet* action on the basis that they already enjoy vested interests in the property—*vide Atchi Kannu vs. Nagumma*, 9 N. L. R. 282—subject of course to our decision as to whether the gift had subsequently been validly revoked, as against the plaintiffs, by the execution of P5. Mr. Wikramanayake concedes, however, and the learned Dis-

trict Judge has held, that the particular interpretation given to the deed of donation P4 in the plaint cannot be supported. His argument on behalf of the plaintiffs may be summarised as follows with reference to this part of the case under appeal :

(1) that P4 created a valid *fidei commissum* in favour of the lawful children of Jane Nona's marriage with Hendrick ;

(2) that the acceptance of the gift P4 by Jane Nona on her own behalf operated as an irrevocable acceptance on behalf of her unborn children (*i.e.* the *fidei commissaries*) as well ; and that her purported subsequent revocation of the gift without their consent was of no avail against them. *John Perera vs. Lebbe Marikar*, 6 S. C. C. 138 ; *Soysa vs. Mohideen*, 17 N. L. R. 279 ; *Abeysinghe vs. Perera*, 18 N. L. R. 222 and *Wijetunge vs. Duwalage Rossie*, 47 N. L. R. 361 (where Wijeyewardene, J. followed the earlier authorities which I have cited, and dissociated himself from the doubts as to their correctness expressed by Soertsz, J. in *Carolis vs. Alwis*, 45 N. L. R. 156) and, finally, *Vallipuram vs. Gasperson*, 52 N. L. R. 169.

(3) that although P4 does not specifiy in explicit terms the time when the property was to vest in the *fidei commissaries*, there is a sufficiently clear indication that the donor had intended the time of vesting to be the date of Jane Nona's death ; and that the *fidei commissum* created by P4 was therefore not bad for uncertainty. Mr. Wikramanayake points out that the absence of an *express* indication as to the time of vesting has not deterred this Court in the past from adopting the interpretation for which he now contends. *Vide*, for instance, the decisions referred to in *Mr. Nadarajah's Treatise, page* 258, and the dissenting judgments of Keuneman, J. and Wijeyewardene, J. in *Sitti Kadija's case* 45 N. L. R. 265 which were approved on appeal by the Privy Council in 47 *N. L. R.* 171. In view of these authorities, Mr. Wickremanayake has invited us to depart from, if we cannot distinguish, the later rulings of the learned Judges in *Pabilina vs. Karunaratne*, 50 N. L. R. 169 at 171 and *Lewis Appu vs. Perera*, 51 N. L. R on this point.

This summary represents the substance of the conclusions arrived at by the learned District Judge in the Court below, and he entered judgment declaring that " the plaintiffs be entitled to the premises *on the death of their mother Jane Nona* ". It should be noted in this connection that there is no suggestion that a breach by Jane Nona of the prohibition against alienation contained in P4 operated to vest the property immediately in her lawful children.

Mr. H. V. Perera, who appeared before us for the defendant, has in the first instance joined issue with Mr. Wikramanayake on each of the points which I have enumerated above. He contends, for instance, that the deed of donation P4, in so far as it purports to create a *fidei commissum* in favour of Jane Nona's children, is void for uncertainty as to the date of vesting ; that in any event the acceptance of the gift P4 by Jane Nona on *her own behalf* could not be construed as an acceptance on behalf of the unborn *fidei commissaries* designated by the instrument, and that this Court should, on reconsideration, considerably modify the earlier doctrines whereby an acceptance of a gift by a fiduciary has been regarded as a sufficient acceptance on behalf of the *fidei commissaries* in cases " where the donation involves a benefit to the family " ; and that P5 being a valid revocation of the earlier gift, the subsequent deed P6 passed to Jane Nona not merely a fiduciary interest but absolute *dominion* in the property which she has since conveyed to the defendant.

I have sufficiently indicated, I think, the extent of the controversy upon which we have at this stage been invited to adjudicate. Some of these questions are complicated by a conflict of judicial authority, other by *dicta* which cannot, to say the least, be easily reconciled. I would refer, by way of illustration, to the contrary views expressed by Soertsz, J. and Wijeyewardene, J., both of whom were Judges with considerable experience in this branch of the law, as to the doctrines of acceptance in relation to *fidei commissary* gifts " for the benefit of a family ".

Is it really necessary or desirable for the Court now to pronounce a judicial decision, affecting perhaps the interests of persons who cannot yet be ascertained with certainty, as to the proper construction of the deed P4 and as to the validity or otherwise of the purported deed of revocation P5 ? This question seems to me to go to the root of actions such as proceedings for *quia timet* relief, and I proceed therefore to examine the defendant's fundamental ground of objection to the judgment appealed from in the present case.

Mr. Perera has strongly urged that the plaintiffs cause of action is premature. He argues that none of the facts pleaded in the plaint or proved at the trial in the Court below entitle the plaintiffs at this stage to a declaratory decree in their favour. He has invited us to go to the extent even of assuming that the interpretation of the deed P4 for which Mr. Wikramanayake contends is correct according to our present understanding of the law. Even upon such a hypothesis, says Mr. Perera, we should bear in mind that the fiduciary Jane Nona is still alive, and that admittedly the condition has yet to be fulfilled upon which the present *contingent* interests in the property claimed by the plaintiffs can become enlarged into vested rights. Whether, as Mr. Wikramanayake contends, each plaintiff already enjoys a *spes* or expectation which would be transmitted to his heirs in the event of his predeceasing Jane Nona, or whether the true intention of the donor was to benefit only those children who would still be alive at the date of vesting, it

is impossible to take the view that all the persons who may eventually succeed to the property are now before the Court. In the result, can one exclude the possibility that disputes may on Jane Nona's death arise between some of the plaintiffs themselves (or their lawful heirs) as to who should eventually benefit under the deed P4 ?

At this point of time the *spes fidei commissi* of each of the plaintiffs, even if transmissible, is in a sense only a " fleeting and uncertain hope " of acquiring *in his own right* a vested interest in the property. *Voet* 2, 15, 8. The ultimate beneficiaries under P4 cannot at present be ascertained with certainty ; indeed, we do not know that the class has yet been closed. In the face of these unpredictable contingencies, it is apparent that, even if a cause of action has accrued to the present plaintiffs to claim some declaration *in general terms* that the conveyance by Jane Nona to the defendant under P7 transmitted to him only her fiduciary interest which is subject to the *fidei commissum* created by P4, a premature interpretation of P4 in respect of all its implications seems to be extremely undesirable. *In re Grobler* (1916) T. P. D. 205. The same point of view has been emphasised in the English Courts with regard to the proper scope of declaratory actions. *In re Staples* (1916) 1 Ch. 322.

The question arises whether any events have yet occurred giving rise to a cause of action entitling the plaintiffs to relief in *quia timet* proceedings ; and, as a corrolary, whether in that event the circumstances of the present case would justify the exercise of our discretion to grant a declaratory decree. That such relief is not available to a party *as of right* is recognised even in South Africa although special legislation was introduced in 1935 to remove some of the limitations inherent in the common law jurisdiction to enter declaratory decrees. *Durban City Council vs. Association of Building Societies* (1942) A. D. 27. It is implicit in this principle that a Court of law should not exercise a discretion in favour of a plaintiff unless the immediate advantages accruing therefrom would substantially outweigh the unsatisfactory features attendant on premature pronouncements as to the future contingent rights of litigants—more so, of persons who are not parties to the proceedings.

The ingredients of a cause of action in *quia timet* proceedings in this country have invariably been examined by reference to the principles of the English Law. *Fernando vs. Silva*, 1 S. C. C. 27 ; *Atchi Kannu vs. Nagumma* (supra) ; *Haramanis vs. Haramanis*, 10 N. L. R. 335 ; *Ceylon Land and Produce Co. vs. Malcolmson*, 12 N. L. R. 16 ; *Raki vs. Cassie Lebbe*, 14 N. L. R. 441 ; *De Silva vs. Dheerananda Thero*, 28 N. L. R. 257 ; and *Gunasekara vs. Kannangara*, 43 N. L. R. 174. It is not desirable, as Wood Renton, J. points out in *Raki vs. Cassi Lebbe*, to attempt to lay down any general rules as to the classes of cases in which such actions are maintainable, but they are admittedly designed " to accomplish the ends of precautionary justice " by preventing wrongs or anticipated mischiefs instead of merely redressing them after they have been committed. *Story on Equity pages* 349 *to* 350. " There must, if no actual damage is done, be proof of imminent danger, and there must also be proof that the apprehended danger will, if it comes, be very substantial..... It must be shown that if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a *quia timet* action ". *Fletcher vs. Bailey*, 28 Ch. D. 688. I have not discovered any local precedents for the granting of relief to protect purely contingent interests in immovable property, and the *ratio decidendi* of some of the authorities previously cited by me certainly suggests that a threat to a present *vested* interest in land is a *sine qua non* to a *quia timet* action. On the other hand, Story points out in paragraph 827 at page 350 that " the jurisdiction is equally applicable *to cases where the right of enjoyment is future or contingent* ". As at present advised, I see no reason why relief in a *quia timet* action should necessarily be denied to a person who, though possessing only a contingent interest in land, is placed by the conduct of some third party in such a situation that there exists at present a substantial and imminent risk of the loss or impairment of his interests when the time eventually arrives for its enlargement into a *vested* right. The principles applicable under our common law are in conformity with this view. So long as proof is forthcoming of some threatened " concrete invasion of a party's rights ", he can claim the protection of a declaratory decree in his favour. *Norris vs. Mentz* (1930) W. L. W. 160. In the words of de Villiers, C.J. in *Geldhenhuys vs. Neetling and Beuthin* (1918) A. D. 426 the claim " must be founded upon the *actual infringement of rights* ", and it is not impossible to visualise rare instances when an invasion of future or contingent rights can be committed or threatened before they have reached the stage of final vesting. In such an eventuality, it would be idle to wait until the damage has actually occurred. I am therefore inclined to the view that a *fidei commissary* may in certain circumstances legitimately claim a judicial declaration for the protection of his rights, even though such rights can be classified only as

future or contingent, provided that he can prove that there is a present risk of their infringement to his ultimate prejudice.

The plaintiffs' complaint against the defendant must now be examined. They allege that the defendant " wrongfully and unlawfully disputes the rights of the plaintiffs to the property ". This circumstance by itself is insufficient to establish a cause of action. As de Villiers, C.J. pointed out in *Geldenhuys' case* (supra), a declaratory order cannot be claimed " *merely because the rights of the claimant have been disputed* ".

It seems to me that the plaintiffs have failed to prove an actual or threatened infringement by the defendant of their alleged *fidei commissary* rights. It is no doubt true that, in a pending partition action instituted by neighbouring landowner who had sought to include this property in the *corpus*, the defendant had intervened in order to have the property excluded from the scope of those proceedings. But this intervention, though influenced primarily by the defendant's desire to protect his own interests rather than those of the plaintiffs, was not calculated to prejudice their rights. Indeed, one finds that the members of the plaintiffs' family were no less vigilant in the same proceedings to achieve this end. Mr. Wikramanayake has urged, however, that his clients genuinely fear that the defendant might at some future date, and without notice to his clients, dispose of an undivided share in the property to someone else, so as to pave the way for dishonestly obtaining thereafter a partition decree in which their rights are not reserved. He argued that, if in that event the property should subsequently pass to a *bona fide* purchaser, the *fidei commissum* created by the deed P4 would be extinguished. Under the new Partition Act No. 16 of 1951, the consequences of such an improper proceeding would, I think, be even more fundamentally prejudicial to the plaintiffs.

The risks attaching to *fidei commissary* rights which are not expressly reserved in decrees for partition are indeed substantial, and when one examines the authorities on this subject one cannot but endorse the observation of *Mr, Nadarajah* at page 186 of his *Treatise on the Roman Dutch Law of fidei commissa* that " the law of Ceylon relating to the partition of *fidei commissary* property (*i.e.* under Ordinance No. 10 of 1863) cannot be said to rest on any very satisfactory basis ". The present trend of judicial authority inclines to the view that such property could properly be partitioned or sold in terms of the earlier Ordinance, and that unless the rights of *fidei commissaries* are expressly reserved under the decree, a subsequent *bona fide* purchaser would take the property unaffected by those rights. (*Vide* the authorities discussed at *pages* 181 *to* 187 *of Mr. Nadarajah's Treatise*). It is a situation of this kind that the plaintiffs apprehend.

It seems to me that the plaintiffs' fears are premature. In the first place, Jane Nona's title, whether it be absolute or limited only to a fiduciary interest, is now enjoyed exclusively by the defendant, so that no " common ownership " of the property yet exists which is a pre-requisite to the institution of partition proceedings. Besides, the earlier Ordinance has, since this action commenced, been superseded by the Partition Act No. 16 of 1951, and many of its provisions are specially designed to afford a greater measure of protection to the interests of persons claiming *fidei commissary* interests in property sought to be partitioned. For instance, Section 5 in terms requires a plaintiff to disclose in his plaint not only the admitted rights of *fidei commissaries* but also any disputed claims to such rights. As a further precaution, the filing of a proctor's certificate, prepared after due inspection of the relevant land registers, is made essential to the continuation of the action after *lis pendens* has been duly registered ; a professional duty is imposed on the proctor concerned to specify in his certificate the names of all persons whose claims or interests can be ascertained from the relevant registers. Finally, any fraudulent or dishonest non-disclosure of *fidei commissary* claims (whether admitted or not) is made an offence punishable under Section 72 of the Act. The purpose of the legislature is by this means to minimise the risk of such claims being overlooked by the Court exercising jurisdiction in partition actions.

In this state of things, no immediate danger attaches at the present time to the interests (assuming that they exist) which in the plaintiffs' expectation will ultimately become enlarged into vested rights. Admittedly, if the interpretation which the plaintiffs place upon the deed P4 be found to be correct, no question of adverse prescriptive user against them has yet arisen. *Abdul Cader vs. Habibu Umma* 28 N. L. R. 92 *at page* 95, and the cases cited in *Mr. Nadarajah's Treatise page* 170 (*footnote* 77). No act or conduct on the part of the defendant has therefore been committed or threatened which can be construed at this stage as an *effective* infringement of the alleged interests of the plaintiffs or of those to whom those interests would, in their submission, be transmitted in a certain eventuality. I would hold that, in the circumstances, no cause of action has accrued to the plaintiffs to claim the relief granted to them by the judgment under appeal. Until such a cause of action has in fact accrued,

the plaintiffs are not entitled to obtain from this Court a bare declaration as to their hypothetical rights on questions of law which still remain academic. The legal problems now submitted for our adjudication have not yet been crystallised into a " crisp dispute ".

It must be remembered that in this country, unlike in England and in South Africa, the common law jurisdiction of the Courts to grant declaratory decrees has not been enlarged by statute. In England, for instance, Order 25 Rule 5 of the Rules of the Supreme Court provides that :—

> " No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

Order 54A also authorises an application to be made to the High Court by " originating summons " by any person claiming interests under a deed, will or other instrument " for the determination of any question or construction arising under the instrument, and for a declaration of the rights of the person interested ". Even under this enlarged jurisdiction the English Courts refuse to make declarations as to rights accruing *upon a future event* unless (*a*) a present right depends on the decision, or (*b*) all the parties interested in any event are *sui juris* or (*c*) there are other special circumstances. In *re Staples* (supra) and *re Freme's Contract* (1895) 2 Ch. 256 and 778. Similarly, in South Africa, " the inconvenience that has been caused by the inability of the Court to settle a dispute between parties *unless there has been an infringement of rights* " (*ex parte Ginsberg* (1936) T. P. D. 155) has in some respects been removed by the provisions of Section 102 of the South African Act No. 46 of 1935 in terms of which :

> " A Court may in its discretion and at the instance of any interested person inquire into and determine any existing, future or contingent future right or obligation notwithstanding that such person cannot claim any relief consequential upon such determination."

I do not doubt that the introduction of similar statutory provision of this nature in Ceylon would in appropriate cases provide a simple, inexpensive and beneficial remedy for the solution of concrete disputes regarding the true meaning of wills and other instruments.

In the meantime, governed as we are by the principles of the common law, I take the view that, even if the plaintiffs may legitimately be regarded as having a *locus standi* to make the present application, they have not established facts entitling them to claim a declaratory decree against the defendant. I am aware that the Provincial Courts of South Africa have, under the common law and before the Act of 1935 was passed, granted *quia timet* relief to contingent or even potential *fidei commissary* heirs in circumstances which in this country would not constitute an actual or threatened infringement of future rights. *Van Rensburg vs. Registrar of Deeds* (1924) C. P. D. 508 and *Mare vs. Grobler* (1930) T. P. D. 632. I have not examined the system obtaining in South Africa for the registration of titles to land, but in Ceylon, at any rate, as Mr. Wikramanayake has frankly conceded, that no risk can attach to the plaintiffs future title unless it be extinguished by a decree in a partition action, and I have already pointed out that the provisions of the new Act of 1951 have reduced the possibility of such a decree being entered without due consideration of the rights of persons claiming *fidei commissary* interests in the property. The deed P4 is registered in the same folio as P7. The defendant, and those who hereafter derive title from him, would expose themselves to the risk of criminal proceedings if, with the assistance of some negligent proctor, they should attempt before Jane Nona's death to institute proceedings under the Act without giving the plaintiffs (or their heirs) an opportunity to put forward their claims under P4. These are claims which certainly merit adjudication at the proper time and therefore require disclosure in any future partition proceedings. That the defendant or his successors in title would make bold to circumvent their statutory obligations and incur the consequential risk of criminal proceedings under the new Act is not lightly to be presumed. Meanwhile the plaintiffs must continue to realise that the price of all contingent *fidei commissary* benefits is constant vigilance.

I am in any event not convinced that a declaratory decree which the plaintiffs are now claiming would necessarily guarantee them any certainty of protection. Section 48 of the new Act indicates that a subsequent partition decree entered by a Court of competent jurisdiction, from which notice of even such a declaratory decree has been dishonestly or carelessly withheld, would extinguish any *fidei commissum* for which provision is not expressly made—leaving the *fidei commissaries* whose rights have been defeated only the consolation of an action for damages and of a criminal prosecution against the wrong-doer. To this extent the position of *fidei commissaries* under the new Act is, notwithstanding the precautionary statutory provisions to which I have referred, perhaps more precarious than it used to be. The passing of a declaratory decree would therefore

not afford a perfect insurance against dangers of the kind which the plaintiffs appear to apprehend.

The dismissal of this action does not involve an adjudication by us one way or the other as to whether the deed of donation P4 created a valid *fidei commissum*, the earlier acceptance of which by Jane Nona allegedly rendered it irrevocable by her unilateral act at a later date. My only decision is that the plaintiffs' action is premature. Nor will the plaintiffs be precluded from instituting fresh proceedings for *quia timet* relief if at some future date an actual or threatened infringement of their rights can be established to the satisfaction of the Court. I trust that the outcome of these proceedings will serve at least to convince the defendant and persons succeeding to his present title that the claims of the plaintiffs under P4, although disputed, are sufficiently substantial to merit judicial investigation at the proper time.

I would set aside the judgment appealed from, and, on the analogy of *Fletcher vs. Bailey* (supra), I would make order that a decree be entered dismissing the plaintiffs' action on the ground that it is premature, but without prejudice to their rights to bring another action in case of actual injury or immediate danger to their alleged interests under the deed P4 No. 26251 dated 2nd June, 1926, attested by E. A. Gurusinghe, Notary Public. The plaintiffs must pay to the defendant his costs both here and in the Court below.

GUNASEKARA, J.

I agree.

Appeal allowed.

Present : BASNAYAKE, J.

DE SILVA vs. KUMARASINGHE AND ANOTHER

Case stated for the opinion of the Supreme Court under Section 4 (6) of the Motor Car Ordinance No. 45 of 1938
Application No. 466 of 1950

Argued and decided on : 16th October, 1950

Motor Tribunal—Case stated by way of appeal—Application for licence for lorry—Form and validity of—Motor Car Ordinance No. 45 of 1938—Sections 4 (6) (a), 31, 43, 45 (3) (d).

An application for a licence for a lorry stated that the lorry was to be used for the purpose of carrying sundry goods, tiles, bricks, etc. of applicant's business and for hire, and that it was to provide a service for the Kandy District and on the routes Kandy to Kurunegala and Kandy to Colombo.

Objections were taken on the grounds that the application did not comply with the requirements of sections 43 31, 45 (3) (*d*) of the Motor Car Ordinance No. 45 of 1938 in that the application was not in the form prescribed in the 2nd Schedule to the ordinance and the applicant failed to specify the place or places outside the proposed area of operation and the purposes for which such service was necessary.

On a case stated by the Motor Tribunal,

Held : (1) That as the application had substantially complied with the requirements of the Motor Car Ordinance the Commissioner had properly entertained it.

(2) That where an appeal by way of case stated lies only on a question of law, the Tribunal should base the question of law, on which the opinion is desired, on the facts as found by them.

Per BASNAYAKE, J.—" The statute (section 4 (6) (*a*), Motor Car Ordinance No. 45 of 1928) requires the Tribunal to state a case. Every member of the Tribunal that heard the appeal must therefore sign the case stated."

Cases referred to : *Peradeniya Service Bus Co. vs. Sri Lanka Omnibus Co.* 51 N. L. R. 233.

J. A. L. Cooray with *I. J. Fernando*, for the appellant.
H. W. Jayawardena, for the 1st respondent.
Walter Jayawardena, Crown Counsel, for the Commissioner of Motor Transport.

BASNAYAKE, J.

This is a case stated under section 4 (6) of the Motor Car Ordinance No. 45 of 1938 (hereinafter referred to as the Ordinance). The questions of law on which the opinion of this Court is sought are as follows :—

(*a*) Whether the applicant for a licence for a lorry is bound to specify in his application all the particulars required to be furnished

under section 43 of the Motor Car Ordinance No. 45 of 1938 and if not whether the application becomes invalid and cannot be considered;

(*b*) Whether an application for a licence for a lorry made in a form other than forms CMT. 14 and 15 in the Second Schedule to the Motor Car Ordinance No. 45 of 1938, but in a form in accordance with the provisions of the Ordinance and substantially the same, cannot be considered; and

(*c*) Whether in the case stated above, the route applied for, namely, Kandy to Kurunegala and Kandy to Colombo, should be considered as an additional service and if so whether the omission to state the purpose for which the additional service is required would make the application invalid.

These questions have been stated by the Tribunal on the application of the objector, one S. P. A. de Silva, who describes himself in the statement of objections under section 46 (2) (*b*) of the Ordinance as the General Secretary, Colombo Lorry Owners' Association. The first respondent to the application is one Narathota Hewage Kumarasinghe (hereinafter referred to as the first respondent), who is the applicant for a licence to use Chevrolet lorry No. CE. 9692 for carrying goods both for his own purposes as well as for hire. The application marked "A" annexed to the case stated is addressed to the Accountant, Municipal Council, Kandy. It states:—

(*a*) that the lorry would be used for the purpose of carrying sundry goods, tiles, bricks, logs, timber and other goods on the owner's own business as well as for hire, and

(*b*) that it is proposed to provide a service for the Kandy District and on the routes Kandy to Kurunegala and Kandy to Colombo.

The questions of law stated for the opinion of this Court are stated as abstract questions and not as questions arising on the facts as found by the Tribunal. It has more than once been pointed out that in a case such as the present where the appeal by way of case stated lies only on a question of law the Tribunal should base the question of law on which the opinion of this Court is desired on the facts as found by them. In my judgment in the case of *Peradeniya Service Bus Co. vs. Sri Lanka Omnibus Co.* 51 N. L. R. 233 I have indicated the way in which a case should be stated.

The objector bases his objection on the ground that the first respondent's application has not been made in the forms prescribed in the Second Schedule to the Motor Car Ordinance No. 45 of 1938. The Tribunal has held that the application is substantially in the prescribed form. I am of opinion that the objection has been rightly overruled. Section 31 which requires the use of Forms 10 to 15 in the Second Schedule to the Ordinance provides that the application for a licence shall be substantially in such one of the forms as may be appropriate. The applicant has therefore complied with the requirements of the statute.

The other objection is based on section 43 (3) (*d*) which requires the applicant for a licence for a lorry to specify the place or places outside the proposed area of operation to or from which a service is to be provided and the purposes for which such service is necessary. The proposed area of operation of the applicant is the Kandy District. As additional services he proposes to run his lorries from Kandy to Kurunegala and Kandy to Colombo. In his application he has specified the purpose of the service as "transporting sundry goods, tiles, bricks, logs, timber and other goods". The Tribunal has rightly overruled this objection too.

The first respondent's application is one that complies with the requirements of the Motor Car Ordinance and has been properly entertained by the Commissioner. The decisions of the Tribunal are correct.

The questions put by the Tribunal need not be answered in the form in which they have been put as I have answered the questions that arise on the case stated with particular reference to the facts of this case.

I wish before I conclude to point out that it is not sufficient in law as in this case for the Chairman alone to sign the case stated. The statute (section 4 (6) (*a*), Motor Car Ordinance No. 45 of 1938) requires the Tribunal to state a case. Every member of the Tribunal that heard the appeal must therefore sign the case stated. I have in a previous instance too made reference to the irregular practice of the Chairman alone signing the case stated.

The appellant should pay the costs of the respondents.

Decisions of the tribunal upheld.

Present : GRATIAEN, J.

WIJEYESEKERA & Co., LTD. vs. THE PRINCIPAL COLLECTOR OF CUSTOMS, COLOMBO

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

Application for a Writ of Mandamus on the Principal Collector of Customs, Colombo. (145.)

Argued on : 14th June, 1951
Decided on : 22nd June, 1951

Mandamus, Writ of—Export of coconut oil—Procedure to be adopted in respect of shipments—Requests for information in regard to such procedure ignored—Insistence by authorities upon procedure subsequently admitted to be incorrect—Refusal to perform public duty—What constitutes such refusal—Payment of costs—Principles which apply—Customs Ordinance, sections 59, 103, *and rules passed under section* 103.

The petitioner company, which was an exporter of coconut oil and other commodities, applied for a mandate in the nature of a writ of mandamus, directing the respondent, the Principal Collector of Customs *inter alia* " to permit the company to export the said consignment of 200 tons of coconut oil by the s.s. ' President Buchanan ' and to pass the same for shipment on the company making payment of the correct duty and other dues in respect of the same and on its complying with the formalities imposed on it by law ". A rule *nisi* was issued by the Supreme Court on 20th February, 1951. Thereafter, and before the application could be finally disposed of, the respondent gave the petitioner an undertaking that it would not be called upon to enter in a bill of lading, any quantity of oil in excess of the true quantity. The petitioner was satisfied with this undertaking, and when the application came up for disposal on 18th April, 1951, the petitioner stated that it was no longer necessary to ask that the rule be made absolute. Each party, however, insisted upon an order for costs in his favour, and this outstanding issue came up for adjudication.

Held : (1) That the petitioner's right to an order for costs against the respondent depended on whether, at the time when the proceedings were instituted, good grounds existed to justify the application for a writ.

(2) That, despite a statutory direction to the contrary, the insistence by the respondent upon the bill of entry being incorrectly filled up, in such a manner that, upon the face of the document, the petitioner would be liable to pay a heavier export duty than was justly due, would amount to a refusal to perform a public duty, and that a *mandamus* would clearly lie.

Held further : That there is a refusal to perform a duty, where it is shown that a party withholds compliance and distinctly determines not to do what is required.

Per GRATIAEN, J.—"I trust that it will never be suggested that public officers need not observe the same high standard which is expected from ordinary citizens with regard to the duty to attend promptly to official or business correspondence".

Cases referred to : *The King vs. Brennock and Abergavenny Canal Navigation*, 3 Ad. and El. 217 (= 111 E. R. 295).
In *re* The Norway, 3 Moo. P. C. 245 (= 16 E. R. 92).
Hockstar vs. De La Tour, 2 El. and B 678 (= 118 E. R. 922).
The Times of Ceylon vs. Attorney-General, 38 N. L. R. at page 446.
The Queen vs. Commissioners of the Navigation of the Thames and Isis, 8 Ad. and El. 901 (= 112 E. R. 1080).

H. V. Perera, K.C., with *G. E. Chitty* and *G. T. Samarawickreme*, for the petitioner.
Walter Jayawardene, Crown Counsel, for the respondent.

GRATIAEN, J.

The petitioner (to whom I shall hereafter refer as " the Company ") is a corporation with limited liability carrying on business in Colombo as an exporter of coconut oil and other commodities. The respondent is the Principal Collector of Customs vested with statutory powers and charged with statutory duties under the Customs Ordinance.

The Company has secured freight for the export of 250 tons of coconut oil by the s.s. " President Jefferson " which was scheduled to sail from the Port of Colombo on 20th October, 1950, and the Company complains that, despite their protests, they were compelled by the Customs authorities who passed the consignment for shipment to acquiesce in a procedure which contravened the law.

It will be convenient if at this stage I describe the correct procedure which should have been followed in regard to this consignment of coconut oil. Section 59 of the Ordinance is normally applicable, and requires an exporter to deliver to the Customs authorities a bill of entry setting out various particulars including " an accurate specification of the *quantity, quality and value* of the goods ". He must also " pay the duties and dues which may be payable *on the goods mentioned in such entry* ". Upon such payment, the bill of entry is countersigned by the Collector and the goods are passed for shipment. An alternative procedure is apparently available to an exporter if the goods which require to be shipped are of such description that it is difficult, for technical reasons, to ensure that the quantity actually shipped will correspond precisely with the quantity intended to be shipped. The respondent states that coconut oil is such a commodity, because it is pumped into a vessel from storage tanks controlled by the Port authorities, and the equipment available does not guarantee perfect accuracy. In such cases the exporter may, if he so desires, resort to an alternative procedure in terms of certain statutory rules passed under Section 103 of the Ordinance. In that event, pending ascertainment of the exact quantity pumped into the vessel, he may deposit a sum of money which the Customs Authorities assess as more than sufficient to cover the duty payable on the consignment. Thereafter, the true quantity shipped is measured, and a correct bill of entry prepared and signed. The exporter is entitled under this procedure to recover the excess duty deposited in terms of the rule, together with interest thereon.

It is apparent that these alternative procedures —*i.e.*, under Section 59 or under the Rules passed under Section 103—are both specially designed to ensure that the bill of entry signed by the exporter and countersigned by the Customs official will always contain accurate particulars of the quantity and value of the consignment. Indeed, it is on the basis of these particulars that export duty and other charges must be levied. The procedure actually insisted upon by the Customs authorities in regard to the consignment of 20th October, 1950 purported,however, to combine the mutually exclusive procedures laid down by Section 59 and the relevent Rule. The Company was required to deposit, in terms of the Rule, a sum which was 25% in excess of the estimated duty. At the same time the Company was called upon, before the actual quantity shipped was estimated to prepare and sign in advance a bill of entry on the assumption that the quantity passed for shipment would exceed by 25% the quantity of the intended cargo. This document was signed under protest, and the Company complains that they were faced with the alternative of either signing a false document or of cancelling the shipment and exposing themselves to a substantial claim for damages from their purchasers. Not unnaturally they selected what they regarded as the less invidious choice.

I understood learned Crown Counsel to state that the Customs authorities now admit that the procedure resorted to by them in regard to the consignment of coconut oil in the s.s. " President Jefferson " cannot be supported. Quite independently of this admission, I am satisfied that it is indefensible. There is no provision in the Ordinance which sanctions a demand that an exporter of goods should submit a bill of entry containing particulars which are known to be false. The actual quantity of oil pumped into the vessel was ascertained to be 247,252 tons. The bill of entry obtained under the circumstances which I have described purported to state that the quantity shipped was 312·5 tons. The excess duty deposited has yet not been refunded for reasons which I am not called upon to examine in connection with the present application.

The Company states that it now became concerned to obtain an undertaking from the respondent that such irregularities would not be repeated in regard to their future shipments. On 20th November, 1950 they wrote to him placing on record their protests against the procedure adopted on the earlier occasion. *No reply was received to this letter.* On 26th January 1951 the Company wrote again and asked that the respondent's position should be clarified. This letter refers specifically to the respondent's previous " order " that an incorrect bill of entry should be signed, and invites him " to be good enough *even at this stage* to inform us under what provisions of the Ordinance or otherwise you made such an order in that instance *and also whether such an order would apply in respect of future shipments* ". This was clearly a legitimate request for information which any exporter was entitled to demand. *Nevertheless, the letter was ignored.* On 7th February, 1951 the Company wrote once more, and the letter concludes as follows :—

> " Unless we have a satisfactory reply from you on or before the 10th instant we shall be compelled to refer this matter to our lawyers and make application to the Supreme Court in order to compel you to carry out your Statutory duties laid down in the Customs Ordinance, so that we might not again be caught

up in the invidious position of having to pay you extra money on account of Duty and Dues on future shipments without sufficient explanation on your part for making such levies which to our mind are unlawful.

Kindly consider this as the final opportunity given to you in the matter ".

It is surprising, but it is nevertheless true, that *this letter was also ignored by the public officer to whom it was addressed.* I do not see how this attitude can have given the Company any other impression than that he was not disposed, in regard to its future shipments, to reconsider his previous decision to insist upon a procedure which is now admitted to be contrary to law. Notwithstanding these rebuffs, the Company has not yet reached the final stages of exasperation. It had now secured freight for a shipment of 200 tons of coconut oil to a foreign buyer per s.s. " President Buchanan " which was expected to sail from the Port of Colombo in May, 1951, and it was therefore of practical importance to know how the Customs authorities would deal with this intended shipment. A registered letter couched in polite but uncompromising language was accordingly forwarded by express post to the respondent asking him once again to clarify his position and *inter alia*, to state " (i.) whether the practice you put into operation in the case of our shipment per s.s. " President Jefferson " on 20th October 1950 will apply and.....(ii.) whether you will also compel us to submit to you a bill of entry of copies thereof setting out therein a quantity 25% in excess of the actual quantity.....as a condition precedent to passing out goods for shipment ". A reply on or before 28th February was requested, *but no such reply was sent. Indeed, the letter was not even acknowledged.*

In this state of things the Company applied to this Court on 19th March, 1951 (by which time the respondent had not yet informed them of his intentions in regard to the proposed shipment) for the issue of a Mandate in the nature of a Writ of Mandamus directing the respondent *inter alia* " to permit the Company to export the said consignment of 200 tons of coconut oil by the s.s. " President Buchanan " and to pass the same for shipment on the Company making payment of the correct Duty and other Dues in respect of the same and on its complying with the formalities imposed on it by law ". The basis of the application was that, having received no reply of any kind to its requests for information as to the respondent's intentions, the Company apprehended that the respondent would not pass the consignment for shipment except upon compliance with the illegal requirements which had been demanded on the earlier occasion. A rule *nisi* was issued by the Court on 20th February, 1951.

In the meantime, and before the application could be finally disposed of, the respondent condescended at long last to write to the Company on 31st March, 1951, stating in reply to its letter of 23rd February, that it would " be permitted to make the shipment referred to provided an entry is passed *in terms of Section 59 of the Customs Ordinance* ". This very belated assurance can only be construed, in the context in which the letter was written, as an undertaking that the Company would not be called upon to enter up in a bill of lading any quantity of oil in excess of the true quantity. The Company was satisfied with this undertaking, and, when the application came up for disposal before my brother de Silva on 18th April, 1951, learned Counsel appearing for the Company stated that it was no longer necessary to ask that the rule should be made absolute. Each party, however, insisted upon an order for costs in his favour, and it is for an adjudication on this outstanding issue that the matter came up for my adjudication on 14th June, 1951.

The Company's right to an order for costs against the respondent depends on whether, at the time when these proceedings were instituted good grounds existed to justify the application for a writ. Admittedly, the respondent is charged with a public duty under section 59 of the Customs Ordinance to accept in proper form a bill of entry tendered by an exporter and containing true particulars as to the quantity, value, etc. of the intended consignment. It necessarily follows that to insist upon the bill of entry being incorrectly filled up in such a manner that, upon the face of the document, the exporter would be liable to pay a heavier export duty than was justly due, would amount to a refusal to perform a public duty. In that event, a *mandamus* would clearly lie.

Learned Crown Counsel has submitted that, upon the facts, the respondent could not be held to have categorically refused to comply with the provisions of Section 59 of the Ordinance at the point of time when the petitioner initiated these proceedings, and that the application for a *mandamus* was therefore premature. I understood the argument to go to the extent of submitting that the petitioner should have actually tendered a correct bill of entry, together with the export duty justly due by him, in respect of the particualr consignment intended for shipment and that no *mandamus* would lie unless and until the respondent had refused to countersign the particular document tendered to him. I am not prepared

to accept this proposition without some qualification. If a public officer, having previously purported to discharge his public duty in a manner which contravened the law, makes it clear that he will act in the same unlawful manner on a future occasion which is imminent, I do not see what purpose would be served by going through the idle formality of tendering to him, in proper form, a document which is certain to be rejected. " It is not indeed necessary that the word ' refuse ' or any equivalent to it, should be used; but there should be enough to show that the party withholds compliance and distinctly determines not to do what is required ". *The King vs. Brennock and Abergavenny Canal Navigation* 3 Ad. and El. 217 (= 111 E. R. 295). Lord Denham there pointed out that if, in effect, a party said to a public officer, " I desire a direct answer, and your not giving it will be considered a refusal ", the public officer may legitimately be regarded as having refused to do his duty if he withholds a direct answer to the question. In the present case the respondent's failure even to acknowledge at the proper time a series of letters which asked for information as to his future attitude speaks for itself. It is legitimate, I think, to apply, by analogy, the language which is appropriate to ordinary contracts in which the necessity of a formal tender may be regarded as waived. *In re The Norway* 3 Moo. P. C. 245 (= 16 E. R. 92), " An announcement, expressly or by implication, that a tender in proper form would be refused constitutes a constructive waiver of any tender ". Nor is a tender necessary where the " creditor " refuses (or may reasonably be understood to have refused) to perform his part of the obligation " even where the repudiation takes place before the time for performance has arrived ". *Hockstar vs. De La Tour*, 2 El. and B. 678 (= 118 E. R. 922).

The respondent now explains that his failure to reply in time to the Company's final letter of 23rd February, 1951, was because he decided on the following day to consult the Law Officers of the Crown as to the scope of his duties under the Ordinance. No excuse of any kind has been offered for ignoring the earlier letters. I appreciate the respondent's action in obtaining proper legal advice *even at this late stage*, but I entirely fail to understand why, in reply to a letter which demanded a disclosure of his intentions before a specified date, he did not regard it as necessary to inform the Company that the Attorney-General's advice was now being obtained, and that his intentions would be communicated *in good time before the vessel was due to sail.* Having failed to take this obvious step, which would have been both courteous and businesslike, he cannot complain if his persistent silence was construed as a virtual refusal to perform his statutory duties in the proper manner. I trust that it will never be suggested that public officers need not observe the same high standard which is expected from ordinary citizens with regard to the duty to attend promptly to official or business correspondence—*vide* the remarks of Macdonell, C.J., *The Times of Ceylon vs. Attorney-General*, 38 N. L. R. at page 446.

The present case bears a strong resemblance to *The Queen vs. Commissioners of the Navigation of the Thames and Isis*, 8 Ad. and El, 901 (= 112 E. R. 1080). The petitioner had called upon the respondents to hold a certain inquiry in accordance with their statutory duties. The respondents did not comply immediately with this request because they had first decided to obtain legal opinion on certain matters, but this decision was not communicated to the petitioner who was led by their conduct to believe that they had refused to perform their duty. It was held that an application for a *mandamus* against the respondents was justified in the circumstances of the case. Lord Littledale said : " there may be a refusal by continued silence as well as by words ". Patterson, J. similarly observed " the petitioner was entitled to some answer.....and no sensible man could treat this as otherwise than as a refusal ". Upon an examination of the one-sided correspondence filed of record in these proceedings I am satisfied that the Company's application for a writ of *mandamus* was, at the time when it was made, entirely justified. The rule need not be made absolute because of the respondent's subsequent undertaking with which the Company is satisfied. The respondent must however pay the costs incurred by the Company in these proceedings.

I have now disposed of the only question which calls for my adjudication. There have been much recrimination and counter-recrimination in regard to matters which do not affect the present issue. If all or any of these allegations be true, they will no doubt be investigated in other proceedings and upon proper material.

Rule not made absolute.
Respondent to pay costs to petitioner.

Present : BASNAYAKE, J.

EASTERN BUS Co. vs. INSPECTOR OF LABOUR, BATTICALOA

S. C. 675—*M. C. Batticaloa* 10435

Argued and decided on : 28th September, 1951

Wages Board Ordinance—Charge under section 44 (1) (*b*)*—Proceedings instituted against company with sanction of Commissioner of Labour—Summons served on managing director—Is the managing director the lawful representative of the company ?—Criminal Procedure Code—Meaning of the words "other like officer" in section* 45 (3)*—Has the company been duly summoned and afforded opportunity of being heard ?*

Where, on the prosecution of a company under the Wages Boards Ordinance, summons was served on the managing director as the legal representative thereof—

Held : (1) That the summons had not been duly served on the company, and that the conviction was bad, as the trial had taken place in its absence.

(2) That the presence of the managing director in Court cannot regularise the failure to serve summons on the company and secure its attendance in the way prescribed by the Criminal Procedure Code.

(3) That the persons contemplated by the words "other like officer" in section 45 (3) of the Criminal Procedure Code are *ejusdem generis* of Secretary, and cannot be persons belonging to a category different to that of Secretary.

Per BASNAYAKE, J.—"An accused person cannot under our law be convicted of an offence unless he has had an opportunity of being heard. Our Criminal Procedure Code contains provisions designed to achieve that end".

C. S. Barr Kumarakulasingham, for the appellant.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

On 4th July, 1950 Dharmalingam Balasingam Inspector of Labour, Batticaloa, instituted, with the sanction of the Controller of Labour, legal proceedings against the Eastern Bus Company Ltd., in respect of offences committed under the Wages Board Ordinance No. 27 of 1941.

On a special motion by the prosecution summons was served on the Managing Director of the Company who appeared in obedience to it and pleaded not guilty.

Later objection was taken to the proceedings on the ground that as the prosecution of the Managing Director did not have the sanction of the Controller of Labour as required by section 54 of the Wages Boards Ordinance, the Court had no jurisdiction to try the Managing Director.

The learned Magistrate overruled the objection holding that the summons had been correctly served on the Managing Director who in his opinion came within the words "other like officer" in section 45 (3) of the Criminal Procedure Code. Thereafter the charge was amended, despite objection by the appellant, to read as follows :—

> "In your capacity as Managing Director of the Eastern Bus Company, Batticaloa, who are accused in this case, you have been summoned before this Court under the provisions of section 45 (3) of the Criminal Procedure Code as the lawful representative of the accused company to answer to the following charges against the company, *viz.*, that you being an employer in a trade, to wit, the Engineering Trade, for which trade a Wages Board has been established by order published in Government Gazette No. 9272 dated the 19th day of May, 1944, did on or about the 1st day of June, 1950, in the premises of the Eastern Bus Company Ltd., Batticaloa, within the jurisdiction of this court in breach of section 44 (1) (*b*) of the Wages Boards Ordinance, No. 27 of 1941, dismiss from employment one E. Hendrick a worker employed by the said employer in the said trade by reason merely of the fact that the said worker had given information with regard to the matters under the said Wages Boards Ordinance No. 27 of 1941, to Selliah Velauthampillai, Asst. Commissioner of Labour, Batticaloa, an officer appointed under section 47 of the said Wages Boards Ordinance and that you have thereby committed an offence punishable under section 44 of the Wages Boards Ordinance No. 27 of 1941, or in the alternative that you did at the same time and place in breach of section 44 (1) (*d*) of the Wages Boards Ordinance No. 27 of 1941 dismiss from employment E. Hendrick a worker employed by the said employer in the said trade, by reason merely of the fact that the said employee is entitled to benefits under the decision of the said Wages Boards for the engineering trade and that you have thereby committed an offence punishable under section 44 of the said Wages Boards Ordinance No. 27 of 1941."

The amended charge was read to the appellant and the trial proceeded, the learned Magistrate holding that the accused was still the Eastern Bus Company.

An accused person cannot under our law be convicted of an offence unless he has had an opportunity of being heard. Our Criminal Procedure Code contains provisions designed to achieve that end. The first question that arises for consideration is whether the Eastern Bus Company has been duly summoned and was afforded, in the manner prescribed by law, an opportunity of being heard. Clearly the summons has not been served on the Secretary. Where summons is not served on the " Secretary" section 45 (3) requires that it should be served on an " other like officer ". The word " like " to my mind indicates that the other officers contemplated by the section are officers *ejusdem generis* of Secretary. The Managing Director of a company is not of the same genus as its Secretary, who is usually a paid servant of the company. In view of the qualification imposed by the word " like ", the persons contemplated by the words " other like officer " cannot therefore be persons belonging to a category different to that of the Secretary. They must be persons of a like status such for instance as the Manager and Assistant Secretary.

As to the meaning of the word " officer " in Company Law, there is no hard and fast rule. Its meaning would depend on the context in which it occurs, but generally speaking the Managing Director of a company or even its Directors are not understood to be its officers in the sense in which its Secretary is its officer.

In the English Companies Act of 1948 the expression is defined so as to expressly include a Director, Manager, or Secretary. Our Companies Ordinance contains no such definition.

For the above reasons I am of opinion that summons has not been duly served on the Eastern Bus Company Ltd., and that the conviction is bad as the trial has taken place in its absence. The presence of the Managing Director in court cannot regularise the failure to serve summons on the Company and secure its attendance in the way prescribed by the Criminal Procedure Code.

The appeal is allowed and the conviction and sentence of the appellant are quashed.

Appeal allowed.
Conviction and sentence quashed.

Present : GRATIAEN, J. & GUNASEKARA, J.

SINNATHAMBY vs. ANNAMAH (WIFE OF SINNATHAMBY)

S. C. No. 60—D. C. Jaffna No. 558

Argued on : 20th July, 1951
Decided on : 27th July, 1951

Divorce—Action by wife for—Husband's brother-in-law living with parties in matrimonial home—Brother-in-law carrying tales to wife about her husband—Frequent disputes—Assaults on husband by brother-in-law—Husband finally compelled to leave home due to such assault—Malicious desertion—Husband's alleged refusal to cohabit with wife after nineteen years of connubial happiness—Wife herself disdaining sexual relations with husband—Does defendant's conduct amount to constructive malicious desertion ?

In an action for divorce instituted by the wife on the grounds of (1) constructive malicious desertion and (2) malicious desertion, by her husband, it was *inter alia* established in evidence that the parties, who were married in 1920, had lived happily together for at least nineteen years. In 1942, the plaintiff's brother took up his abode with the parties in the matrimonial home, and indulged in the habit of carrying tales to his sister, about the defendant. Frequent disputes resulted between husband and wife, and, in 1943, the defendant was assaulted by his brother-in-law. Finally, on 29th June, 1949, when the defendant remonstrated with his wife and her brother—(who had refused to accept an urgent telegram addressed to the defendant by his adopted son)—he was promptly assaulted by his brother-in-law, and finally left home thereafter.

It was further clearly established in evidence that,—despite an allegation that the defendant was "guilty of constructive malicious desertion since 1939, in that he intentionally ceased to cohabit with the plaintiff and thereby repudiated the state of marriage between the parties ",—the plaintiff-wife herself was averse to having sexual relations with the defendant.

Held : That the defendant had not in law maliciously deserted his wife, and that, on the evidence as established, the legal concept of constructive malicious desertion did not arise for consideration.

Per GRATIAEN, J.—".....in my opinion, the legal concept of constructive malicious desertion is not involved in a husband's alleged lack of interest in a mutual matrimonial obligation which his wife herself admittedly disdained."

C. Renganathan with *Nagendra* and *Vannithamby*, for the defendant-appellant.

No appearance for the plaintiff-respondent.

GRATIAEN, J.

The plaintiff and her husband the defendant are both retired members of the teaching profession. They married in January, 1920, taught at the same school, pooled their salaries for their joint benefit, and admittedly lived happily together for at least 19 years. By this time their ages were 42 and 46 respectively. It was a childless marriage but later, apparently, they adopted a son called Jayadeva who was at the time of the trial being educated in Colombo.

It cannot be pretended that the marriage was not punctuated by occasional quarrels followed by the usual reconciliations. The wife would complain that her husband was extravagent. She would sometimes complain that he drank rather too much. All that it is necessary to point out in this connection is that there is such a thing as " give and take " in any matrimonial home, and that the law does not recognise such lapses as giving rise to a cause of action for divorce. Besides, the allegations to which I have referred, such as they were, have clearly been exaggerated. The plaintiff herself called as a witness the parish priest who almost invariably helped them to smooth over their differences. He said, in answer to a question put to him by the learned Judge, that the defendant was " not addicted to liquor ". With regard to the allegation that the defendant was unreliable in matters of finance, he seems at any rate to have been regarded as a suitable person to be entrusted with the responsibilities of Treasurer of the Parish Church.

In 1942 the position deteriorated. This circumstance synchronised with the arrival in the matrimonial home of the plaintiff's younger brother Daniel. It is common ground that from that time there were many disputes between the parties because the defendant demanded that Daniel should take up residence elsewhere, while the plaintiff was adamant that he should remain where he was. Admittedly, Daniel was prone to the thoroughly nasty habit of carrying tales to the plaintiff about the alleged " goings on " of her husband in the village. The defendant says that this idle gossip was entirely without foundation. Daniel did not give evidence on the point, so that the tales which Daniel conveyed have not been substantiated. Nevertheless the learned Judge appears to think that they were probably true, because the plaintiff at any rate believed them.

In 1943 Daniel assaulted the defendant, who prosecuted him in the Magistrate's Court at Mallakam. The proceedings were later withdrawn at the plaintiff's request, and Daniel for some time left the home in which he had been such an unwelcome guest to the master of the house. Later, however, he returned and the troubles and gossip started all over again. The learned Judge seems to have taken the view that it was unreasonable conduct on the part of the defendant to object to giving shelter to a brother-in-law who delighted in carrying tales about his host to his host's wife. It is a matter of opinion, I suppose. For myself, I think that any man would reasonably have regarded such a situation as quite intolerable, and that any woman who did not agree to send away a brother so adicted to inquisitiveness was only asking for trouble. In 1945 the defendant left his home by way of protest. There was another reconciliation at the instance of the parish priest. Until June, 1949, husband, wife and brother-in-law lived together, after a fashion, under the same roof. But during this final period the husband spent most of his time in philosophic detachment in a separate room of his own. He now occupied the position of an unwanted guest himself rather than the master of his own household.

The culminating episode took place on 29th June, 1949. On that day the adopted son Jayadeva had sent an urgent telegram to the defendant from Colombo. A postman took it to the matrimonial home at a time when only Daniel and the plaintiff were in. They refused to accept it. Later in the day the defendant was informed of this incident by the postman. He was naturally incensed, and remonstrated with Daniel and the plaintiff, whereupon he was assaulted by Daniel. The plaintiff complains that the defendant finally left the home after this incident. I really do not know what else a man in his position could be expected to do.

The evidence of the parish priest is to the effect that on more than one occasion after this incident the defendant had expressed his willingness to resume cohabitation with his wife provided that Daniel, who by now had twice laid hands on him, would remove himself from the scene. This condition was rejected by the plaintiff. Instead, she sued him on 15th August, 1949, for a decree of divorce *a vinculo* matrimonii upon two causes of action.

The second cause of action which can more conveniently be disposed of at this stage, alleges that the defendant " maliciously deserted " the plaintiff on 29th June, 1949, after what I would refer to as the " telegram incident ". The learned Judge's findings on this issue are in accordance with the facts which I have already described. I shall quote the relevant passage of the judgment appealed from :—

" There remains the question whether the defendant finally left the plaintiff in June, 1949.

This is connected with the incident of the telegram. Here too assuming that the defendant is speaking the truth in regard to the incident of the telegram and that the plaintiff and Daniel spitefully refused to accept the telegram and deliver it to him. I am inclined to think that there was a sufficient ground for the defendant to take the initiative for a quarrel. The evidence of the Kirima Vidane who inquired into the respective complaints of the parties shows what either party had to say. Perhaps the defendant himself got the worse of the quarrel and it was this reason that compelled him to leave the house finally. He may have considered that discretion was the better part of valour. I am satisfied that the defendant never came back to the plaintiff after the incident of June, 1949, and that he did so with a view to leave the plaintiff alone ".

In another part of the judgment the learned Judge says with reference to Daniel's presence in the house in the combined role of unwelcome guest and gratuitous informant :

" If in the course of these trouble Daniel did use violence on the defendant, the defendant was himself to blame if he got the worse of it."

I am content to say that on the *facts* relating to the second cause of action, the learned Judge was clearly not entitled to hold that *in law* the defendant had maliciously deserted his wife.

There remains for consideration the plaintiff's first cause of action, which alleges, according to issue (3) as framed by counsel who appeared for her at the trial, that the defendant was " guilty of constructive desertion since 1939 "—*i.e.* no less than 10 years before the institution of this action —" in that he intentionally ceased to cohabit with the plaintiff and thereby repudiated the state of marriage between the parties ".

I should have been inclined to regard this allegation as ambiguous except for the fact that it was clearly understood by the parties, their respective counsel, and by the learned Judge himself as the complaint of a frustrated female spouse that, after 19 years of connubial happiness, her husband had wilfully and maliciously ceased to have sexual relations with her. It is not necessary to decide whether such an allegation, if true, could by itself support a charge of *constructive* malicious desertion—and whether relief in such a situation would in any event be available 10 long years after the alleged cause of action had first accrued. All that I need say is that the plaintiff herself has by her own evidence rendered academic any legal issue which might have arisen from this aspect of the case. I shall quote three passages of what she said :

" *Q.* Did the defendant fail to have marital relations with you after 1939 ?
A. We had no intercourse after 1939.
Q. After 1939 did the defendant request you for marital intercourse ?
A. I have no recollection of his having asked me.
Q. Why did he keep away like that ?
A. He did not like me so he did not ask."

.....

Q. Do you like the defendant ?
A. Now I have no love for him.
Q. From when was that ?
A. From 1939.
Q. Have you ever asked him after 1939 to have sexual intercourse with you ?
A. No.
Q. You did not desire it ?
A. I did not like it.

To Court :

Q. You did not like it ?
A. Yes.
Q. Is it because you did not want it or you did not ask for it ?
A. I did not like him. I hated him.
Q. So that even if he had asked you you would have refused ?
A. He did not ask. " Even if he did I would not have consented."

.....

Q. Since 1939 if the defendant had invited you affectionately to have intercourse with him would you have agreed ?
A. No."

In spite of these very frank admissions, the learned Judge took the view that constructive malicious desertion was established against the defendant because " the plaintiff's attitude of mind which she explained at the trial is not relevant to this particular issue, for the only question which arises is whether the defendant intentionally ceased to cohabit with her ". Once again, I am content to say that, in my opinion, the legal concept of constructive malicious desertion is not involved in a husband's alleged lack of interest in a mutual matrimonial obligation which his wife herself admittedly disdained.

In my opinion the judgment appealed from should be set aside, and I would make order dismissing the plaintiff's action. As the evidence recorded in certain incidental proceedings discloses the fact that the plaintiff is possessed of property of her own, I think that this is a case in which she should be ordered to pay the defendant's costs both in this Court and in the Court below.

GUNASEKARA, J. — *Judgment set aside.*
I agree. — *Plaintiffs action dismissed with costs in both courts.*

Present : GRATIAEN, J. & GUNASEKARA, J.

V. J. J. NEWTON *et al* vs. J. S. SINNADURAI

S. C. No. 250—D. C. Point Pedro, No. 4733

Argued on : 16th July, 1951
Decided on : 25th July, 1951

Compromise, of action—Terms of Settlement—Subsequent discovery by one party that fulfilment contrary to law—Application to set aside settlement—Other party fulfilling terms undertaken by him—Judgment for party fulfilling—Prejudice to party not taken into consideration by Court—Duty of Court in recording terms of settlement—Need to give effect to intention of parties by rectifying terms recorded or reading into them implied agreement—Equitable considerations applicable in such circumstances.

Plaintiff sued the defendants jointly and severally for the recovery of Rs. 2,500 due on a promissory note. The defendants, while admitting the execution of the note, pleaded in their answer that they had discharged the debt by securing the allotment of 25 shares of the total value of Rs. 2,500 in a private company called " Newton's Ltd." in accordance with a contemporaneous agreement between the parties.

At the trial the parties settled their dispute in the following among other terms. (*a*) that the plaintiff disclaimed all right, title and interests in the said 25 shares allotted to him, that he would have no further claim in the Company, that he would give a writing on or before 7-2-49 to be considered by the Board of Directors of the said Company requesting the Company to buy over all his interests in the said shares.

(*b*) that when all the necessary papers aforesaid are executed and sent over to the Company on or before 7-2-49 the defendants would become liable in the amount claimed on the note to the plaintiff and for the payment of which six weeks' time would be given to the defendants.

A decree was entered accordingly and the plaintiff performed his part of the obligation. The defendants, however, later discovered that Newton's Ltd. was precluded by its Articles of Association from holding shares on it's own business and applied to Court for a declaration that the purported settlement was null and void in that ground.

The plaintiff claimed the sum of Rs. 2,500 on the ground that he had complied with his part of the consent decree and the learned District Judge made order in his favour.

The defendant appealed.

Held : (1) That the learned District Judge erred in making the order as the effect of his order is that the plaintiff would not only succeed in recovering the money advanced to the defendants, but also retain the shares for which he had admittedly not paid.

(2) That from the recorded settlement it is clear that the substantial agreement between the parties was that the plaintiff should have a decree for the payment of money advanced on the note, provided that he agreed to take the necessary steps to transfer the shares to a person nominated and selected by the defendants for the purpose.

(3) That, in equity, the Court is entitled and in duty bound to give effect to the intention of the parties either by rectifying the terms of the recorded settlement or by reading into those terms an implied agreement to the effect that the plaintiff should in the circumstances implement the true purpose of the agreement by transferring the shares to any person nominated by the defendants.

Per GRATIAEN, J.—Indeed, I venture to suggest that some responsibility attaches in such cases to the trial Judge himself, whose duty it is to enter a decree in accordance with the terms of settlement ; that responsibility involves a duty to ensure that the decree so passed is embodied in language which, while giving full effect to the intentions of the litigants, is at the same time capable of enforcement should the necessity arise.

Authorities referred to : *United States of America vs. Motor Trucks Ltd.* (1924) A. C. 196.
Lovell and Christmas, Ltd. vs. Wall, 104 L. T. 85.
Mackenzie vs. Coulson L. R. 8 Eq. 375.
Fernando vs. Fernando (1921) 23 N. L. R. 266.
Meerasaibo vs. Theivanayagam Pillai (1922) 24 N. L. R. 453.
Cheshire and Fifoot's Law of Contracts (1st edition) page 102.
The Moorcock (1889) 14 P. D. 64.
Shirlaw vs. Southern Foundaries Ltd. (1939) 2 K. B. 206.

N. E. Weerasooriya, K.C., with *T. W. Rajaratnam*, for the defendants-appellants.
S. J. V. Chelvanayagam, K.C., with *V. S. A. Pullenayagam*, for the plaintiff-respondent.

GRATIAEN, J.

The difficulties presented by the questions arising for consideration in this appeal can all be traced to the carelessness with which the terms of compromises in pending litigations are so often drafted for submission to the Court of trial. Indeed I venture to suggest that some responsibility attaches in such cases to the trial Judge himself, whose duty it is to enter a decree in accordance with the terms of settlement ; that responsibility involves a duty to ensure that the decree so passed is embodied in language which, while giving full effect to the intentions

of the litigants, is at the same time capable of enforcement should the necessity arise.

This action relates to certain transactions which were allegedly connected with the incorporation of a private Company with limited liability known as "Newton's Ltd." The plaintiff sued the defendants jointly and severally for the recovery of a sum of Rs. 2,500 and interest due to him in terms of their promissory note dated 26th September, 1947. The defendants admitted the execution of the note, but pleaded by way of defence that they had discharged the debt by their fulfilment of a contemporaneous promise to secure the allotment to the plaintiff of 25 shares in the Company of the aggregate par value of Rs. 2,500. These shares, they said, had been duly registered in the plaintiff's name. The plaintiff, however, strenuously asserted that no such allotment of shares had been authorised by him.

After some preliminary evidence had been led, the parties arrived at a settlement of this dispute. The basis of the compromise was that the plaintiff, who presumably had less confidence in Newton's Ltd. than the defendants had, was prepared to place at their disposal the shares which had at their instance been registered in his name, and the defendants in that event were willing to pay back to him the amount of the promissory note which was alleged to represent the value of the shares in question. A consent decree was accordingly drawn up on 25th February, 1949, in the following terms :—

> "It is ordered and decreed of consent that on the plaintiff disclaiming all right, title and interest in the 25 shares allotted to him by the Company called Newton's Ltd. and further stating that he will in future have no further claim on the Company and that he will give a writing to be considered by the Board of Directors of the said Company wherein he will ask the Company to buy over all his rights to the said shares, and on this undertaking the defendant stating that when the necessary papers referred to are executed and sent over to the Company he will become liable in the amount claimed in the pro-note to the plaintiff and the plaintiff do execute this writing referred to and forward the same to the Company before 7-2-49.
>
> It is further ordered and decreed that if this writing is executed and sent before 7-2-49 that the defendant should be given six weeks time from 7-2-49 to pay and settle the amount claimed on the pro-note. It is agreed that on payment of the sum claimed in this case the plaintiff will return the title deeds insurance policy and other documents which have been handed over by the defendant to the plaintiff.
>
> It is ordered and decreed that if the writing is not so given by the plaintiff the action will stand dismissed with costs. If he gives the writing the agreement will be given effect to as recorded.
>
> And it is further ordered and decreed that if the writing is given but the defendant fails to pay the claim on the pro-note within six weeks from 7-2-49 then the defendant will be liable to pay costs. If the defendant pays the amount claimed within six weeks as agreed upon the costs will be divided".

That the parties had at this stage settled their disputes and genuinely desired to give effect to the terms of this compromise is clear enough. In fact, the plaintiff furnished the stipulated disclaimer within the prescribed time, and expressed his willingness to make over the shares to the Company in terms of the decree. Unfortunately, however, the defendants discovered at a later date what any reasonable man engaged in a business transaction of this kind would have been concerned to ascertain before the terms of the final settlement was drawn up—namely, that "Newton's Ltd." was precluded by its Articles of Association from holding shares in its own business, and that the plaintiff's disclaimer in favour of the Company was valueless.

In these circumstances the defendants applied to the Court for a declaration that the purported settlement of 25th January, 1949, was inoperative and therefore null and void. The plaintiff on the other hand claimed that, on an application of the strict terms of the compromise, he had fulfilled his part of the bargain and was accordingly entitled to the benefit of his decree for the sum payable on the promissory note sued on. The learned District Judge upheld the latter contention, and the effect of his order is that the plaintiff would not only succeed in recovering the money advanced to the defendants but would also retain the shares for which he had admittedly not paid. I refuse to think that the law can countenance a situation so violently opposed to the spirit of the settlement which had been carelessly but honourably arrived at in January, 1949.

It is necessary in the first instance to examine the terms of the recorded settlement in the background in which the negotiations had taken place. I shall then proceed to consider whether it was not legitimate for the learned Judge to find some means of giving effect to the real intention of the parties to the compromise by adding to the terms of the agreement, and if necessary substituting fresh terms which would be more in

accordance with the substantial result which the parties had intended to achieve.

On the first question I find no difficulty whatsoever. The plaintiff did not wish to be burdened with the shares in the Company which the defendants had purchased in his name. He demanded instead the return of his money which he had advanced to them. Obviously he could not reasonably demand both the shares as well as the money. The defendants on their part agreed to repay the money on condition that the shares were transferred by the plaintiff to some person nominated by them and from whom they could claim the consideration which they had provided for their purchase. Who that person should be, was a matter in which the plaintiff had no concern. It was only of subsidiary importance, not vital to the main purpose of the transaction. If the compromise be looked at in this light, it is abundantly clear that *the substantial agreement between the parties was that the plaintiff should have a decree for the payment of the money advanced on the promissory note provided that he agreed to take the necessary steps to transfer the shares to a person nominated and selected by the defendants.*

In their attempt to give effect to this agreement, the terms of the settlement were carelessly conceived and carelessly drawn up. The only transferee nominated to receive the shares standing in the plaintiff's name was not qualified in law to receive them. Is the Court then so powerless that it must sanction a result which the parties themselves did not intend and would not, if they had addressed their minds to the question at the proper time, have contemplated ?

One answer to the problem lies, I think, in the power of the Court to rectify on equitable grounds a written agreement which, owing to a common mistake, does not substantially represent the real intention of the parties, and even to order specific performance of the agreement as rectified. *United States of America vs. Motor Trucks Ltd.* (1924) A. C. 196. " The essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement *into harmony with that prior agreement*..... It pre-supposes that by common mistake the final completed instrument fails to give proper effect to the prior contract ". *Lovell and Christmas, Ltd. vs. Wall*, 104 L. T. 85. The real effect of the equitable jurisdiction vested in a Court of equity is *not to rectify the contract itself but to rectify the instrument* in which the terms of the contract have been inaccurately represented. *Mackenzie vs. Coulson* L. R. 8 Eq. 375. That such jurisdiction is vested in our Courts has long been recognised. *Fernando vs. Fernando* (1921) 23 N. L. R. 266 and *Meerasaibo vs. Theivanayagam Pillai* (1922) 24 N. L. R. 453.

In the present case it is also permissible, in my opinion, to read into the recorded settlement of January, 1949, certain implied terms in order to repair an intrinsic failure of expression. This power exists whenever " the document which the parties have prepared may leave no doubt as to the general ambit of their obligations ; but they may have omitted, through inadvertence or faulty draftsmanship, to cover an incidental contingency, and this omission, unless remedied may frustrate their design. In such a case the Judge may himself supply a further term which will implement their presumed intention and, in a hallowed phrase, give *business efficacy* to the contract. In doing this, he does not impose a term *ab extra*, but merely does what the parties would themselves have done had they thought of the matter". *Cheshire and Fifoot's Law of Contracts* (1st edition, page 102.)

The leading English authority on this point which has frequently been followed in our Courts is *The Moorcock* (1889) 14 P. D. 64. " The question ", said Bowan L.J., " is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they saw nothing about the burden of an unseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the transaction ". I would refer to one further decision in which Mackinnon L.J. makes an observation which seems very aptly to meet the problem with which we are confronted in the present case :—

> " *Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying ; so that, if while that parties are making their bargain an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common ' Oh, of course ' ". *Shirlaw vs. Southern Foundaries Ltd.* (1939) 2 K.B. 206.

Let us assume what when the terms of settlement between the parties were communicated to the Court in their present form, the learned Judge himself, and not merely some " officious bystander ", had posed the very pertinent question, " what would be the position if it is discovered that a transfer of the 25 shares by the plaintiff to Newton's Ltd. cannot be lawfully effected ? " Can it reasonably be suggested that the answer would have been, as the plaintiff's Counsel in effect suggested in the lower Court, " Of course, in that event the plaintiff is entitled

to retain the shares and have his money as well ? " *or* that the defendant would have replied that the whole basis of the settlement must then fall through ? On the contrary, I do not doubt that *both* parties would have informed the Judge that if Newton's Ltd. in whom the defendants had a controlling interest, could not lawfully obtain a transfer of the shares, it would be equally satisfactory that the plaintiff should make the shares available *to any other person nominated by the defendants.*

For these reasons I think that the Court is entitled, and indeed in duty bound, to give effect to the intention of the parties *either* by rectifying the terms of the recorded settlement *or* by reading into these terms an implied agreement to the effect that the plaintiff should, in the eventuality which has occurred, implement the true purpose of the agreement by transferring the shares to any person nominated by the defendant. I would therefore amend the decree passed in the lower Court on 25th January, 1949, and substitute for it a decree in the following terms :—

" (1) that the defendants should jointly pay to the plaintiff a sum of Rs. 2,500 with interest thereon calculated at the rate of 12% per annum from 26th September, 1947 until 25th January, 1949, and thereafter with legal interest on the aggregate amount of the decree until payment in full.

(2) that the plaintiff should sign and execute, on demand, such transfer forms or documents as may be tendered to him by the defendants for the purpose of transferring the 25 shares in Newton's Ltd. standing in his name to any person or persons nominated by the defendants, and that, in the event of his failure to sign and execute such forms or documents within one week of demand, the Secretary of the District Court of Jaffna be authorised to sign and execute the same on the plaintiff's behalf ".

In all the circumstances of the case I would make no order as to the costs of this appeal or of the action or the incidental proceedings in the Court below.

GUNASEKARA, J.

I agree.

Appeal allowed, decree varied.

Present : BASNAYAKE, J. & GUNASEKARA, J.

WEST vs. ABEYAWARDENA & OTHERS

S. C. 572/L—D. C. Colombo (F) 2680

Argued on : 10th, 11th, 13th, 14th, 24th and 25th September, 1951
Decided on : 10th October, 1951

Fidei commissum—Gift to donee—Prohibition against alienation—Property to devolve on donee's children after donee's death—Donee's children free to deal with property—Failure to accept on behalf of fidei commissaries—Revocability of such gift with consent of donee.

Entail and Settlement Ordinance (Chap 54) Section 5—Proper person to make application for exchange—Effect of order on such application—Fidei commissum impressed under section 8 on property exchanged—Can such effect be avoided by execution of deeds—Validity of order made on application by wrong party.

Held : (1) That a donation to X with a prohibition against alienation and with a further provision that after X's death, the property gifted is to devolve on X's children, who are free to deal or dispose of it in any manner they like, creates only a *fidei commissum* simplex or unicum. It does not create a *fidei commissum familiae.*

(2) That in the case of a *fidei commissary* donation creating such a *fidei commisum* simplex or unicum, there must be a valid acceptance not only by the immediate fiduciary donee but also by or on behalf of the *fidei commissary* donees, even though the latter are not in esse at the time the donation is made, in order to render the donation irrevocable. *Carolis vs. Alwis*, 45 N. L. R. 156 approved, and *Wijeyetunge vs. Rossie*, 47 N. L. R. 361, not followed.

(3) That if there is no such valid acceptance by or on behalf of the *fidei commissary* donees, the donation is revocable by the donor with the consent of the fiduciary donee.

(4) That the proper person to make an application under section 5 of the Entail and Settlement Ordinance is the fiduciary alone. A person who is not a fiduciary but only an usufructuary, although such a person may be entitled to the rents and profits during his lifetime of property subject to a *fidei commisum* is not entitled to make an application under section 5 of the Entail and Settlement Ordinance. Where an application is correctly made under the said section 5 and an order is made thereon, the property taken in exchange becomes impressed with the same *fidei commissum* to which the property exchanged was subject to, by operation of section 8 of the Entail and Settlement Ordinance. The parties effecting such exchange cannot excape this consequence by executing deeds in such a way as to avoid the *fidei commisum* applying to the land taken in exchange.

(5) That where an application is made under section 5 o the Entail and Settlement Ordinance, by a person not entitled to make such an application under that section, the order made thereon is not a valid order under the said Ordinance and does not attract to itself the consequences prescribed in the said Ordinance.

Authorities referred to : *Carolis et al vs. Alwis* 45 N. L. R. 156.
Wijetunge vs. Rossie et al, 47 N. L. R. 361.
Pothier—A Treatise on the Law of Obligations or Contracts, Vol. I, Evans, translation, pp. 43—44.
Censura Forensis, Part I, Book IV, Chapter 12, paragraph 16, Barber's translation, p. 90.
Colonial & Foreign Laws, Vol. 2, p. 149.
Ex parte Orlandini & two others, South African Law Reports, 1931, O. F. S., P. D., p. 141.
Book XXXVI, Title I, Section 27.
Sande, Webber's translation, p. 211 *et seq.*
Treatise on Restraints, Webber's translation, p. 214, etc.
Book XXXVI, Title I, Sec. 63, Macgregor's translation.

N. K. Choksy, K.C., with *Sir Ukwatte Jayasundera, K.C., H. W. Jayawardena* and *G. T. Samerawickrema*, for the defendant-appellant.

N. E. Weerasooria, K.C., with *Vernon Wijetunge*, for the plaintiff-respondents.

BASNAYAKE, J.

This is an action for declaration of title to a portion of land in extent about 2 roods and 25 perches. The plaintiffs claim that they are entitled to the land as the heirs of one Mututantrige Jane Fernando. Their case is that one Siman Fernando was the original owner of the land. By deed No. 2110 of 4th October, 1883, (hereinafter referred to as P1B), Siman and his wife Maria gifted to their daughters Cecilia and Jane both of whom were minors at that date, one being 9 years and the other 6½ years, in equal undivided shares, an allotment of land in extent 3 acres 2 roods and 38·24 perches, known as "The Priory". The gift was subject to the following conditions :—

(*a*) That Siman during his lifetime be entitled to take the rents and profits of the premises.

(*b*) That after his death his wife should be entitled to take one half of the rents and profits, the other half going to the donees.

(*c*) That the donees shall not be entitled to sell, mortgage, lease, or otherwise alienate or encumber, the land for a term longer than four years at a time.

(*d*) That the rents and profits shall not be liable to be sold in execution for their debts.

(*e*) That after the death of the donees the land shall devolve on their lawful issue, and that in the event of any one of the donees dying without lawful issue, her rights in the land should devolve on the surviving donee.

The gift was accepted by one Jacob Cooray and two brothers of the donees, Alfred Thomas Fernando and James Fernando.

In 1896, 13 years afterwards, the donors Siman and Maria made an application under the Entail and Settlement Ordinance to which the donees were made respondents. Jane who was a minor aged 19½ years was represented by her brother James as guardian *ad litem*. In that application the donors sought the authority of Court to exchange "The Priory" for another property known as "Siriniwasa". The relevant paragraphs of that application are as follows :—

> ".....move that under the provisions of the Ordinance No. 11 of 1876 this Court may be pleased to authorise and empower the first respondent Cecilia Fernando and the third respondent as guardian *ad litem* of the second respondent Jane Fernando to convey and assign unto the first petitioner the premises called and known as "The Priory" (described in Schedule A in the said petition) free from all conditions and restrictions and to order and decree accordingly.
>
> "In consideration thereof to authorise and empower the petitioners to transfer and assign unto the 1st and 2nd respondents the allotments of lands and the buildings thereon called "Siriniwasa" (fully described in Schedule B to the said petition) subject to the conditions that they shall not sell mortgage or otherwise alienate the same except with the consent of the petitioners or the survivor of them and to the further condition that the first petitioner shall during his lifetime be entitled to take use enjoy and appropriate to his own use the rents issues and profits of the said premises and after his death and in the event of the second petitioner surviving him she shall during her lifetime be entitled to take use enjoy and appropriate to her own use one just half of the said rents issues and profits the other half thereof being taken used enjoyed and appropriated by the 1st and 2nd respondents."

That application was granted.

The Order of Court was carried out by Deed No. 1399 of 23rd June, 1896, (P3). The relevant portion of that deed reads as follows :—

> ".....Mututantrige Siman Fernando and Colombapatabendige Maria Perera to transfer and assign unto the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando all those the said allotments of the land and buildings called and known as "Siriniwasa" subject to the condition that they shall not sell

mortgage or otherwise alienate the same except with the consent of the said Mututantrige Siman Fernando and Colombapatabendige Maria Perera or the survivor of them and to the further condition that the said Mututantrige Siman Fernando shall during his lifetime be entitled to take use enjoy and appropriate to his own use the rents issues and profits of the said premises and that after his death and in the event of his wife the said Colombapatabendige Maria Perera surviving him she shall during her lifetime be entitled to take use and enjoy and appropriate to her own use one just half of the said rents issues and profits the other half being taken used enjoyed and appropriated by the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando."

On the very same day, by deed No. 1401, Cecilia transferred to Siman for a sum of Rs. 45,000 her " one undivided moiety " in " Siriniwasa ". By deed No. 2180 of 30th June, 1900, Jane and Siman who were now the co-owners of " Siriniwasa " effected a partition of the land by which Jane took lots A, B, C of the Eastern portion and Siman took lots D and E of the Western portion. By deed No. 3129 of 30th November, 1905, Jane who was married at that date with the concurrence of her husband transferred to Siman her divided Eastern portion of " Siriniwasa " for Rs. 75,000. By deed No. 4218 of 6th December, 1907, Siman transferred " Siriniwasa " and " Anandagiri " to his son James for Rs. 75,000 subject to a mortgage of Rs. 100,000. By virtue of the last will of James " Siriniwasa " amongst other properties came to the trustees of the Sri Chandrasekera Trust. They conveyed the Northern portion of " Siriniwasa " in extent one acre, one rood and one-tenth of a perch to the defendant's predecessor in title Richard Lionel Pereira by deed No. 290 (P8) of 20th December, 1924. By deed No. 340 of 20th April, 1935, Richard Lionel Pereira gifted the land in question to Carman Sylvene Pereira his daughter.

The learned District Judge has held that deed P1B created a *fidei commissum* in respect of " The Priory " and that by virtue of the proceedings under the Entail and Settlement Ordinance that *fidei commissum* attached to " Siriniwasa " and that Jane was not entitled to transfer her share of " Siriniwasa " to her father Siman and that therefore James obtained no title to the land by the conveyance of " Siriniwasa " to him by Siman. Therefore he held that the trustees of the Sri Chandrasekera Fund had no title to convey to the defendant's predecessor in title, and that on the death of Jane in 1933 her share devolved on the plaintiffs. He also holds that the defendant is a *bona fide* possessor and is therefore entitled to compensation for improvements, which he assessed at Rs. 59,857·37. This appeal is from that decision. Learned Counsel for the appellant contends—

(*a*) that deed P1B did not bring into existence a *fidei commissum* because there was no acceptance on behalf of (1) the donees, and (2) the *fidei commissaries.*

(*b*) that even if deed P1B brought into existence a *fidei commissum* that *fidei commissum* has been " destroyed " by the proceedings under the Entail and Settlement Ordinance, wherein the Court authorised a transfer of " Siriniwasa " without the burden of a *fidei commissum.*

(*c*) that the application under the Entail and Settlement Ordinance has not been made by the proper party and the order made on that application is null and void.

(*d*) that in any case the defendant is a *bona fide* purchaser for value without notice of the *fidei commissum.*

On the question of compensation for improvements and *jus retentionis* there is no dispute. The appellant does not canvass the findings of the learned District Judge.

Now, on his first submission that a *fidei commissum* is not brought into existence by deed P1B, learned Counsel for the appellant relies on the following paragraph of the deed :

" And these presents further witness that Mututantrige John Jacob Cooray also of Horetuduwa aforesaid doth hereby on behalf of the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando who are minors jointly with Mututantrige Alfred Thomas Fernando and Mututantrige James Fernando brothers of the said minor donees accept the gift and grant of the said premises subject to the respective conditions aforesaid ".

He contends that Jacob Cooray the brother-in-law of donees had no authority in law to accept the gift nor had their brothers any legal authority to do so. He goes further and says that even if the acceptance by the brother-in-law and the brothers is sufficient there is no acceptance at all on behalf of the *fidei commisaries.* Without such acceptance he submits that it is open to the donor and donee to revoke or alter the terms of the gift.

The question whether there was acceptance by the immediate donees, the fiduciaries, is only of academic interest as they have by their subsequent conduct ratified the acceptance of the gift on their behalf by their brother-in-law and brothers. The question that remains for decision is whether the acceptance of the fiduciaries amounts to acceptance in respect of the *fidei commissaries.*

Now on this point the authorities are divided. In the case of *Carolis et al vs. Alwis* 45 N. L. R.

156, Soertsz, J. held that acceptance by the immediate donee is not sufficient acceptance on behalf of the *fidei commissaries*. He says that it is also well settled that in the case of *fidei commissary* donations there must be acceptance by the fiduciaries as well as by the *fidei commissarii* and, as a rule, but for one or, perhaps, two exceptions, the acceptance must be in the lifetime of the donor. He relies on Perezius from whom he has quoted at length.

In the case of *Wijetunge vs. Rossie et al* 47 N. L. R. 361, Wijeyewardene, S.P.J. dissents from the view taken by Soertsz, J. He takes the view that a donation is irrevocable even in the absence of an acceptance on behalf of children not yet *in esse*.

Pothier—A Treatise on the Law of Obligations or Contracts, Vol. I, Evans' translation, pp. 43-44 in his treatise on Obligations sums up the views of the jurists on the question of acceptance of gifts. He poses the question thus :

> " Hence arises another question, whether after giving you anything with the charge of restoring it to a third person in a certain time, or of giving him some other thing, I can release you from the charge without the intervention of such person, who was no party to the act, and who has not accepted the liberality which I exercised in his favour ? "

Wijeyewardene, J. has preferred the view of those jurists who hold the opinion that a *fidei commissary* donation though not accepted by the *fidei commissaries* cannot be revoked by the mutual consent of the donor and the fiduciaries.

I find myself unable to accept the view of those jurists. The other school of thought appeals to me and as its view seems to be more in keeping with the underlying principles of our law of donations. Their view is thus explained by Pothier—A Treatise on the Law of Obligations or Contracts, Vol. I, Evans' translation, pp. 43-44 :

> " The reason upon which they ground their opinion is, that, the third person not having intervened in the donation, the engagement which the donatory contracts in his favour is contracted by a concurrence of intention in the donor and donatory only ; and consequently may be dissolved by an opposite consent of the same parties, according to the principle that *nihil tam naturale est, quaeque eodem modo dissolvi quo colligata sunt*. The right acquired to the third person is then according to these authors, not irrevocable, because being formed by the sole consent of the donor and donatory without the intervention of the third person it is subject to be destroyed by the destruction of this consent, produced by an opposite consent of the same parties."

It will be useful to consider what Van Leeuwen Censura Forensis, Part I, Book IV, Chapter 12, paragraph 16, Barber's translation, p. 90 has to say on the same topic.

> " A gift is perfected as soon as the donor has expressed his intention, whether in writing or verbally, even by bare agreement, and for this reason a gift at the present day gives rise to an action. But at one time it did not arise except by stipulation and by delivery. But this was changed by Justinian. With this limitation, however, that it is not considered perfected before acceptance on the part of the donee has followed, contrary to Anton. Fab., and Joann. del Costillo Soto Major, who were of opinion that it was enacted by Justinian, that by a mere gift apart from acceptance even a person ignorant of his rights may acquire, to prove which they adduce, *cum in arbitrio verb. hoc facere quod instituit*. For though the Emperor enacted there that a gift should be perfected without stipulation and delivery by a simple and bare declaration of intention, still this must be understood of such a bare intention as after acceptance and acknowledgment can give rise to an obligation and action. Since, otherwise, no one is bound to himself so as to have to persist in his bare intention, by which he is bound to the other only after consent and acceptance by the latter ; and when this has not followed, the donor is perfectly free to charge his bare intention."

The views of Burge Colonial and Foreign Laws, Vol. 2, p. 149 on this point are stated thus :

> " It has been considered by some Jurists, that it was competent to the public notary to accept the donation for the *fidei commissary*, but this opinion has been controverted, and is opposed to the rule of law, *alteri stipulari nemo potest* and such a mode of acceptance was admitted only when the *fidei commissary* had subsequently ratified it. Unless, therefore *fidei commissary* had, by himself or another accepted the donation, it was in many cases, subject to revocation by the donor ".

Burge goes on thereafter to state the cases in which the donor is not free to revoke his gift.

Learned Counsel for the respondent laid great emphasis on the point that acceptance on behalf of the *fidei commissaries* was not necessary in the case of a " *fidei commissum in favorem familiae* ". He submitted that in this instance the *fidei commissum* was " *in favorem familiae* ". He relied strongly on the case of *Ex parte Orlandini and two others* South African Law Reports, 1931, O.F.S. P.D. p. 141. In that case De Villiers, J.P. adopted the view of Perezius in preference to those of Grotius and other jurists cited by Pothier. De Villiers, J.P. founds his decision on an argument of Perezius the force of which, with the greatest respect to that eminent jurist, I am unable to see. He says :

> " Now it seems to me that the argument of Perezius is unanswerable, for, if acceptance by minors and unborn persons were necessary to lend binding force to a *fidei commissum in favorem familiae*, it would follow that such a *fidei commissum* could not, in practice, be constituted by act *inter vivos*."

Now, what is a " *fidei commissum in favorem familiae* " ? Voet Book XXXVI, Title I, Section 27 says :

"A *fidei commissum* can also be left to the family, and Justinian has laid down that in such a case under the term family are included not only parents and children and all relatives, but also the son-in-law and daughter-in-law to supply the place of those who have died, where the marriage has been dissolved by the death of son or daughter. But Sande points out at some length that by civil law adopted children, *alumni* and freed men were included under the term *familia* when there is any question of some *fidei commissum* being left to the family and in that connection he puts the question whether woman or their issue are included in the family. In section 12 he has collected the authorities who have laid down at greater length what is included under "family", genus, *stirps*, *linea*, *parentela*, *domus*, *cippus*, and the like. Now there is also a bequest to the family when the testator forbids the alienation of a thing out of the family or directs that it should not go out of his line of descent or out of his 'blood'."

From the foregoing it would appear that a *fidei commissum* such as that created by deed P1B is not a *fidei commissum in favorem familiae*, for if it is a gift to the immediate donees with a prohibition against alienation and after their death to their children who are left free to deal or dispose of the property in any manner they like. This is the kind of *fidei commissum* known as *unicum*. It is binding on only one person. He who follows first after the burdened heir or legatee can with impunity transfer the prohibited property to a stranger Sande, Webber's translation, p. 211 et. seq.

Of the Roman Dutch Law commentators only Sande discusses at length the nature and effect of a *fidei commissum in favorem familiae*. His authority is so high that even Voet quotes him when discussing the question. I shall therefore take the liberty of citing more than one passage from his treatise on Restraints.

Sande Treatise on Restraints, Webber's translation, p. 214 etc., states :

"But the *fidei commissum* is simplex and pure, if the testator has himself bequeathed the property to the family, as if he says in clear terms, "I leave my landed property to the family." This form of words, added to a prohibition upon alienation, has this effect, that the prohibited person cannot change the order of succession, which the law interprets as being laid down by the testator and therefore he cannot pass by a nearer and leave the property to a more remote member of the family."

"This is so except where it can be gathered from the words of the will itself that the intention of the testator was otherwise; for example, if wishing to provide for the preservation of his family, he says "I will, or I order, that the landed property be retained, remain, and be left in the family". For from these words would be induced a real, multiplex, and perpetual *fidei commissum*, which would last as long as anyone of the family survived."

"Thus when a thing is prohibited from alienation outside the family or from going out of the name of the deceased, if this thing is alienated contrary to the will of the testator, a right of action is given to those who are members of the family and the name of the deceased. *Nomen* and *familia* are taken as synonymous. In the case of *fidei commissum* in favour of a family the donor or testator must use the expression "family" or words to that effect in order to indicate his clear intention to benefit his family."

It is clear to my mind from what has been said above that P1B does not create a *fidei commissum in favorem familiae*. As the *fidei commissum* is not one in favour of the family and the gift has not been accepted by or on behalf of the *fidei commissaries* it is revocable by the mutual consent of the donor and donee.

Now, in the instant case, what Siman and the two children Cecilia and Jane did was to revoke the deed of gift of "The Priory" and receive in exchange another gift of "Siriniwasa" subject to a new condition, namely, not to alienate the land without the consent of the donor or his wife should she survive him. In that view of the matter the proceedings under the Entail and Settlement Ordinance were not necessary, but perhaps it was thought that the safer course would be to obtain the permission of Court under that Ordinance. The fact that action was taken under that Ordinance on the footing that there was a valid *fidei commissum* which could not be revoked does not alter the true nature of the gift and its revocability. The Entail and Settlement Ordinance provides the machinery for carrying out what under the Roman-Dutch Law was permitted with the authority of the Courts.

Voet Book XXXVI, Title I., Sec. 63, Macgregor's translation observes :

"In addition to this, the Commentators have mostly held that the remaining assets which can be kept without deterioration may be exchanged by the fiduciary for other assets which are better and more useful, especially if it does not seem to be probable that the *fidei commissary* heir has any affection for the goods belonging to the inheritance; since the person in whose favour the probihition against alienation was constituted would appear not to be deprived of any advantages, nor does an exchange of goods by which the *fidei commissary* heir is not prejudiced, but is benefited, appear to be contrary to the testator's desire. For though one is forbidden to alienate goods belonging to the Church or included in a dowry, yet one is allowed by law to exchange even these for others which are more useful. Hence the fiduciary is not to be prevented from acquiring servitudes for the benefit of the *fidei commissary* property, or from liberating it from servitudes which have been imposed on it..... Moreover, the alienation of houses which are held subject to a *fidei commissum*, and are falling in from age, is permitted with us on an order of Court, subject to the proviso that the money obtained therefrom should be expended in the purchase of other property or some other kind of investment, and that what is so acquired should take the place of what has been alienated, and become *fidei commissary* property."

It would appear therefore that under the common law it is the fiduciary who is qualified to make the application for sale of *fidei commissary* property, and not any one else. That seems reasonable for what interest can the donors have in the property once they have given it away. It is the fiduciaries who should decide what is in their interests. The Ordinance contains no indication that it meant to alter the common law by authorising persons other than the fiduciary to make applications for sale or exchange of *fidei commissary* property.

Section 5 enacts as follows: "Any person entitled to the possession or to the receipt of the rents and profits of any movable property now or which may hereafter become subject to such entail, *fidei commissum*, or settlement as aforesaid, or of any share thereof, may apply to the District Court by petition in a summary way to exercise the powers conferred by this Ordinance."

The question is whether the donor on deed P1B who had a life interest comes within the ambit of the section. Is he "a person entitled to the possession or to the receipt of the rents and profits of the land"? In a sense he is such a person as he was in physical possession of the land and by virtue of the life interest reserved for himself he was entitled to the rents and profits. But is that the interest and possession contemplated in the section or is it the possession and interest of the fiduciary. Having regard to the common law on the subject and to the fact that the Ordinance is not designed to alter that law I am of opinion that a donor who has created a *fidei commissum* reserving a life interest is not entitled to make an application under the section. The rule of construction of statutes—sometimes called the golden rule—is, that the words of the statute must *prima facie* be given their ordinary meaning. But that rule has its exceptions. One of those exceptions is that where the plain words fail to achieve the manifest purpose of the enactment the ordinary meaning must yield to what is the real meaning of the words according to the intent and purpose of the legislature. In this view of the enactment there was no proper application before the Court and the order passed thereon was not an order under the enactment. Hence the order and the action taken thereon do not attract the consequences prescribed in the statute.

One of the consequences is that provided in section 8 that any property taken in exchange for any property exchanged under the Ordinance shall become subject to the same entail, or *fidei commissum* as the property for which it was given in exchange was subject to at the time of the exchange.

While on this point I wish to say that I hold the view that where a proper application and order thereon is made under section 5 and an exchange is effected in consequence the property taken in exchange becomes the subject to *fidei commissum* by operation of section 8 without more and the parties effecting the exchange cannot escape that consequence by executing the deeds in such a way as to avoid a *fidei commissum* in respect of the land taken in exchange.

For the above reasons the appellant is entitled to succeed as there is no *fidei commissum* binding on "Siriniwasa", which has been gifted subject to one condition, and the donees have not committed a breach of that condition. The original donor therefore obtained the entire rights of "Siriniwasa" from his two daughters Cecilia and Jane and rightly alienated it to his son who gifted it to the trustees from whom the present defendant derives her title.

In my view therefore this appeal should be allowed with costs both here and below.

Gunasekara, J.

I agree that deed No. 2110 of 4th October, 1883, (P1B) did not create a *fidei commissum*, for the reasons that there has been no acceptance on behalf of the *fidei commissaries* and that it was not the intention of the donor to create a *fidei commissum* in favour of a family. I therefore concur in the order proposed by my brother.

Appeal allowed.

Present : Gratiaen, J. & Gunasekara, J.

THE CEYLON INSURANCE Co., Ltd., vs. (1) RICHARD AND ANOTHER

S. C. No. 374—D. C. Colombo, No. 18823/M

Argued on : 5th July, 1951

Decided on : 1st August, 1951

Motor Car Ordinance, No. 45 of 1938—Sections 69, 130, 133, 137 and 138—Motor Car Accident—Driver authorised in certificate of competence to drive car not exceeding specified weight—Action claiming

damages by injured party—Comprehensive policy of Insurance—Condition of policy that insurer not liable for damage caused while car being driven by person not holding certificate of competence—Action by Insurer for declaration pending action by injured party for damages that insurer not liable to indemnify owner of car or to pay damages that may be decreed in favour of injured party—Injured party added-defendant —Rights and duties of insurer.

The defendant was at all material times the owner of a motor car which was 23 cwts 3 qrs. in weight. On 11-4-46 the plaintiff company—" an authorised insurer ", within the meaning of the Motor Car Ordinance No. 45 of 1938—issued to the defendant in respect of his motor car a comprehensive policy of insurance covering 3rd party risks for a period of one year. It was a condition of the policy that that the company would not be liable in respect of any claim arising while the vehicle was being driven by an " excluded driver " which expression as defined in the Schedule to the policy included " any person who is not the holder of a certificate of competence unless he has held and is not disqualified from obtaining such certificate ".

On 17-5-46 the said car, while being driven by the defendant's driver, who held a certificate of competence only to drive a motor car not exceeding 19 cwts. in weight, met with an accident resulting in injuries to the added-defendant, who instituted action No. 18669 of the District Court of Colombo, claiming damages in Rs. 15,000.

The plaintiff company thereafter instituted the present action under section 137 of the Motor Car Ordinance for a declaration against the defendant that it was not liable to indemnify him in respect of the accident because the motor car was at the relevant time being driven by an excluded driver within the meaning of the policy. The company further prayed for a declaration that as the condition in respect of which the breach was committed was a condition referred to in section 130 (4) of the Ordinance, it was not liable under section 133 to pay any damages that may be decreed in favour of the added-defendant in the pending action 18669.

The added-defendant intervened on notice of action being served on him.

The learned District Judge dismissed the company's action on the ground that it could not rely on a breach of the condition of the policy which excludes liability when the car is being driven by an " excluded driver ".

The plaintiff appealed and the added-defendant cross-appealed.

Held : (1) That in view of section 69 of the Motor Car Ordinance, the defendant's driver's certificate of competence was not valid for any motor car which exceeded 19 cwts. in weight, and therefore in permitting the driver to drive the motor car in question the defendant committed a breach of a condition of the policy.

(2) That the breach of the condition relied on by the company was a breach of a condition contemplated by section 130 (4) (c) (ii) of the Ordinance, because the driver was not the holder of a certificate of competence within the meaning of that section.

(3) That the company was under no contractual liability to indeminify the defendant in respect of the said accident.

(4) That as the company in its notice to the added defendant failed to specify the breach of the condition relied on by it as required by the proviso to section 137 of the Ordinance the added defendant's statutory right to obtain satisfaction of the decree under section 133 direct from the company would be unaffected by the declaration of non-liability against the defendant.

(5) That in the circumstances, the company could discharge its obligation under section 133 and seek its remedies against the defendant under section 138 of the Ordinance.

Per GRATIAEN, J.—"*As between insurer and insured*, their rights and obligations *inter se* are measured solely by the terms of their contract so that the contractual duty of the former to indemnify the latter may be avoided on any lawful ground which the parties might mutually agree upon. *As far as the injured party is concerned*, however, his right against the insurer to claim direct satisfaction of a decree entered in his favour against the insured is unaffected by the terms of the contract itself unless the insurer is protected by a declaration (under section 137) that there has been a breach of a condition in the policy which falls within one or other of the categories of excepted conditions enumerated in section 130 (4). Subject to this the insurer must pay the injured third party and seek thereafter to recover from the insured any sum which exceeds the amount of his strict liability under the contract subsisting between them. It will thus be seen that the insurer's *statutory* liability towards a third party may well exceed his contractual liability towards the insured himself. It is permissible and proper, in my opinion, for a Court whose jurisdiction is invoked under section 137, to enter a decree, if the circumstances so warrant, declaring that the injured party's rights against the insurer shall not be affected by a declaration in respect of the insurer's rights against the insured".

Case referred to : *Zurich General Accident and Liability Insurance Co. vs. Morison* (1942) 2 K. B. 55 C. A.

H. V. Perera, K.C., with *H. Wanigatunge* and *Ramalingam*, for the plaintiff-appellant.
N. K. Choksy, K.C., with *J. M. Jayamanne*, for the defendant-respondent.
S. J. Kadiragamar with *E. R. S. R. Coomaraswamy*, for the added defendant-respondent.

GRATIAEN, J.

This action relates to a policy of insurance in respect of third-party risks issued in conformity with the requirements of Part 8 of the Motor Car Ordinance No. 45 of 1938. It will be convenient if I set out shortly the scheme of this legislation which has been introduced for the protection of members of the public who might be injured on the highway through the negligence of drivers of motor vehicles.

Sections 127 and 128 prohibits the user of a motor car, as defined in the Ordinance, unless there is in force a policy of insurance (issued by

an " authorised insurer ") against third-party risks in relation to the use of the vehicle by the driver concerned. Section 130 generally renders in-operative, as far as the rights of the third parties against the insurer are concerned, any restrictive conditions in the policy which may bind the insured person himself, *except to the extent provided by section* 130 (4). For the purposes of the present case it is sufficient to refer only to one category of the excepted conditions, namely, a condition of non-liability if the accident occurs at a time when the car is being driven " by any person who is not the holder of a certificate of competence ". *Section* 130 (4) (*c*) (*ii*). Should the insured become liable under a decree to pay damages to an injured person in respect of an accident occuring at a time when the policy is in force, section 133 imposes a duty on the insurer to satisfy the decree by payment direct to the injured person—unless the insurers are entitled to escape liability on the ground that there has been a breach of an excepted condition such as I have previously described. As a condition precedent to relief from such statutory liability, however, section 137 requires the insurer, within a prescribed period, to obtain a declaration from a Court of competent jurisdiction that a breach has been established of " a condition of the policy being one of the conditions enumerated in section 130 (4) ". The proviso to section 137 also requires that notice of such an action, *specifying* the breach of the condition relied on, should be given within a prescribed period to the injured party whose rights against the insurer are regulated by the Ordinance and not by the terms of the contract itself. The injured party on receipt of this notice is empowered, if he so desires, to be made a party to the declaratory action instituted under section 137. The underlying purpose of this legislation is made clear by the provisions of section 138. As *between insurer and insured*, their rights and obligations *inter se* are measured solely by the terms of their contract so that the contractual duty of the former to indemnify the latter may be avoided on any lawful ground which the parties might mutually agree upon. *As far as the injured party is concerned*, however, his right against the insurer to claim direct satisfaction of a decree entered in his favour against the insured is unaffected by the terms of the contract itself unless the insurer is protected by a declaration (under section 137) that there has been a breach of a condition in the policy which falls within one or other of the categories of excepted conditions in section 130 (4). Subject to this, the insurer must pay the injured third party and seek thereafter to recover from the insured any sum which exceeds the amount of his strict liability under the contract subsisting between them. It will thus be seen that the insurer's *statutory* liability towards a third party may well exceed his contractual liability towards the insured himself. It is permissible and proper, in my opinion, for a Court whose jurisdiction is invoked under section 137, to enter a decree, if the circumstances so warrant, declaring that the injured party's rights against the insurer shall not be affected by a declaration in respect of the insurer's rights against the insured.

I shall now consider the facts of the present case. The plaintiff Company is an " authorised insurer " within the meaning of the Ordinance. The defendant was at all material times the owner of a Wolsley motor car No. Z784 which was 23 *cwts.* 3 *quarters in* weight. On 11th April, 1946, the Company issued to the defendant in respect of this motor car a comprehensive policy of insurance, covering third party risks, for a period of one year. It was a condition of the policy that the Company should not be liable in respect of any claim arising while the vehicle was " being driven by.....an " excluded driver " as defined in the Schedule to the policy. The expression " excluded driver " is defined in the Schedule as meaning

> " (1) any person other than the insured or a person driving with the insured's express or implied permission ;
>
> (2) any person who is not the holder of a certificate of competence unless he has held and is not disqualified from obtaining such certificate ".

It will be seen that the first category of " excluded driver " under the policy corresponds to the class dealt with by section 130 (4) (*b*) (*i*) of the Ordinance. The second category corresponds to but is narrower than, the class dealt with by section 130 (4) (*c*) (*ii*). In fact, the Company was entitled, if it so desired, to relieving itself, in terms of the policy of statutory obligations to a greater extent than it has chosen to do in the present case.

On 17th May, 1946, when the car was being driven on the public highway by the defendant's employee J. P. Silva, it met with an accident in consequence of which the added defendant, who is a minor, sustained certain injuries. The added defendant, through his next friend, nas sued the defendant with notice to the Company, in section No. 18669 in the District Court of Colombo for the recovery of Rs. 15,000 as damages in respect of the accident. I understand that this action has been pending for over four years.

On 18th December, 1947, the Company commenced the present proceedings under section 137 of the Ordinance for a declaration against the defendant that it was not liable to indemnify him in respect of the accident because the motor car was at the relevant time being driven by " an excluded driver " within the meaning of the policy. The Company further prayed for a declaration that, as the condition in respect of which a breach had been committed was a condition of a kind authorised by section 130 (4) of the Ordinance, it was not liable, under section 133, to pay any damages that may be decreed in favour of the added defendant against the defendant in the pending action No. 18869 (which I assume the parties concerned will some day have the energy to bring to a conclusion). Notice of the institution of the present proceedings was given to the added defendant who thereupon intervened in order to protect his rights. The learned District Judge after hearing arguments upon the relevant provisions of the Ordinance and upon the meaning of the contract of insurance, dismissed the Company's action against the defendant with costs. The added defendant was ordered to bear his own costs. The Company then appealed to this Court asking for a reversal of the judgment against it. The added-defendant has filed certain cross-objections in terms of section 772 of the Civil Procedure Code.

I propose in the first instance to consider the merits of the case *as between the Company and the defendant*, without reference to the statutory rights and obligations of the added-defendant and the Company *inter se*.

It is common ground that on the day of the accident J. P. Silva was driving the insured motor car with the express permission of the defendant. He did not therefore fall within the first category of " excluded driver " defined in the Schedule annexed to the contract. It is also common ground, however, that Silva did not possess, and had never possessed, a certificate of competence authorising him to drive a car whose weight exceeded 19 cwt. He only possessed a certificate of competence P3 which in terms authorised him to drive private motor cars weighing " 19 cwt. and below ", whereas the weight of the insured car, as I have already pointed out, slightly exceeded 23 cwt. In spite of these admitted facts the learned District Judge took the view that the Company could not rely on a breach of the condition of the policy which excludes liability when the car is being driven by " a person who is not a holder of a certificate of competence unless he has held *and* is not disqualified from obtaining such certificate ". With great respect, I find it impossible to appreciate the logic of the learned District Judge's conclusions on this part of the case.

The contract of insurance relates expressly to the Wolsley motor car No. Z764, *and to no other vehicle*. It is therefore quite apparent that the relevant part of the definition of " excluded driver " in the Schedule makes it a condition of liability that the driver should possess at the relevant time or have previously possessed (without any supervening disqualification) a certificate of competence issued by the Commissioner of Motor Transport authorising him to drive a motor car of a description (in respect of weight or any other factor) *to which the insured vehicle belongs*. It is true that section 63 of the Ordinance divides " motor cars " into only five specified classes, and that the insured vehicle falls within the class described in section 63 (*e*). It is also true that section 64 prohibits a person from driving a motor car " of any class " on a highway unless he is the holder of an effective certificate of competence which is valid " for that class of motor cars ". If these two sections had stood by themselves, there might have been some justification for the view that the licencing authority, when issuing certificates of competence, has no authority to submit a particular " class " of vehicle to some further sub-classification. But this is precisely what section 69 of the Ordinance empowers him to do. It expressly declares :—

> " (1) Notwithstanding anything contained in this Part, the Commissioner may in his discretion issue to any person a certificate of competence expressed to be valid for a specified motor car or for motor cars of any specified weight or description.
>
> (2) No person who is the holder of a certificate of competence issued under sub-section (1), shall drive on a highway any motor car other than the motor car specified in that certificate or a motor car of the weight or description specified in that certificate, as the case may be ".

It is therefore apparent that Silva's certificate of competence was not valid for the insured vehicle or for any motor car whose weight exceeded 19 cwt. There are obvious reasons why the Commissioner should, in the public interest, be vested with a discretion in matters of this sort, and it is no less reasonable for an insurer to insist as a condition of his liability that the vehicle should be driven by some person whom the licencing authority has certified as competent to drive a motor car of the particular weight and description to which the insured vehicle corresponds. A contract must be construed with

reference to its context, and it would be monstrous to suggest that the terms of the policy would be satisfied if the driver possessed only a certificate of competence in such a restricted form that he could not drive the insured vehicle without committing a punishable offence.

It has also been suggested that as Silva was not an " excluded driver " within one part of the definition of that term he could not be regarded as " excluded " even if he fell within the second category of excluded drivers. This argument must be rejected because it does great violence to the language of the contract. It would imply that liability attaches to the Company if, for instance, the insured consciously permits the vehicle to be driven by a lunatic or a person whose certificate of competence has been cancelled by a Court of law under section 75 of the Ordinance ; similarly, it would imply an argument to indemnify in a case where a person who possesses a valid certificate of competence steals the car and drives it without the owner's permission. The language of the policy does not sanction the imputation of such reckless benevolence on the part of the insurer.

For the reasons which I have set out I take the view that the Company was under no *contractual* liability to indemnify the defendant in respect of the accident which occurred on 17th March, 1946. I am also of the opinion, for similar reasons, that the breach of the condition relied on by the Company was a breach of a condition contemplated by section 130 (4) (*c*) (*ii*) of the Motor Car Ordinance No. 45 of 1938, because Silva was not " the holder of a certificate of competence " within the meaning of that section. If, therefore, the Company has satisfied the conditions prescribed by the proviso to section 137, it would also be entitled to claim non-liability to satisfy, in terms of section 133 of the Ordinance, the decree which the added-defendant may obtain against the defendant in action No. 18669 of the District Court of Colombo. In order to decide this latter question, it is necessary to consider the cross-objections filed on behalf of the added-defendant.

As I have previously stated, the added-defendant exercised his right to intervene in this action in order to protect his rights against the Company. His intervention was specially necessary because the Company had expressly asked for a declaration of non-liability to satisfy the decree in the pending proceedings in D. C. 18669. He associated himself with the defences raised by the defendant, and to that extent his objections have failed. He has in addition raised two additional issues (1) that the District Court of Colombo had no territorial jurisdiction to entertain the Company's action and (2) that *as far as he is concerned* the Company cannot claim the benefit of its declaration of non-liability *against the defendant* because he has not within the prescribed period been furnished with a notice from the Company, as required by the proviso to section 137, " specifying the breach of the condition on which (it) proposes to rely ". The section expressly declares that such a notice is a condition precedent to an insurer's right to escape his *statutory* obligations under section 133.

We have had the benefit of a very well-considered argument from Mr. Kadiragamar on the issue as to jurisdiction, but it is unnecessary to give a definite decision on this question because the added-defendant's second objection is in my opinion entitled to prevail.

The only notice which the Company furnished to the added-defendant within the prescribed period is contained in the letter P7 dated 16th December, 1947, informing him that the Company intended to institute proceedings against the defendant " for a declaration that there has been a breach of *a* condition enumerated in section 130 (4) of the Ordinance and specified in the Policy of Insurance ". It is apparent, and Mr. Perera has very properly conceded, that this notice does not purport to *specify* the particular condition a breach of which is relied on. Indeed, section 130 (4) enumerates as many as a dozen conditions. The purpose of the proviso is abundantly clear, and has been explained by the Court of Appeal in England in connection with section 10 of the Road Traffic Act 1934 which corresponds to section 136 of our local Ordinance, in which similar words—viz., a " notice..... *specifying* the non-disclosure or false representation on which he proposes to rely "—appear. Vide *Zurich General Accident and liability Insurance Co. vs. Morison* (1942) 2 K. B. 55 C. A. Applying the *ratio decidendi* of this authority, I would in the present case say :

" (1) that if an insurer desires, by obtaining a declaratory decree against the insured under section 137 of the Ordinance, to escape his statutory obligations towards the injured third party under section 133 as well, he must within the statutory period fixed by the proviso give to the third party a notice *specifying the particular condition a breach* of which is relied on ; and no breach other than that so specified can be relied on in order to escape the statutory obligation imposed by section 133 ;

" (2) that if no such notice or if, as in this case, a defective notice (in which particulars are specified) is furnished to the third party, the latter's statutory right to obtain satisfaction of his decree under section 133 direct

from the insurer would be unaffected by any declaration of non-liability which the insurer may obtain *against the insured* in terms of section 137; in that event, the insurer must discharge his obligation under section 133 and then seek his remedy against the insured under section 138".

The principle is clear enough. The terms of the policy of insurance are matters within the knowledge of the immediate parties to the contract, whereas pedestrians and others, for whose benefit compulsory insurance legislation has been introduced, have no voice as to the warranties and conditions in insurance policies. The Ordinance withdraws statutory protection from an injured third party only if contractual conditions of a particular kind are proved to have been violated, and then only provided that the third party has been duly furnished with particulars of the breach relied on. This procedure enables the injured man to investigate the specific allegations of which he has been given notice within the prescribed period, so that he can decide whether or not to protect himself by contesting the grounds on which the insurer seeks to escape the statutory obligations imposed on him by section 133. If, upon such investigation, the third party is satisfied that the insurer is protected, the third party might well consider in any particular case that the expense of obtaining a decree which does not bind the insurer but only an impecunious tort-feasor would be profitless.

It has been suggested that, although the notice served on the added-defendant did not comply with the requirements of the proviso, he must be deemed, by having intervened in these proceedings, to have waived the deficiencies in the notice. On the contrary, the purpose of a third party's intervention, which is expressly contemplated by the proviso, is to enable him to protect himself by relying on the defective notice so as to ensure that his statutory rights are declared to be unaffected by the order which the insurer is seeking to obtain against the insured. To impute some idea of a notional waiver to the conduct of the added-defendant in this case seems to me to be unwarranted by the circumstances of this case. I refuse to believe that there is any principle of law under which words of protest can, at the moment and indeed by the very fact of their utterance, become converted into words of condonation.

For the reasons which I have given, I would set aside the judgment appealed from, and enter a decree in the following terms :—

(*a*) declaring that, as between the plaintiff and the defendant, there has been a breach of a condition in the policy of insurance No. 2200 dated 11th April, 1946, so as to relieve the plaintiff of its contractual obligations to indemnify the defendant in respect of the accident which occurred on 17th May, 1946;

(*b*) declaring that, as between the plaintiff and the added-defendant, the plaintiff is nevertheless under a statutory obligation to pay to the added-defendant the amount of the decree including costs, which might be entered in favour of the added-defendant against the present defendant in action No. 18669 of the District Court of Colombo;

(*c*) declaring further that, as between the plaintiff and the defendant, the plaintiff will be entitled to recover from the defendant, both under the terms of the said policy No. 2200 and by virtue of section 138 of the Motor Car Ordinance No. 45 of 1938, such amount as may be paid by the plaintiff to the added-defendant in satisfaction of the decree in the said action No. 18669.

I would also make order that the plaintiff should pay to the added-defendant his costs both here and in the Court below, but that the defendant should pay to the plaintiff its costs in both Courts.

GUNASEKARA, J.

I agree.

Appeal allowed.

Present : NAGALINGAM, J., BASNAYAKE, J. & GUNASEKERA, J.

IN RE KRISHNAPILLAI VAIKUNTHAVASAN

In the Matter of a Rule Nisi for Contempt of Court issued on Krishnapillai Vaikunthavasan on the Application of the Attorney-General.

Argued on : 24th September, 1951
Decided on : 10th October, 1951

Contempt of Court—Article published in newspaper, commenting on the facts of a pending case—Does the publication tend to interfere with the due course of justice?—Apology, and offer to publish unqualified withdrawal of offending passages—Considerations affecting sentence—Costs in criminal or quasi-criminal proceedings.

Where a *rule nisi* for contempt of Court was issued on the editor of a newspaper, in respect of a passage commenting on the facts of a pending case, and the editor apologised, and offered to publish an unqualified withdrawal of the offending passages.

Held: (i) (NAGALINGAM, J., *dissentiente*:) That in considering the sentence to be imposed on him, the Court should take into account the question of not only preventing the mischief in that particular case, but also the prevention of mischief arising in other cases, and that, therefore, a punishment, however slight, should be imposed on the offender.

(ii) That under our law costs cannot be awarded in criminal or quasi-criminal proceedings except in the case provided by Section 352 of the Criminal Procedure Code.

Per BASNAYAKE, J.—" In a case of contempt of this nature, the question that arises for decision is not whether the publication in fact interferes, but whether it tends to interfere with the due course of justice, and if it tended to prejudice either the mind of the judge or any other person who would have to consider the case, then it is a publication that ought not to be allowed ".

Per NAGALINGAM, J.—"In regard to this question I think it is but proper and right that a Court of law should take into consideration all mitigating circumstances and temper justice with mercy. The respondent states, and it has not been challenged, that he started this paper in January this year without any previous experience of journalism, he having been employed as a clerk till 1950 after he had left school. He also states that he published the article as an item of public interest and of news value but without any intention to influence or prejudice the trial of the case. There is the further circumstance that the publication was made at a very early stage of the proceedings, and the effect of such a publication at that date (to prejudice mankind against a party to the cause) would have been almost nil. Besides the respondent has at the earliest possible opportunity without raising any technical or other plea made a full and complete apology ".

Cases referred to : *Veerasamy vs. Stewart et al* (1941) 42 N. L. R. 481.
Rex vs. Weisz and another (1951) 2 T. L. R. 337 ; (1951) 2 All E. R. 408.
Gugenheim vs. Ladbroke & Co. Ltd. (1947) 1 All E. R. 292.
Rex vs. Clarke 103 Law Times 636.
In re Labouchre and another—Ex parte the Colombus Company, Ltd. 17 T. L. R. 578.
Greenwood vs. The Leather-Shod Wheel Company Ltd. 14 T. L. R. 241.
King vs. Parke, (1903) 2 K. B. 432 ; 19 L. T. 627.
Hunt vs. Clarke, (1889) 58 L. J. Q. B. 490 ; 61 L. T. 343.
Abdul Wahab vs. Perera, 6 C. L. W. 130.
Jayasinghe vs. Wijesinghe 40 N. L. R. 68.

R. R. Crossette Thambyah, Solicitor-General, with *A. C. M. Ameer, Crown Counsel,* for the Attorney-General.

G. E. Chitty, with *Vernon Wijetunge, Amarasingham* and *Neville Kanakaratne,* for the respondent.

BASNAYAKE, J.

On the application of the Attorney-General a Rule Nisi for contempt of Court was issued on the respondent Krishnapillai Vaikunthavasan. The allegation in the application was that on the 20th day of April, 1951, the respondent published in the issue of the newspaper called " People's Voice " an article entitled " Threat to Murder Leftist Leader—Hakmana Police Run Riot " That article contained the following objectionable passages:—

" Under the auspices of the Rural Development Movement the D. R. O. and Medical Officer of Health had organised a National Day Celebrations at Hakmana on New Year Day on the 14th. The celebrations took place at the police station.

In spite of the exhortations of the Minister for State and his prohibition stalwarts the consumption of liquor seems to have been one of the principal part of the celebrations. Quite a number of Richard Aluvihare's " most efficient " police force were dead drunk.

A quarrel arose between one of the local residents Warnasuriya and a police constable. It led to words and others had to intervene and the resident was persuaded to go home where he was locked inside his house by relations who were afraid of further trouble.

But our " efficient " police force was not going to leave it at that. Three police constables who were playing a prominent part in the celebrations, one of whose main aims was to inculcate crime prevention in the area, went in search of Warnasuriya. Meeting his brother, Albert, on the way they stabbed him. Then it was a case of stabbing everybody who came on the scene. One man, Lambis Silva, was stabbed to death. Another woman died of injuries later. Several others are lying in a critical condition in hospital.

The incidents took place within a few yards of the police station.

How do you account for this wanton lawlessness on the part of the police force ? Is it that they were just drunk or had run amok ? By careful investigation and discussion with a number of people of the area I have come to the conclusion that this sort of behaviour is part of the deliberate attempt of the police, acting on instructions, to intimidate and terrorise the people of the area.

We must remember that Hakmana is in the Matara district—the Red strong-hold, the Stalingrad of Ceylon, as it is usually called. The Member for Hakmana is a Communist. Hence the police have been given instructions to teach the people of the area a good lesson for the " crime " of having voted Communist and to bring them round to a suitable frame of mind before the next general elections. They have been instructed to use force indiscriminately and no questions would be asked. In obeying these instructions to the letter the poor police constables are sometimes not able to draw a line between communist supporters and U. N. P. supporters. This is what happens when the police is trained to kill.

The crime at Hakmana was committed with weapons taken from the police station. The constables left after making threats in the hearing of the Inspector of Police and yet the Inspector went to the scene only after the killings. The weapons were handed over to him by the constables and the Inspector is still on duty.

The position in the Southern Province has degenerated to such fantastic proportions that the other day the Superintendent of Police, Mr. Colin Wijeyasooriya, had the audacity to send a message to Dr. S. A. Wickremasinghe, the communist leader, through Mr. Premalal Kumarasiri, that if the doctor would not discontinue his attacks on the police, he would be opening himself to assault and risk of murder by the police.

The U. N. P. Government must hold itself responsible before the people for these police brutalities and murders."

When the Rule came up for hearing, Counsel for the respondent tendered an affidavit in which the respondent while admitting his offence denied that he ever intended to commit a contempt of Court. He apologised and expressed his contrition and offered to publish an unqualified withdrawal of the offending passages. He pleaded that the offence was unwittingly committed owing to his inexperience as a journalist.

In the course of his affidavit he stated—

(*a*) that he was the editor, printer, publisher, and proprietor of a weekly English newspaper called " People's Voice ".

(*b*) that he printed and published the article in question,

(*c*) that he was not the author of the article,

(*d*) that he started the publication of the paper in question only in January, 1951,

(*e*) that he had no previous training or experience as a journalist as he had been a clerk since he left school,

(*f*) that he had no intention of prejudicing the fair hearing of the case against the assailants of the deceased Lambis Silva,

(*g*) that he was not aware that at the time he published the article legal proceedings had commenced,

(*h*) that his paper is printed and published and mainly circulated in Colombo and that no more than 40 copies were in circulation in Matara and Galle.

The only question that now remains for consideration is the sentence that should be passed on the respondent. Learned Counsel pleaded that the respondent should be treated as a first offender and discharged with a warning and not punished. He relied strongly on the case of *Veerasamy vs. Stewart et al* (1941) 42 N. L. R. 481.

According to the passages quoted in the application of the Attorney-General, it would appear that the writer purported to give a first-hand account of the events that occurred at the National Day Celebrations at Hakmana on 14th April, 1951. Now the respondent's publication was made on the 20th of April, 1951. Marambe Liyanage Lambis Silva had been killed on 14th April, 1951, and the Magisterial inquiry into his death had commenced on 15th April, 1951. The inquiry stood adjourned for 28th April, 1951. In a case of contempt of this nature the question that arises for decision is not whether the publication in fact interferes, but whether it tends to interfere with the due course of justice, and if it tended to prejudice either the mind of the judge or any other person who would have to consider the case, then it is a publication that ought not to be allowed. There can be no doubt that the article in the instant case, which contains a highly coloured and far from impartial account of the events leading to the death of Lambis Silva, tends to interfere with the due course of justice.

In regard to the question of sentence I find myself unable to take the view that the respondent should go unpunished. Contempt of Court is a very serious offence and is ordinarily punishable with imprisonment. The case books contain instances in which offenders have been punished with a fine. The instances in which guilty offenders have been discharged with a warning are rare. The most recent English case which is one of those rare instances is *Rex vs. Weisz and another* (1951) 2 T. L. R. 337 ; (1951) 2 All E.R. 408. The reasons for the course taken by the Court are stated thus in the judgment of Lord Goddard :

" We have now to consider what penalty, if any, should be imposed on Mr. Martin. We do not overlook the fact that he sent the papers to Counsel, who settled the indorsement. We have not been asked to hear any application against Counsel, and therefore only say this ; no doubt, had Counsel been asked to explain his action, he would have said, as Mr. Martin has said, that this form of indorsement has been often used in these cases without its ever having been said to be a contempt ; and he might well have pointed particularly to *Gugenheim vs. Ladbroke & Co., Ltd.* (1947) 1 All E. R. 292. We recognize that there is considerable force in this, and as we have already said with regard to the solicitor it ought to be regarded as strong mitigation. We hope, however, that Counsel as well as solicitors will always bear in mind that they owe a duty to the Court as well as to their clients, and that a main object in requiring the signature of Counsel or a solicitor to pleadings settled by them is to prevent issues, whether called feigned or fictitious, from being presented to the Court. Henceforward there will be no excuse for using this form of indorsement, or, we would add, one such as " Money due under a contract in writing made between the parties ", when the claim is simply in respect of gaming or wagering. While holding Mr. Martin guilty of a contempt, we acquit him of any intention to act in contempt of the Court,

and he has, by his Counsel, offered a full apology. We therefore impose no penalty on him ".

There appears to be an impression that an apology to the Court erases the effect of a contempt of this nature. In order to remove that impression I wish to repeat here the words of Darling J. in *Rex vs. Clarke* 103 Law Times 636 :

" It is not to the Court that an apology can do any good. Apology is due to the person whose trial might have been prejudiced, and the public whose interest it is to see that justice is fairly administered in this case, and not to the Court which has no feeling in the matter."

For, as was observed by Darling J. in the same case :

" When one does repent of a wrong we will not punish him as though he still persisted in his wrong doing."

Now, in regard to the case on which Counsel relied, I wish to observe with the greatest respect that the decisions collected therein to my mind afford no support for the course taken, nor am I able to reconcile the concluding paragraph of that judgment with the earlier observations, three passages of which I quote below.

" It may well be that when the true facts are known these descriptions may fit the crime, but the use of these expressions at this stage is calculated to prejudice the accused in regard to the charges preferred against them."

" I fully appreciate this and I should not have been disposed to take serious notice of the petitioner's complaint if it related only to the use of the word " murder ", and if that word occurred in this first editorial only. But the difficulty here is the insistence upon the fact that the offence is murder."

" Again it may well be that when the true facts are ascertained by the proper tribunal these statements may prove to be correct, but to say all this at this stage when the case is due to be tried is calculated to prejudice the accused."

I find myself unable to regard that case as an authority for the proposition that an offender guilty of contempt should go unpunished when he acknowledges his offence, expresses regret, and offers to make amends. The instances where offenders guilty of contempt even though of a technical nature have been punished despite the tendering of an apology and the expression of regret are many. It is sufficient to mention here the cases of *In re Labouchre and another—Ex parte the Colombus Company Ltd.* 17 T. L. R. 578 and *Greenwood vs. The Leather-Shod Wheel Company, Ltd.* 14 T. L. R. 241. The latter case is similar to the instant case in many respects. There too the respondent admitted his offence and expressed his regret both by affidavit and through his Counsel. He had no direct interest in the prosecution of the action, he had been editor of the paper for hardly a month when the contempt was committed, he was a young man and had but little experience in the management of newspapers, and he offered to publish an apology in his paper. Despite all this he was asked to pay £20 and the costs of the applicant. When dealing with the question of punishment it must be remembered that the jurisdiction of the Court exists not only to prevent the mischief in this particular case, but also to prevent similar mischief arising in other cases. I have given very careful thought to the question of punishment. In view of the repentance of the respondent and the mitigating circumstances, I refrain from imposing a sentence of imprisonment. I sentence the respondent to pay a fine of Rs. 250. If he does not pay it, he will undergo six weeks' rigorous imprisonment.

I make no order as to costs as those proceedings are of a quasi-criminal nature and under our law costs cannot be awarded in criminal or quasi-criminal proceedings except in the case provided by section 352 of the Criminal Procedure Code.

GUNASEKARA, J.

I concur in the order proposed by my brother Basnayake.

NAGALINGAM, J.

At the instance of the Attorney-General a Rule was issued on the respondent calling upon him to show cause why he should not be punished for contempt of Court in that he being editor, printer and publisher of a weekly English newspaper called " Peoples' Voice " published in the issue of the said newspaper dated 20th April, 1951, an article entitled " Threat to murder Leftist Leader —Hakmana Police Run Riot ", which said article was calculated to prejudice the fair hearing of the Matara Magistrate's Court case No. 23259, before this Court in its Assize jurisdiction.

The article referred to an incident that had taken place at Hakmana on 14th April, 1951, in which at least one person lost his life as a result of receiving stab injuries and certain others were wounded. The article was published, as stated earlier on 20th April, 1951, and the respondent in his affidavit states that to the best of his knowledge and belief at the time he published the article he was not aware of any proceedings having been instituted in a Court of law in respect of the incidents which were the subject of the article. The affidavit of the A. S. P., however, clearly establishes that on 15th April, 1951, the Magistrate of Matara commenced an inquiry under the provisions of the Criminal Procedure

Code. That inquiry was obviously one in terms of section 153 of the Criminal Procedure Code and constituted proceedings before a Court of law.

Learned Counsel for the respondent in attempting to show cause suggested that a possible view was that there were no legal proceedings in a Court of law at the date of the publication as no charge had been framed against any accused person, and that therefore the publication did not amount to a contempt of Court in that it could be said that it could have been the intention of the respondent in publishing the article to prejudice the fair trial of any case.

I do not think this contention is entitled to any weight. When a report is made to a Magistrate under section 148 (1) (*b*) of the Criminal Procedure Code, it could properly be said for the purpose of the law of contempt that a proceeding has commenced which is pending before a Court of law, and it is immaterial whether in the report any person is named or not. The case of *King vs. Parke* (1903) 2 K. B. 432; 19 L, T. 627 and *Rex vs. Clarke* 103 Law Times 626 support this view. I do not, however, wish it to be understood that in no circumstance would a rule for contempt of Court lie when a publication is made calculated to prejudice the fair trial of a case that may thereafter be instituted in respect of incidents that may have occurred earlier. In other words, the question whether in fact at the date of publication a proceeding should be pending at all, is a question that must be decided when it does arise and in appropriate proceedings.

The respondent, however, in this case, has unreservedly admitted the commission by him of a contempt and has tendered his apologies and thereby submits himself to the mercy of the Court. In these circumstances there can be little doubt but that the rule should be made absolute.

The further question however remains to be considered as to what, if any, should be the punishment that should be imposed on the respondent. In regard to this question I think it is but proper and right that a Court of law should take into consideration all mitigating circumstances and temper justice with mercy. The respondent states, and it has not been challenged, that he started this paper in January this year without any previous experience of journalism, he having been employed as a clerk till 1950 after he had left school. He also states that he published the article as an item of public interest and of news value but without any intention to influence or prejudice the trial of the case. There is the further circumstance that the publication was made at a very early stage of the proceedings, and the effect of such a publication at that date (to prejudice mankind against a party to the cause) would have been almost nil. Besides the respondent has at the earliest possible opportunity without raising any technical or other plea made a full and complete apology.

In the case of *Hunt vs. Clarke* (1889) 58 L. J. Q. B. 490; 61 L. T. 343 Lord Justice Cotton in dismissing an appeal from an order requiring an application to issue a rule laid down certain principles which have a large bearing on the question of sentence.

> "My view was in substance this, that where the offence complained of is of a slight and trifling nature, and not likely to cause any substantial prejudice to the party in the conduct of the action or to the due administration of justice, the party ought not to apply, and is mere waste of time to do so, and that it is not merely a proceeding in order to have the case properly conducted and justice properly administered, but that it is a mere waste of time to attempt to throw costs on the person who has done the act, where it is obvious there could not be any case calling upon the Court for committing, which is a more serious matter to be done, and only to be done when the administration of justice really requires it."

In our own Courts this view of Lord Justice Cotton has been reflected particularly in the case of *Veerasamy vs. Stewart* (1941) 42 N. L. R. 481, which is the last of the reported cases in our Courts on this matter; but before I deal with this case I shall refer to the earlier cases which were cited at the Bar.

The case of *Abdul Wahab vs. Perera* 6 C.L.W. 130 was a case where the respondents expressly published leaflets containing matter which was calculated to prejudice the fair trial of a case that was then pending before the Magistrates Court. In that publication certain inflammatory language was also used calculated to excite racial feeling. The learned Chief Justice who delivered the judgment refers to this aspect of the article being calculated to excite racial feeling and social indignation. It may be a matter of doubt that such a circumstance should have been taken into consideration even in regard to the sentence for an incitement of racial feeling is one which is not a matter properly within the law of contempt of Court. There are other provisions of the law under which a transgression of that kind can be punished but the point to be remembered is that the object of the publication of the leaflet was to summon a meeting with a view to bring to the notice of the public not only the heinous nature of the crime but also the guilt of the accused whose name was specifically disclosed. That such an organised attempt at interference with the course of justice is a serious case of contempt there can be little doubt, and in that case the Court imposed the fine of Rs. 200 on each of the

respondents. Arising out of the same incident another rule was issued on a leading proctor for his participation in the publication of the notice and for that he did preside at a public meeting in pursuance of the notice. In that case in view of the position the respondent held in the public life of the area and in view of the fact that he was a live wire behind the publication he was sentenced to pay a fine of Rs. 500.

In 1938 in the case of *Jayasinghe vs. Wijesinghe* 40 N.L.R. 68 where again there was a publication of a notice the avowed object of which was to make the reference to certain criminal pleadings then pending and the effect of which would have been to prejudice the accused in the case in his defence at the trial the Court sentenced the re-pondent to pay a fine of Rs. 100.

I now come to the case of *Veerasamy vs. Stewart* (supra) which was a case far more serious than the present one in its effect in regard to prejudicing the fair trial of the accused person concerned in the case and that was a case where the respondent maintained the position that no offence had been committed by him by the publication. An apology was tendered only after the Court had held that a clear contempt of Court had been committed. Even in these circumstances, Soertsz, J., while making the rule absolute gave the following as his reasons for not imposing any punishment :—

> " In all these circumstances, and particularly in view of the fact that I have found that it was not the purpose of the respondents when they published these articles to cause prejudice to the accused, or to interfere with the cause of justice, I think that it will be sufficient if I order that the rule be discharged, in view of the apology that has been tendered by the respondents. This apology, I think, will serve the purpose the petitioner had in view in making this application."

Applying these principles to the present case where the respondent at the beginning of his career as a journalist without any previous experience and without any intention to prejudice the trial of the case published the article, and that at a very early stage of the proceedings in the Magistrate's Court, resulting in its having little or no effect in regard to the actual trial of the case, I think the ends of justice would be amply met if the rule were made absolute and no further punishment were inflicted.

My order, therefore, is that the rule be made absolute.

Rule made absolute and respondent fined.

Present : GRATIAEN, J. & PULLE, J.

ABDUL CADER vs. SITTINISA *et al*

S. C. No. 77—D. C. Galle No. 818

Argued on : 19th June, 1951
Decided on : 18th July, 1951

Proctor and client—Gift—Donee, wife of donor's proctor—Deed of gift drafted on proctor's instructions by another notary who attested same—No opportunity to donor of independent advice—Undue influence—Presumption of

The plaintiff apprehensive of death entrusted to one W, his proctor and a close relative, the duty of drafting and attesting a number of conveyances. W, obtained the services of another notary to draft and attest one of the deeds by which the plaintiff conveyed irrevocably and with immediate effect a house to his niece, who was the proctor's wife. The terms of the deed were communicated by W, himself and were in complete accord with the plaintiff's wishes. At the time of the execution the plaintiff's faculties were normal and unimpaired.

The plaintiff sought to set aside the deed of gift on the ground that it was obtained by undue influence and duress on the part of W, that the transaction was vitiated because W, being plaintiff's legal adviser stood in a position of active confidence, and that the gift was bad because no delivery of the property had taken place.

Held : (1) That the deed of gift belongs to a class of case where the special relationship between the proctor and his client at the time of execution of the gift raises a presumption that the former had influence over the latter.

(2) That in such a case the gift should be set aside unless the presumption is rebutted by the donee by proof of circumstances which satisfy the Court that the gift was the result of the free exercise of the donor's independent will.

(3) That in the circumstances of this case the presumption of undue influence has not been rebutted.

Per GRATIAEN, J.—" The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee (*i.e.* the solicitor or the relative in whom the solicitor has a special interest) and with the full appreciation of what he was doing ".

Cases referred to : *Allcard vs. Skinner* 36 Ch.D. 145.
Liles vs. Terry (1895) 2 Q. B. 679.
Willis vs. Barron (1902) A. C. 271.
Coomber vs. Coomber (1911) 1 Ch. 723.
Inche Noriah vs. Shaik Ali (1929) A. C. 127.

H. V. Perera, K.C., with *J. A. L. Cooray*, for the plaintiff-appellant.
H. W. Jayawardene, for the 1st to 3rd defendant-respondents.
M. H. A. Azeez, for the 4th to 9th defendants-respondents.

GRATIAEN, J.

The principal parties to the transaction to which these proceedings relate are the plaintiff, who was over 70 years of age at the relevant date, and his nephew Mr. Wadood Abdul Wadood who was a proctor and notary. Mr. Wadood, was the 2nd defendant in the action, but he died during the pendency of these proceedings, and his heirs were substituted as parties in his place. The 1st defendant is the widow of Mr. Wadood and was the daughter of the plaintiff's cousin.

The plaintiff had fallen ill during the month of May, 1943, and was suffering from a painful affliction in his scrotum. I shall assume, as the learned District Judge has done, that the evidence as to the state of the patient's condition at the time has to some extent been exaggerated. His mental faculties were certainly unimpaired. On the other hand, there is no reason to doubt that his affliction induced in him a state of acute mental depression. There are clear indications that in June he had taken a pessimistic view of his chances of recovery, and that he decided in consequence to distribute a considerable part of his wordly possessions among the members of his family. He instructed Mr. Wadood to prepare for his signature a number of deeds of gifts whereby certain properties were to be transferred to his present wife and to his other relatives. One of these transactions took place on 4th June, 1943. Two other deeds of gift were executed on 13th June, another on 14th June and yet another on 16th June. On each occasion, except for a comparatively small gift under the deed 1D6 in favour of Wadood's daughter Suriya, the attesting notary was Mr. Wadood who had also been responsible for drafting the respective conveyances. On 21st June two further deeds were executed, but to these I shall refer later. On 23rd June Mr. Wadood attested another transfer from the plaintiff to a relative.

Shortly afterwards the plaintiff was restored to better health, and it is a point in favour of Mr. Wadood that the plaintiff has since confirmed the earlier donations in respect of which Mr. Wadood was the attesting notary, and also the gift in favour of Suriya. With regard to the transactions of 21st June, however, the plaintiff adopted a very different attitude, and it is necessary that I should now refer to these in some detail.

The notary who had attested the earlier deed of gift 1D6 in favour of Wadood's daughter was the witness Mr. M. S. A. Hamid. He states that he drafted the deed on instructions which he had previously received " through Mr. Wadood ". The document was attested by him in the plaintiff's house on the evening of 14th June, and on that occasion the plaintiff told him " that there will be another deed to be attested, and that Mr. Wadood could not possibly attest it, and the plaintiff said that he would send the title deeds through Mr. Wadood in about 3 or 4 days' time ". Mr. Hamid relates that shortly afterwards " Mr. Wadood brought a plan with certain papers relating to a partition about which I had to refer in Court, and he wanted a deed drafted in favour of the 1st defendant (*i.e.* Mrs. Wadood). I drafted that deed. Mr. Wadood gave me further instructions about the assignment of a mortgage which I drafted in favour of Mr. Wadood. I asked Mr. Wadood why this mortgage bond was to be assigned and he told me that the plaintiff wanted him to recover certain monies from one Deesan Silva (*i.e.* the mortgagor) and return them to the plaintiff. Two days later after preparing the deeds I went to the plaintiff's house with Mr. Wadood ".

On the evening of 21st June Mr. Hamid attested the deed of gift P1 where by the plaintiff purported to transfer the house in which he resided to his " niece " Mrs. Wadood. The house was valued when the action commenced at Rs. 20,000 and its value has since appreciated. The gift is declared in the conveyance to be *irrevocable* and it purported to come into immediate operation. The donation was accepted by the 1st defendant on the same evening.

The other document attested by Mr. Hamid on 21st June was the deed of assignment 1D10 whereby the plaintiff, in consideration of a sum of Rs. 1,287·50 (the receipt of which the plaintiff purported expressly to acknowledge) assigned to Mr. Wadood the existing mortgage executed in the plaintiff's favour by his debtor Deesan Silva.

Admittedly this recital bears no relation to the actual facts. Mr. Wadood did not pay any consideration for this assignment until 12th February, 1944, by which time serious disputes had arisen between the parties. Moreover, the language of the assignment, taken by itself, is inconsistent with the terms of the arrangement that Mr. Wadood should be appointed only as an agent for the collection of the mortgage debt. Looked at in another way, the occasion for the later payment of the consideration on the basis of an outright assignment, and before Deesan Silva liquidated his debt, is not quite clear.

The present action was instituted by the plaintiff on 2nd September, 1943,—*i.e.* very shortly after his recovery—to have the deed No. 1149 of 21st June, 1943, in favour of Mrs. Wadood set aside. The substantial grounds upon which the action was based are *inter alia*

(*a*) that the gift in favour of Mrs. Wadood had been obtained by undue influence and duress on the part of Mr. Wadood;

(*b*) that the transaction was vitiated because Mr. Wadood, being the plaintiff's legal adviser at the time, stood in a position of active confidence towards the plaintiff;

(*c*) that, the parties to the transaction being Muslims, the gift was in any event bad because no delivery of the property had taken place.

A further issue was also raised at the trial in which the plaintiff suggested that he was not of sound disposing mind at the time of the transaction, and he gave evidence to the effect that he was unconscious when his signature was obtained to the deed. This evidence was rejected by the learned Judge who also held against the plaintiff on all the other issues. I am satisfied that if, in the circumstances of the case, the burden was on the plaintiff positively to establish undue influence and duress, the action was properly dismissed. It was on this assumption that the plaintiff's action was disposed of in the Court below.

I have given my anxious consideration to this case, and have borne in mind the circumstance that Mr. Wadood, who was a professional gentleman of good repute, died before he could give his own version of the transaction which is now impugned.

The conclusion at which I have arrived is that the learned Judge has misdirected himself as to the burden of proof in this case. Had he not fallen into error on this fundamental point, it seems to me that upon the evidence the plaintiff's claim was entitled to succeed. I am happy to state that my judgment does not in any sense involve a finding that Mr. Wadood had acted *dishonestly* in the transaction which is under investigation. He was found wanting only in a proper appreciation of the obligations which the law imposes upon persons who are placed in a position where *interest* and *duty* are brought into conflict with each other.

That Mr. Wadood and the plaintiff stood in the relationship of proctor and client during the month of June, 1943, has been very clearly established. The plaintiff was ill at the time, and, as I have already said, one cannot resist the conclusion that, influenced by his apprehensions as to the chances of recovery, he decided that the time had arrived for him to dispose of a considerable part of his possessions. In that state of mind he entrusted to Mr. Wadood, who was not only his close relative but also a lawyer in whom he reposed special confidence, the professional duty of drafting and attesting a number of notarial conveyances which, as Mr. Jayawardene himself suggests, were in effect of a quasi-testamentary character. The objects of the benevolence were certainly not unnatural. I also assume, because I accept the learned Judge's express findings which are not vitiated by misdirection, that the plaintiff, in spite of his physical condition at the time, was possessed of his normal faculties and was not incapable of making dispositions of his own free will. Indeed, it is not denied that the terms of these conveyances which Mr. Wadood had attested and which the plaintiff has subsequently confirmed were in complete accord with the plaintiff's wishes.

I do not reject the submission that it was probably the plaintiff himself who expressed to Mr. Wadood a desire to include Mrs. Wadood, whom he regarded as his niece, in the group of persons whom he proposed to benefit. Nor do I deny that among persons in the class of society to which the plaintiff belongs, it was perfectly natural that a sick man, over 70 years old, in apparent anticipation of death, should be disposed to distribute his properties, by a series of gifts *inter vivos*, among his kith and kin. But the questions which confront themselves in regard to such a situation are (1) what obligations the law imposes upon a proctor when his client desires to make over a gift of valuable property to the proctor's wife, and (2) how Mr. Wadood in fact reacted to that situation.

The answer to the first question which I have posed is clear enough. "The law with a wise providence, not only watches over all the trans-

actions of parties in this predicament, but it often interposes to declare transactions void which, between other persons, *would be held unobjectionable.* It does not so much consider the bearing or hardship of its doctrine upon particular cases, as it does the importance of preventing a general public mischief, which may be brought about by means, secret and inaccessible to judicial scrutiny, from the dangerous influences arising from the confidential relationship of the solicitor and client". *Story on Equity (3rd Edition) page* 129.

The Courts are under a duty to scrutinise with "close and vigilant suspicion" any transaction in which a proctor is professionally concerned and from which he or his close relative obtains from the lay client a benefit by way of gift. If, of course, the client can affirmatively prove that the gift was procured by fraud, duress or undue influence, the transaction must obviously be set aside. But failure to achieve this positive result, as the plaintiff has failed in these proceedings, does not conclude the matter. The impugned transaction belongs to a class of case where the special relationship between the proctor and his client at the time of execution of the gift raises a *presumption* that the former had influence over the latter. In such cases, unless the presumption can be rebutted, "the Court interferes, *not on the ground that any wrongful act has in fact been committed, but on the ground of public policy*". *Allcard vs. Skinner* 36 Ch. D. 145.

The relationship of proctor and client was still subsisting between Mr. Wadood and the plaintiff, and it was therefore the plain duty of Mr. Wadood, when the plaintiff expressed to him a desire to donate valuable property to Mrs. Wadood, to insist that the plaintiff should obtain independent legal advice in regard to the transaction. The ties of kinship and the bonds of natural affection which connected the plaintiff and Mr. and Mrs. Wadood did not exclude the operation of this necessary precaution. It was not sufficient for Mr. Wadood merely to procure the services of Mr. Hamid to draft and attest the necessary deeds of conveyance upon instructions which were communicated by Mr. Wadood himself. Had Mr. Hamid been expressly employed to give the plaintiff the benefit of his independent advice on this occasion, he should (and I do not doubt that he would) have discussed many relevant matters with the plaintiff such as *inter alia* (1) the disadvantages arising from making an irrevocable gift of his private residence (2) the desirability of making a testamentary disposition or a *donatio mortis causa* in favour of Mr. Wadood instead of a gift *inter vivos* taking immediate effect, (3) the reservation of at least a life interest in the property (4) the arrangements which the plaintiff could make for an alternative residence in the event of his surviving his present illness. What actually occurred was that the plaintiff's instructions, and any discussions which may have arisen thereon, took place between the plaintiff and Mr. Wadood direct, and that those instructions were merely communicated by the latter to Mr. Hamid. In the result, Mr. Hamid's *potential influence*—I need not place it higher than that—was never removed from the atmosphere in which the transaction was eventually carried out.

In *Liles vs. Terry* (1895) 2 Q. B. 679, the client of a solicitor, without independent advice, made a voluntary conveyance to him of certain premises in trust for herself for life, and after her death in trust for the solicitor's wife, who was her niece. The Court of Appeal set aside the deed although "the plaintiff intended to make the gift.....and knew that she could not afterwards alter it and intended to bind herself irrevocably". Lord Esher was satisfied that the position "was fully explained by the solicitor to the plaintiff before she executed the deed, so that she did precisely what she intended to do and that no undue influence whatever was exercised on her". Nevertheless, he applied "the positive rule of equity to the effect that, because the solicitor who acted in relation to the execution of the deed was the husband of the plaintiff's niece, *and the plaintiff had not the advice of an independent solicitor*, therefore the gift which the plaintiff intended to make for the benefit of the niece was invalid. In other words, *there is in such a case a legal presumption of undue influence by the solicitor which cannot be met or rebutted by any evidence*". The House of Lords took a similar view in *Willis vs. Barron* (1902) A. C. 271 where the gift had been obtained from a client in favour of his solicitor's son.

The proper functions of an independent legal adviser whose services are called in aid in transactions of this nature are clearly indicated by Fletcher Moulton L.J. in *Coomber vs. Coomber* (1911) 1 Ch. 723. "It is necessary", he said, "that some independent person, free from the taint of interest which would affect his advice, *should put clearly before the person what the nature and consequences of the act are*.....The donor should be for the time being removed entirely from the suspected atmosphere, and from the clear language of an independent mind he should

know precisely what they are doing". In *Inche Noriah vs. Shaik Ali* (1929) A. C. 127 the Privy Council dealt with a case where the donor had in fact consulted an independent lawyer who, however, did not possess "a knowledge of all the relevant circumstances" which was essential to the best independent advice which "a competent and honest adviser would give if acting solely in the interests of the donor". The gift was set aside. In the present case, it cannot be pretended that Mr. Hamid stood in the position of an independent adviser when his services were procured merely to draft and attest the deed of gift. He was not retained to give any advice to the plaintiff and, in the words of Lord Hailsham in the case to which I have referred, there was really no occasion for him to "bring home to the plaintiff the consequences to himself of what he was doing or the fact that he could more prudently, and equally effectively, have benefitted the donee without undue risk to himself by retaining the property in his own possession during his life and bestowing it upon the donee by his will".

It would seem that the decision of the Privy Council in *Inchi Noriah's* case has to some extent modified the rigours of the equitable doctrine laid down earlier in *Liles vs. Terry* (*ibid*). The present rule, in its modified form, is that the donee must rebut the presumption of undue influence by proof of circumstances which satisfy the Court that the gift was the result of the free exercise of the donor's independent will. "The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee (*i.e.* the solicitor or the relative in whom the solicitor has a special interest) and with the full appreciation of what he was doing". Lord Hailsham has taken the view that such proof *may often be* "*the only means by which the donee can rebut the presumption*", and any proctor placed in Mr. Wadood's position would be well advised to assume that no other method of removing the suspicion created by the situation is likely to satisfy a Court of law.

The principles which are enunciated in the authorities emphasise the importance, from the point of view of public policy of "insisting that a gift made under circumstances which give rise to the presumption of undue influence must be set aside unless the donee is able to satisfy the Court of facts sufficient to rebut the presumption". In the present case I am content to say, without casting an aspersions on the *bona fides* of Mr. Wadood, that the presumption of undue influence, which was created by the existing professional relationship in which he stood towards the plaintiff, has not been rebutted. The plaintiff was entitled before making over his valuable residential house to his proctor's wife, to independent advice which in this case was not made available to him. I would therefore set aside the judgment of the learned District Judge and enter a decree setting aside the deed of gift No. 1149 dated 21st June, 1943. The plaintiff is entitled to the costs of the argument in this Court, but in all the circumstances of this case I would make no order as to the costs of the trial as between the plaintiff and the 1st defendant. He unnecessarily, and with little regard for the truth, exaggerated the grounds on which his cause of action was based. With regard to the costs of the defendants who were substituted as parties in the place of Mr. Wadood on his death, it seems to be that there was no need to join them in the proceedings. I would therefore order the plaintiff to pay to these defendants their costs both here and in the Court below.

In the view which I have taken, I do not propose to discuss the difficult question whether, and to what extent, the proviso to section 3 of the Muslim Intestate Succession and Wafks Ordinance (Cap. 50) has altered the earlier law affecting donations under the Muslim Law. With regard to the preliminary objection raised by Mr. Jayawardene to the constitution of this appeal, I agree so entirely with the observations made by my brother Pulle in his separate judgment that it is unnecessary to add to anything which he has said. It is very much to be hoped that the Civil Appellate Rules will be amended at any early date so as to authorise Judges to grant relief to appellants, where as in this case, a technical breach of the rules has caused no prejudice to the other side. To my mind, it would be a travesty of justice if some mere technicality were to deprive a party of his right of appeal to the Supreme Court from a judgment which seriously affect his interests. Until the present rule is relaxed, I see no reason why the revisionary powers of this Court should not be exercised in appropriate cases.

Appeal allowed.

Present : BASNAYAKE, J.

KUMARASWAMY vs. SANMUGAM AND OTHERS

S. C. 169—*C. R. Kayts* 6661

Argued on : 20th November, 1950
Decided on : 28th May, 1951

Thesawalamai—Ordinance 59 *of* 1947—*Action for pre-emption brought one year after registration of transfer deed—Sale before Ordinance came into operation—Vested rights—Retrospective effect.*

Held : (1) That Ordinance 59 of 1947, which lays down that no action to enforce the right of pre-emption shall be instituted or maintained, if more than one year has elapsed from the date of registration of the purchaser's deed of transfer, does not apply, where the sale took place before the Ordinance came into operation.

(2) That under our law, a statute is not to be construed as taking away vested rights unless there is express provision to that effect.

C. Renganathan with *S. Sharvananda*, for the plaintiff-appellant.

No appearance for the respondent.

BASNAYAKE, J.

The sole question that arises for decision on this appeal is whether the instant case is governed by Ordinance No. 59 of 1947.

The learned Commissioner has held that it is so governed. Hence this appeal.

Shortly the facts are as follows : The plaintiff and the defendants were co-owners of a land called "Sinnathoppu" in extent 15 lms v.c. The plaintiff claims to be entitled to an undivided 36/48 share, and the first and second defendants claim the remainder. The plaintiff complains that the first and second defendants, without notice to him and without his knowledge, sold 5/48 to the third defendant who was neither a co-owner nor an adjacent land owner having an *otty* mortgage on the share of the said land.

At the trial ten issues were settled. The tenth which the learned Commissioner has decided as a preliminary issue reads :—

> "Can the plaintiff institute or maintain this action to enforce the right of pre-emption if more than one year has elapsed from the date of registration of the deed of transfer No. 10964 of 20-11-47 attested by Mr. Kanagasabai at the time this action was instituted ?"

The above issue is based on section 9 of the Thesawalamai Pre-emption Ordinance No. 59 of 1947 (hereinafter referred to as the Ordinance) which came into operation on 1st July, 1948, (Gazette of 28th May, 1948). That section reads :—

> "No action to enforce a right of pre-emption on the ground that the notice required by section 5 was not given or that the notice given was irregular or defective shall be instituted or maintained—
>
> (i) if the actual purchaser of the land is also a person who at the time of the purchase had the right of pre-emption over the property purchased by him ; or
>
> (ii) if more than one year has elapsed from the date of the registration of the purchaser's deed of transfer."

In the instant case the sale took place before the Ordinance came into operation and the obligations imposed by section 5 were not law at the time. Section 9 cannot therefore be regarded as applying to the transaction. It has to be determined according to the law then in force, viz., Part VII, Section 1, of the Thesawalamai. Though section 14 has repealed so much of the Thesawalamai as is inconsistent with the Ordinance, section 6 (3) of the Interpretation Ordinance provides for the application of the old law in regard to rights acquired before the repeal. It is clear from that provision that under our law a statute is not to be construed as taking away vested rights unless there is express provision to that effect.

The judgment of the learned Commissioner cannot be sustained. The appeal is allowed with costs, and the case will go back for the trial of the other issues.

Appeal allowed.
Case sent back for trial.

END OF VOLUME XLV