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THE

NEW LAW REPORTS

containing Cases decided by the Supreme Court of Ceylon, Court of Criminal Appeal and Her Majesty the Queen in Her Privy Council on appeal from the Supreme Court of Ceylon

WITH A DIGEST

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JUDGES OF THE SUPREME COURT

OCTOBER, 1954, TO SEPTEMBER, 1955

Chief Justice

The Hon. Sir Alan Edward Percival Rose

The Hon. Mr. H. H. Basnayake (acting)

Puisne Justices

The Hon. Mr. C. Nagalingam

The Hon. Mr. E. F. N. Gratiaen

The Hon. Mr. E. H. T. Gunasekara

The Hon. Mr. M. F. S. Pulle

The Hon. Mr. V. L. St. Clair Swan

The Hon. Mr. H. W. R. Weerasooriya

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TABLE OF CASES

	PAGE
Abdul Cader *v.* Commissioner for Registration of Indian and Pakistani Residents	572
Abdul Hamid *v.* Odhavji Anandji & Co., Ltd.	505
Abeywardene *v.* Dharmapala	399
Adamjee, Mohamedaly *v.* Hadad Sadeen	345
Agnes Perera *v.* Edward Perera	241
Alibhoy *v.* Ceylon Wharfage Co., Ltd.	470
Amarasekara *v.* Abeygunawardene	361
Ambalavanar *v.* Navaratnam	422
Annamalai Chettiar *v.* Greasy	477
Appuhamy, B. A. J. *v.* Silva	247
Appuhamy, Charles *v.* Abeysekera	243
Appuhamy, Sarnelis *v.* Ram Iswara	221
Arumugam *v.* Vijayaratnam	259
Assistant Government Agent, Matara *v.* Siddik	575
Attorney-General *v.* Alwisappu	254
Attorney-General *v.* Uplands Bus Co., Ltd.	248
Baiya *v.* Karunasekera	265
Banda, Muthu *v.* The Queen	217
Barrett *v.* Altendorff	25
Billimoria *v.* Commissioner for Registration of Indian and Pakistani Residents	156
Buddhadasa *v.* Nadaraja	537
Cader, Abdul *v.* Commissioner for Registration of Indian and Pakistani Residents	572
Cargills (Ceylon) Ltd. *v.* Commissioner of Stamps	187
Carthelis, Don *v.* Ibrahim	561
Central Union Insurance Co., Ltd. *v.* Boteju	149
Charles Appuhamy *v.* Abeyesekera	243
Chatoor *v.* General Assurance Society, Ltd.	566
Chelliah *v.* Kadiravelu	455
Chellan *v.* Ponnan	95
Chelvanayakam *v.* Natesan	271
Chissel *v.* Chapman	121
Cooray *v.* Dias	234
Cooray *v.* Grero	87
Corera *v.* Muttucumaru	80
Dambadeni Hatpattu Co-operative Stores Union, Ltd. *v.* Yagoda	327
Dep *v.* Nagaratnam	262
De Silva, Edwin *v.* Karunadasa	1
De Silva, J. H. *v.* Abeyaratne	574
De Silva, K. T. N. *v.* Commissioner of Motor Traffic	447
De Silva, M. Justin *v.* Don Niculas	439
De Silva, M. M. R. *v.* The Registrar of Companies	519
De Silva, T. A. K. *v.* Hirdramani Ltd.	481
De Silva, V. E. B. *v.* Mervyn Fernando	406
Dharmaratne *v.* Fernando	498
Don Carthelis *v.* Ibrahim	561
Don Geeris Appu *v.* The Queen	409
Don Seemon *v.* Dias	232
Duraisamy *v.* Commissioner for Registration of Indian and Pakistani Residents	313

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	PAGE
Ekmon *v.* Sugathadasa	191
Fernando *v.* Goonewardene	238
Fernando *v.* Milly Nona	549
Fernando *v.* Podi Nona	491
Fernando *v.* The Queen, ...	228
Fonseka *v.* Chandrasekera	114
Fuard *v.* Weerasuriya	12
Ganapathy *v.* Ramasamy	495
Geeris Appu *v.* The Queen	409
Githohamy *v.* Karanagoda	250
Gunatilleke *v.* Fernando	105
Hameed *v.* Commissioner for Registration of Indian and Pakistani Residents	152
Hamid, Abdul *v.* Odhavji Anandji & Co., Ltd.	505
Hamid Marikar *v.* Commissioner of Income Tax	359
Haturusinghe *v.* Kadaduraya	60
Herat *v.* Amunugama	529
Holland Colombo Trading Society, Ltd. *v.* Alawdeen	385
Incorporated Law Society of Ceylon *v.* Commissioner of Income Tax ..	97
In re de Soyza	287
In re Evelyn Warnakulasuriya	525
In re Jayatilleke	49
In re Noor Jehan	29
In re South Western Bus Co., Ltd.	30
In re Warnakulasuriya	525
Jamaldeen *v.* de Silva	68
Jansen *v.* Sanitary Inspector, Dehiwala-Mt. Lavinia U. C. ..	445
Jayalath *v.* Abdul Razak	145
Jayaram *v.* Saraph	22
Jayasinghe *v.* Boragodawatta Co-operative Stores	462
Jayasinghe *v.* Goolam Hussein	381
Jayatilleke *v.* Siriwardene	73
Jayatilleke, *In re*	49
Jehan, *In re*	29
Justin de Silva *v.* Don Niculas	439
Kadirgamadas *v.* Suppiah	172
Kanagaletchumy *v.* Marikair	465
Kanagaratnam *v.* Bartholomeusz	71
Kanapathipillai *v.* The Queen	397
Kandy Omnibus Co., Ltd. *v.* Roberts	293
Kandy Omnibus Co., Ltd. *v.* Silverline Bus Co., Ltd.	289
Kumaraswamy *v.* Subramaniam	44
Law Society *v.* Commissioner of Income Tax	97
Lewis Singho *v.* Liyanage	428
Liyanage *v.* Thegiris	546
Lokubanda Arachchi *v.* Mohamed	511
Luvis *v.* The Queen	442
Marikar, Hamid *v.* Commissioner of Income Tax	359
Mawelle Dhammavisuddhi Thero *v.* Kalawane Dhammadassi Thero ..	284
Misso *v.* Mohamedally	370

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PAGE

Mohamedaly Adamjee *v.* Hadad Sadeen 345
Moragolle Sumangala, Rev. *v.* Rev. Kiribamune Piyadassi 322
Murugiah *v.* Jainudeen 176
Muthu Banda *v.* The Queen 217

Navaratnam *v.* The Village Committee of Kandukara Ihala Korale .. 430
Noor Jehan, *In re* 29
North-Western Blue Line Bus Co., Ltd. *v.* Green Line Omnibus Co., Ltd. 116
Nuhman *v.* Abdul Nakeem 418

Palaniyandi *v.* Commissioner for Registration of Indian and Pakistani Residents 374
Palisena *v.* Perera 407
Pandithakoralage *v.* Selvanayagam 143
Paramasivam *v.* Commissioner for Registration of Indian and Pakistani Residents 514
Pemananda Thero *v.* Thomas Perera 413
Perera, Agnes *v.* Edward Perera 241
Perera, E. L. *v.* Munaweera 433
Perera, K. V. *v.* Dharmatillake 214
Perera, N. Solomon *v.* Thomas Fernando 380
Perera, Podinona *v.* Haniffa 165
Perera, Simon *v.* Rasanayakam 42
Perera & Sons, Ltd., *v.* Pate 334
Podinona Perera *v.* Haniffa 165

Queen, The *v.* ——— (*See* R. *v.* ———)

R. *v.* Don Geeris Appu 409
R. *v.* Fernando, M. S. 228
R. *v.* Gunawardene, Thejawathie 193
R. *v.* Kanapathipillai 397
R. *v.* Luvis 442
R. *v.* Muthu Banda 217
R. *v.* Ruparatne 353
R. *v.* Sumanasena 11
R. *v.* Thejawathie Gunawardene 193
R. *v.* Vaikunthavasan 102
Ramalingam *v.* The Jaffna Central Bus Co., Ltd. 501
Ramasamy Kone *v.* Ginigathena Police 404
Re ——— (*See* In re)
Regina *v.* ——— (*See* R. *v.* ———)
Rodrigo *v.* Narayanasamy 402
Ruparatne *v.* The Queen 353

Salahudeen *v.* Commissioner of Stamps 351
Sapi Nona *v.* Inspector of Police, Horana 119
Sarnelis *v.* Civilian Labour Administrative Officer 366
Sarnelis Appuhamy *v.* Ram Iswara 221
Savundranayagam *v.* Commissioner of Income Tax 457
Sedarahamy *v.* Abubucker 83
Seemon, Don *v.* Dias 232
Seenivasagam *v.* Kirupamoorthy 450
Seevaratnam *v.* Gopalasamy 66
Senanayake *v.* Navaratna 5
Senaratne *v.* Simon Appu 550

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	PAGE
Setuwa *v.* Ukku	337
Shahul Hameed *v.* Commissioner for Registration of Indian and Pakistani Residents	152
Shivagurunathan *v.* Visaladchi	376
Silinduhamy *v.* Weeraperuma	182
Silva *v.* Karunawathie	93
Silva *v.* Muniamma	357
Silva, de *v.* ——— (*See* de Silva *v.* ———)	
Simon Appu *v.* Somawathie	275
Singarayer *v.* The Attorney-General	39
Sinnathamby *v.* Kandiah	535
Sinnathurai *v.* Sub-Inspector of Police, Vavuniya	509
Sivakkolunthu *v.* Kamalambal	52
Solomon Perera *v.* Thomas Fernando	380
South-Western Omnibus Co., Ltd. *v.* James Silva	330
South-Western Bus Co., Ltd., *In re*	30
Soyza, *In re*	287
Subbiahpillai *v.* M. A. Sheriff & Co., Ltd.	553
Sumanasena *v.* The Queen	11
Sumangala, Rev. Moragolle *v.* Rev. Kiribamune Piyadassi	322
Superintendent, Yatadola Estate, Matugama *v.* Muthuraman	523
Suppiah *v.* Sivarajah	226
Suppiah Chettiar *v.* Samarakoon	161
Surabiel *v.* Ekanayake	167
Thangadorai Nadar *v.* Esmailjee	343
Theobald *v.* Arambepola	563
Urban Council, Nawalapitiya *v.* The Attorney-General	169
Vaikunthavasan *v.* The Queen	102
Valachenai Co-operative Stores *v.* Vellacuddy	171
Visvalingam *v.* Gajaweera	111
Witharne *v.* de Zylva	57
Warnakulasuriya, *In re* Evelyn	525
Waseela Umma *v.* Sally	425
Werahera Wimalasara, Rev. *v.* Porolis Fernando	369
Wickremasinghe *v.* Abdul Raheem	280
Wijesinghe *v.* Martin	158
William *v.* Commissioner of Income Tax	257
Wimalasara, Rev. Werahera *v.* Porolis Fernando	369

ERRATA

Page 44—Headnote, line 1, for *appears* read *applies*.

Page 252—Line 15 from bottom, for *ensures* read *enures*.

Page 313—Middle of headnote, for *Section* (2) read *Section 6* (2).

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DIGEST

Actions—

PAGE

1. Condictio indebiti—*Auction sale of immovable property—Notarial fees—Exorbitant sum charged—Payment made under mistake of fact—Remedy of purchaser.*

A purchaser at a public auction of immovable property is entitled to sue a notary for the refund of exorbitant fees paid under a mistake of fact to the notary for attesting the conditions of sale. The obligation in such a case arises out of quasi-contract.

SARNELIS APPUHAMY *v.* RAM ISWARA 221

2. *Land Development Ordinance (Cap. 320)—Permit-holder—His right to maintain* actio rei vindicatio.

A permit-holder under the Land Development Ordinance enjoys a sufficient title to enable him to maintain a vindicatory action against a trespasser.

PALISENA *v.* PERERA 407

Adjournment—

See POSTPONEMENT.

Administration of Estates—

1. *Death of plaintiff—Assignee's claim to be substituted as plaintiff—"Legal representative"—Civil Procedure Code, s. 394 (2).*

Where the plaintiff in a pending action dies it is only his legal representative who can be substituted as a party in his place. A person, therefore, who claims the plaintiff's interests in the action by virtue of an assignment which had been made by the plaintiff is not entitled to be substituted, as he is not a legal representative within the meaning of section 394 (2) of the Civil Procedure Code.

KADIRGAMADAS *v.* SUPPIAH 172

2. *Fiduciary relations—Administrator and beneficiary—Gaining of "pecuniary advantage" by fiduciary—Constructive trust—Trusts Ordinance (Cap. 72), s. 90* 529

See TRUSTS (3).

Adoption of Children Ordinance—

See HABEAS CORPUS (2).

Agency—

Parliamentary Election—Agency—Principles applicable—Proof of agency 271

See PARLIAMENTARY ELECTIONS (2).

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PAGE

Appeal—

1. *Absence of complainant—Acquittal of accused—Power of Magistrate to cancel order—Right of appeal if cancellation is refused—Criminal Procedure Code, ss. 194, 336.*

An appeal can be preferred as of right against an order refusing to vacate an order of acquittal passed under section 194 of the Criminal Procedure Code.

SEEVARATNAM *v.* GOPALASAMY 66

2. *Motor Traffic Act, No. 14 of 1951—Right of appeal to Supreme Court—Appealable period—Computation—Sections 210, 211, 212.*

The appealable period of twenty-one days in section 212 (2) of the Motor Traffic Act runs from the date of the determination or order of the Transport Appeals Tribunal and not from the date on which notice of the determination or order is served on the appellant.

NORTH-WESTERN BLUE LINE BUS CO., LTD. *v.* GREEN LINE OMNIBUS CO., LTD. 116

3. *Workmen's Compensation Ordinance—Appeal—Form of petition of appeal—Sections 48 (1), 49 (1), 51—Criminal Procedure Code, s. 340 (2).*

A point of law stated in a petition of appeal filed under section 48 (1) of the Workmen's Compensation Ordinance need not be certified by an advocate or proctor in terms of section 340 (2) of the Criminal Procedure Code.

Thomas v. Ceylon Wharfage Co., Ltd. (1948) 49 N. L. R. 397, overruled.

SARNELIS *v.* CIVILIAN LABOUR ADMINISTRATIVE OFFICER .. 366

4. *Revision—Order of Supreme Court calling for record—Jurisdiction of lower Court thereafter to continue proceedings.*

When, in an application in revision, the Supreme Court calls for the record of the proceedings in question, the Judge of the lower Court must forward the record immediately and has no jurisdiction to continue the proceedings; a judgment or order pronounced by him thereafter in contravention of this rule is *ultra vires.*

WASEELA UMMA *v.* SALLY 425

5. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Citizenship by registration—Power of Supreme Court to order fresh inquiry.*

When an appeal is preferred to the Supreme Court by an applicant who has been refused citizenship the Supreme Court has inherent jurisdiction to order, if necessary, a fresh inquiry.

PARAMASIVAM *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 514

6. *See also* PRIVY COUNCIL.

Attorney-General—

Power of Attorney-General to exhibit informations 193

See TRIAL AT BAR.

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Bills of Exchange Ordinance— PAGE

See NEGOTIABLE INSTRUMENTS.

Brothels Ordinance—

Brothels Ordinance—Charge of "Keeping or managing a brothel"—Quantum of evidence—Sentence.

If a person keeps in a place even one solitary prostitute to be supplied to all comers, that person may be convicted of "keeping or managing a brothel".

Where a Magistrate chooses to impose a sentence of imprisonment rather than a fine for a first offence under the Brothels Ordinance, he must give reasons for so doing, or at least the proceedings must show that he has exercised his discretion properly.

PODINONA PERERA *v.* HANIFFA 165

Buddhist Ecclesiastical Law—

1. *Vihara—Dedication—Failure of donors to nominate first incumbent—Resulting position in regard to incumbency—Right of incumbent to appoint successor.*

A Vihara was dedicated in 1904 in the presence of a number of priests belonging to the Ramanna Nikaya. G, the most senior of the priests, accepted the dedication on behalf of the Sangha. At the time of the dedication no Viharadhipathy was expressly nominated by the donors.

Held, that, in the absence of an express nomination of a Viharadhipathy by the donors, there was nothing to counter the inference that the intention was to constitute G himself as the first incumbent. Even if G could not be regarded as the incumbent, the legal position was that the incumbency was vacant and, in that circumstance, the right to appoint to the vacant incumbency vested in the Chapter on whose behalf the Vihara was accepted, as in a case where the chain of pupilary succession was broken.

Held further, that a Viharadhipathy was not entitled to appoint as his successor a priest who was not his pupil.

MAWELLE DHAMMAVISUDDHI THERO *v.* KALAWANE DHAMMADASSI THERO 284

2. *Incumbency of temple*—Sisyanusisya paramparawa—*Impostor cannot acquire right to incumbency by prescription—Prescription Ordinance (Cap. 55), s. 10*—Res judicata—*Two important principles—Privity between pupil and tutor.*

The status of the lawful incumbent of a Buddhist temple under the *sisyanusisya paramparawa* cannot be extinguished by prescription by a *de facto* incumbent who is an impostor.

For the purpose of adjudicating upon a plea of *res judicata* raised in a dispute concerning rights to the incumbency of a Buddhist temple no privity of estate or interest can be assumed between a pupil and his tutor who is not proved to have been the lawful incumbent.

Two important tests must be applied whenever a plea of *res judicata* is raised: (1) whether the judicial decision in the earlier litigation was, or at least involved, a determination of the same question as that sought to be controverted in the later litigation in which the estoppel is raised, and, if so, (2) whether the parties to the later litigation are the parties or the privies of the parties to the earlier decision.

REV. MORAGOLLE SUMANGALA *v.* REV. KIRIBAMUNE PIYADASSI .. 322

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PAGE

3. *Trust—Property donated to seminary under a trust instrument—No formal dedication to Sangha—Power of trustee to remove a priest from premises—Sanghika property.*

The ceremonies which took place when a Buddhist seminary was established upon certain premises did not constitute a formal dedication sufficient to pass the premises from private ownership to the Sangha. Thereafter the owners of the premises conveyed the premises to trustees to be used as a Buddhist seminary for the benefit of a certain priest, G., and his pupil priests. On the face of the instrument, the lay trustees were vested with power, *inter alia*, to appoint a successor to G. in the office of " Chief Priest " and also to remove " any of the priests remaining in the premises " on grounds of misconduct or misbehaviour.

Held, that inasmuch as the premises in question were not Sanghika property the trustees were entitled to remove a priest from the premises on *bona fide* grounds in accordance with the power vested in them under the trust instrument.

REV. WERAHÉRA WIMALASARA *v.* POROLIS FERNANDO .. 369

4. *Buddhist Temporalities Ordinance (Cap. 222)—" Controlling Viharadhipati "—Meaning of expression—Sections 2, 4 (1) and (2), 20, 22, 29 (1).*

In the case of a temple which was exempted from the operation of section 4 (1) of the Buddhist Temporalities Ordinance (Cap. 222) the management and the title to the property of the temple are vested in the priest who is the principal bhikkhu in the line of pupillary succession from the first incumbent of that temple. The " controlling viharadhipati " need not be resident in the temple.

" At no time in the history of Buddhist temples in this Island has a priest who had no right to the incumbency of the temple been invested with the title to, or the power to manage, the temporalities of the temple."

" In enacting Cap. 222 there was no intention on the part of the legislature to draw a distinction between a Viharadhipati and an incumbent."

Sumana Therunnanse v. Somaratne Therunnanse (1936) 5 C. L. W. 37 and *Chandrawimala Therunnanse v. Siyadoris* (1946) 47 N. L. R. 304, not followed.

PEMANANDA THERO *v.* THOMAS PERERA 413

By-laws—

See LOCAL AUTHORITIES (2), (6), (7).

Carriers—

Carrier by trade—Action for failure to deliver goods—Quantum of proof necessary—Vis major—" *Boat note* "—*Customs Ordinance, s. 40.*

Plaintiff sued defendant, a Company carrying on the business of landing and shipping of goods in the Port of Colombo, for their failure to deliver to the plaintiff a consignment of 436 bags of beans—each bag bearing the identifying mark " I.O.T.C."—alleged to have been consigned to the plaintiff on the s.s. " June Crest " which arrived at the Port of Colombo.

Held, that before the plaintiff could claim damages from the defendant for loss or non-delivery of goods, he had to prove that 436 bags bearing the identifying mark " I.O.T.C." were actually delivered out to the defendant at the ship's side.

Held further, that in the absence of proof of negligence, the defendant, as carrier, was not liable to deliver the goods in good condition. In order to establish that the goods had deteriorated through negligence on the part of the defendant, the plaintiff should have tendered evidence of the sound condition of the goods at the time of the consignment and of the improbability of deterioration during transit.

A carrier's obligations towards a consignee discussed.

ALIBHOY *v.* CEYLON WHARFAGE CO., LTD. 470

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PAGE

Certiorari—

See WRIT OF CERTIORARI.

Charge—

1. *Indictment—Particulars—Mistake as to date of alleged offence—Effect of error—Criminal Procedure Code, s. 171.*

The date given in the plaint of an alleged offence was stated to be "on or about March 28, 1954". The evidence led at the trial gave the date as March 29, 1954.

Held, that a mistaken date in an indictment is not a material error unless the date is of the essence of the offence or the accused is prejudiced.

PANDITHAKORALEGE *v.* SELVANAYAGAM 143

2. *Charge—Duplicity—Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172), s. 26—Criminal Procedure Code, ss. 171, 425.*

The charge against the accused was that he did "sow, plant or cultivate" hemp plants in breach of section 26 of the Poisons, Opium and Dangerous Drugs Ordinance.

Held, that the charge was not bad for duplicity. Section 26 of the Poisons, Opium and Dangerous Drugs Ordinance created one offence, whether it was committed by sowing, planting or cultivating.

Held further, that, even if there was error in the charge, the error was immaterial.

WIJESINGHE *v.* DON MARTIN 158

3. *Excise Ordinance (Cap. 42)—Possession of excisable article—Difference between s. 43 (a) and s. 44—Misjoinder of charges.*

The charge against the accused was that he had in his possession seven bottles of unlawfully manufactured arrack in breach of section 43 (*a*) of the Excise Ordinance, but the penal section under which the offence was punishable was stated to be section 44 of the Ordinance.

Held, that sections 43 (*a*) and 44 created two distinct and separate offences, and that the reference to these two sections in respect of one and the same charge had the effect of a joinder of two separate charges.

DON SEEMON *v.* DIAS 232

4. *Joinder of accused—"Same transaction"—Criminal Procedure Code, ss. 148 (1) (b), 184, 187 (1)—Excise Ordinance (Cap. 42), ss. 17, 43 (g), 44.*

When two or more persons are accused of different offences committed in the same transaction within the meaning of section 184 of the Criminal Procedure Code, it is not necessary that the charge must expressly state that the offences were committed in the same transaction.

But where the charge is framed by Court under section 187 (1) of the Criminal Procedure Code without any prior evidence that the offences were committed in the course of the same transaction and exactly in terms of a police report which does not contain even an accusation that the offences were so connected, an accused person cannot be convicted of the offences if the evidence led at the trial does not prove that the offences were committed in the course of the same transaction.

COORAY *v.* DIAS 234

Cheating—

Penal Code—Cheating—Section 403—Meaning of term "property".

In a prosecution under section 403 of the Penal Code for cheating and dishonestly inducing a delivery of property, it was proved that the accused had deceived the Assistant Controller of Exchange into believing

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that he, the accused, had not purchased foreign exchange for travel for the year 1950 and thereby had induced the Assistant Controller to deliver to the accused a permit for foreign exchange for travel to the value of Rs. 750.

Held, that a permit for foreign exchange for travel could be regarded as " property " within the meaning of section 403 of the Penal Code.

KANAGARATNAM *v.* BARTHOLOMEUSZ 71

Cheques—

See NEGOTIABLE INSTRUMENTS.

Children and Young Persons Ordinance—

See HABEAS CORPUS (2).

Citizenship—

1. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 6, as amended by Act No. 45 of 1952, s. 2 (2) and (3)—Acquisition of citizenship—Applicant's wife—Proof of her uninterrupted residence in Ceylon.*

In an application made by a person, under the Indian and Pakistani Residents (Citizenship) Act, for the registration of himself and his family as citizens of Ceylon, the applicant, who had married in India on February 24, 1941, showed that his wife did not join him in Ceylon earlier than June 3, 1942, owing to apprehension of enemy action and by reason of the special difficulties created by the existence of a state of war.

Held, that the applicant was entitled to claim the benefit of the provision contained in the last paragraph of section 6, as amended by Act No. 45 of 1952.

SHAHUL HAMEED *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 152

2. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, as amended by Act No. 37 of 1950—Section 2A (b)—Effect of words " while in Ceylon".*

The words " while in Ceylon " in paragraph (*b*) of Section 2A of the Indian and Pakistani Residents (Citizenship) Act connote actual physical presence in Ceylon.

BILLIMORIA *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 156

3. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Citizenship by registration—Corroborative evidence—Prima facie case—Section 14 (7) (a).*

If, in an application for acquisition of citizenship by registration under the provisions of the Indian and Pakistani Residents (Citizenship) Act, the Commissioner insists on having corroborative evidence of the applicant's testimony, such corroborative evidence must not be rejected arbitrarily.

PALANIYANDI *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 374

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PAGE

4. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Citizenship by registration—Residential qualification—Standard of proof required—Quantum of evidence—Power of Supreme Court to order fresh inquiry.*

The qualifications of a person to be registered as a citizen of Ceylon under the Indian and Pakistani Residents (Citizenship) Act have to be proved on a balance of probability (as in civil proceedings) and not " beyond reasonable doubt " (as in criminal trial).

When an appeal is preferred to the Supreme Court by an applicant who has been refused citizenship the Supreme Court has inherent jurisdiction to order, if necessary, a fresh inquiry.

PARAMASIVAM *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 514

5. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Citizenship by registration—Sections 6 and 22 (as amended by Section 4 of Act No. 37 of 1950)—" Permanently settled in Ceylon "—Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, s. 4 (1) (a)—Citizenship Act, No. 18 of 1948, ss. 4, 5—Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947, s. 29.*

In an application by an Indian Tamil to register him and his wife and minor children as citizens of Ceylon—

Held, that under Section 6, read with Section 22, of the Indian and Pakistani Residents (Citizenship) Act, an Indian or a Pakistani residing in Ceylon is entitled as of right to exercise the privilege of being registered as a citizen of Ceylon if at the time of his application (made within the requisite period of time)—

(1) he and his family (if any) possess the residential qualifications respectively prescribed for them by the Act, and he demonstrates his intention to settle permanently in Ceylon by electing irrevocably to apply for registration ; and
(2) he satisfies all the other relevant conditions laid down in Section 6 (2) of the Act ; and
(3) the requirement as to " origin " in paragraph (*a*) of the words of the definition is satisfied, or, he is at least a descendant of a person whose origin was as aforesaid.

Although the concept of " permanent settlement " involves two elements—the fact of residence and the intention permanently to remain in Ceylon—the requisite intention is satisfactorily established by the applicant's positive decision to claim registration with a " clear understanding " of its implications. Once the practical tests prescribed by the Act have been satisfied, it is not necessary to decide inferentially whether or not the applicant may be presumed to have acquired a domicil of choice in Ceylon.

DURAISAMY *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 313

6. *Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 6 (2) (1)—" Assured income "—Proof.*

Documentary evidence is not the only method of establishing an assured income within the meaning of section 6 (2) (1) of the Indian and Pakistani Residents (Citizenship) Act.

ABDUL CADER *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 572

Civil Procedure—

1. *Execution of proprietary decree—Right to challenge validity of decree—Jurisdiction—Civil Procedure Code, ss. 325, 394* 145

See EXECUTION OF DECREES (1).

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PAGE

2. *Liquid claim—Summary procedure—Instrument must bear stamp—Civil Procedure Code, ss. 703, 705 (2), 706.*

A condition precedent to the issue of summons in an action by summary procedure on a liquid claim is that the document on which the action is based should be properly stamped, as required by section 705 (2) of the Civil Procedure Code.

CENTRAL UNION INSURANCE CO., LTD. *v.* BOTEJU .. 149

3. *Civil Procedure Code—Proctor—Appointment—Requirement of writing signed by the client—Section 27—Death of plaintiff—Assignee's claim to be substituted as plaintiff—"Legal representative"—Section 394 (2).*

When the petition of appeal was filed on behalf of the defendants, the Proctor who presented it had not been appointed in writing, as required by section 27 of the Civil Procedure Code, to act for some of the appellants. He was so appointed after the appealable time had expired. He had, however, without objection from any of the parties, represented all the defendants at various stages of the proceedings earlier.

Held, that the irregularity in the appointment of the Proctor was cured by the subsequent filing of a written proxy.

Held further, that where the plaintiff in a pending action dies it is only his legal representative who can be substituted as a party in his place. A person, therefore, who claims the plaintiff's interests in the action by virtue of an assignment which had been made by the plaintiff is not entitled to be substituted, as he is not a legal representative within the meaning of section 394 (2) of the Civil Procedure Code.

KADIRGAMADAS *v.* SUPPIAH 172

4. *Civil Proceduere Code—Execution of money decree—Judgment-debtor's right in a pending action—Liability to seizure and sale—Section 218* .. 226

See EXECUTION OF DECREES (2).

5. *Court of Requests—Taxation of costs* 406

See COSTS (2).

6. *Co-operative Societies Ordinance (Cap. 107)—Section 46 (2) (f)—Award of arbitrator—Procedure for its enforcement—Civil Procedure Code, s. 224.*

When a party makes application to Court to enforce an arbitrator's award under the provisions of the Co-operative Societies Ordinance notice must first be issued to the party against whom the award is sought to be enforced. In such a case an *ex parte* application under section 224 of the Civil Procedure Code is inappropriate.

Kandy Co-operative Urban Bank v. Senanayake (1937) 39 N. L. R. 352, not followed.

JAYASINGHE *v.* BORAGODAWATTA CO-OPERATIVE STORES .. 462

7. *Civil Procedure Code—Necessary party—Refusal to join in action—Duty of Court to add such party—Sections 17, 18 (1), 473.*

Section 473 of the Civil Procedure Code provides that where there are several trustees they shall all be made parties to an action instituted by one or more of them. Hence, if one of them refuses to join in the action it is the duty of the Court, acting under section 18 (1), to add him as a party defendant.

SINNATHAMBY *v.* KANDIAH 535

8. *Interrogatories—Use thereof to obtain admissions.*

Interrogatories may be administered in order to enable the party interrogating to ascertain what the case is he has to meet or what really are the matters in issue.

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PAGE

Plaintiff, an insurance company, instituted action for the recovery of a certain sum of money against the defendant who, at the dates material to the action, held its power of attorney as chief agent in Ceylon. One cause of action proceeded on the basis that the defendant had authority to effect cover notes and to issue policies of insurance thereon on behalf of the plaintiff company. Without any averment to the contrary and without even a suggestion of impropriety on the part of the defendant in effecting a cover note and issuing certain policies in pursuance of the cover, plaintiff suddenly made allegations of fraud and illegality on the part of the defendant in effecting the cover and issuing the policies.

Held, that in order to prevent any surprise at the trial, the defendant was entitled to administer interrogatories for the purpose of ascertaining the facts and circumstances upon which the plaintiff made the allegations of illegality and fraud.

CHATOOR *v.* GENERAL ASSURANCE SOCIETY, LTD. .. 566

9. *See also* ADMINISTRATION OF ESTATES ; APPEAL ; CIVIL PROCEDURE CODE.

Civil Procedure Code—

Sections 17, 18 (1), 473	535
Section 27	172
Section 218	226
Section 224	462
Section 247	439
Sections 325, 394	145
Section 394 .. .. .. 145 ;	172
Section 408	262
Section 473	535
Sections 703, 705 (2), 706	149

See also ADMINISTRATION OF ESTATES ; APPEAL ; CIVIL PROCEDURE.

Collation—

Privy Council—Collation—Matrimonial Rights and Inheritance Ordinance (Cap. 47)—Section 35—Donee's right to keep his gift and renounce share in donor's estate—Registration of Documents Ordinance (Cap. 101)—Section 8—" Instrument affecting land ".

If a father gives property to his son on the occasion of the son's marriage, and dies intestate, the son is not deprived by section 35 of the Matrimonial Rights and Inheritance Ordinance of the option of renouncing all claim to share in his father's estate or of bringing the property into collation. If he chooses the latter alternative, he has a further option of bringing in either the property itself or the value thereof.

Pending administration of the estate of a person who had died intestate it was decided by Court on the 3rd February, 1941, that certain immovable property which had been gifted by the deceased to his son on the occasion of the son's marriage should be brought into collation. No formal order was drawn up to give effect to this decision and no transfer by the donee was executed in favour of the administrator. Subsequently the property was mortgaged by the donee and sold to A by the Fiscal in pursuance of a hypothecary decree entered in favour of the mortgagee. The present action was instituted by A against the administrator for declaration of title to the property and for ejectment of the administrator therefrom.

Held, that the order made by Court on the 3rd January, 1941, could not deprive the donee of his right to sell or mortgage the property. As the property had been mortgaged, and sold to A, the donee could only claim to participate in the estate of the deceased person if he brought

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in the value of the property gifted, since he was no longer in a position to bring in the property itself, but this fact in no way affected A's title to the property.

Held further, that the order of the 3rd February, 1941, could not be regarded as an instrument affecting land within the meaning of section 8 of the Registration of Documents Ordinance.

MURUGIAH *v.* JAINUDEEN 176

Company Law—

1. *Stamps—Trust in favour of Company which is not yet in existence—Conveyance by trustee to Company after grant of incorporation—Amount of stamp duty payable—Stamps Ordinance, Schedule, Part I, Items 23 (1) (b), 23 (4), 23 (8), 27 (Proviso)—Trusts Ordinance, s. 84* .. 351

See STAMPS ORDINANCE (2).

2. *Company Law—Annual general meeting—Failure to hold it—Charge against directors for failure to furnish annual return to Registrar of Companies—Inference of guilt—"Knowingly and wilfully"—Burden of proof—Companies Ordinance, No. 51 of 1938, ss. 106 (1), 108 (1) and (4), 110, 346.*

The directors of a company were charged under section 108 (4) read with section 346 of the Companies Ordinance with having failed to forward to the Registrar of Companies the annual return for a certain year as required by section 108 (1). The accused pleaded that no general meeting was held during the relevant year and that it was, therefore, impossible to furnish the return. They did not, however, establish that the failure to hold the general meeting was not due to any default on their part.

Held, that the failure to hold the general meeting was due to the default of the accused themselves and that they were not entitled, therefore, to rely on their own default as an answer to the charge.

Held further, that the burden was on the accused, as directors, to establish that no blame could be attached to them for failing to carry out the statutory duties cast on them.

DE SILVA *v.* REGISTRAR OF COMPANIES 519

Compromise—

Jurisdiction—Court acting beyond its powers—Consent of parties—Validity of compromise—Rent Restriction Act, No. 29 of 1948, s. 13.

Although parties cannot by agreement give the Courts jurisdiction which the Legislature has enacted that they are not to have, nevertheless a compromise after action which is advantageous to a party and secured to him by a decree subsequently entered of consent is not void as offending the prohibition against waiver. A sub-tenant, therefore, who, after a decree has been entered against the tenant, consents to be bound by it upon conditions advantageous to himself and embodied in the decree by adjustment, cannot subsequently resist enforcement of the decree on the ground that it is invalid for lack of jurisdiction. The sub-tenant, in such a case, forfeits by waiver the protection of section 13 of the Rent Restriction Act.

DEP *v.* NAGARATNAM 26

Condictio indebiti—

Auction sale—Notarial fees—Exorbitant sum charged—Payment made under mistake of fact—Remedy of purchaser 224

See ACTIONS (1).

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PAGE

Consent—

See COMPROMISE.

Construction of Documents and Statutes—

See INTERPRETATION.

Contracts—

1. *Inducement of breach of contract—Ingredients of the wrong* .. 25

See DELICTS (1).

2. *Rent Restriction Act, No. 29 of 1948—Premium paid as condition of grant of tenancy—Right of tenant to recover it—Illegal contract—Sections 8, 15, 23.*

No claim can be grounded on an illegal contract. A tenant, therefore, is precluded from recovering from the landlord any premium paid by him in contravention of section 8 of the Rent Restriction Act as a condition of the grant of the tenancy.

VITHARNE *v.* DE ZYLVA 57

3. Condictio indebiti—*Payment made under mistake of fact—Quasi-contract* 221

See ACTIONS.

4. *Guarantee—Fidelity bond—Misbehaviour of employee—Duty of employer to inform guarantor about it immediately—Co-operative Societies.*

In the case of a continuing guarantee for the honesty of a servant there should be read into the contract " an implied term between the employer and the fidelity guarantor that the former will inform the latter of such cases of dishonesty in the servant as will entitle the employer to dismiss him and that the surety is then entitled to call upon the employer either to dismiss the servant or to discharge him (the surety) from further liability ".

By a bond dated January 14, 1946, the 1st, 2nd and 3rd defendants bound themselves jointly and severally in a sum of Rs. 4,000 to indemnify a registered Co-operative Society against the loss of its property or monies through defalcation or other breach of duty on the part of the 1st defendant during the period of his stewardship as Manager of the Society's Wholesale Department. On March 21, 1946, a shortage of Rs. 1,500 was detected for which the 1st defendant was unable to account. The offence was, however, condoned upon the replacement of the money within a week. Subsequently, on June 30, 1947, it was discovered that 1st defendant had been committing a series of misappropriations to the extent of Rs. 13,701·52 between March 21, 1946, and June 30, 1947. The Co-operative Society thereupon sued all three defendants on the bond dated January 14, 1946, for the recovery of Rs. 4,000.

Held, that the conduct of the Co-operative Society in condoning, without the knowledge or approval of the 2nd and 3rd defendants, the misappropriation brought to light in March, 1946, had the effect of discharging the 2nd and 3rd defendants from liability to indemnify the Society in respect of subsequent acts of dishonesty.

DAMBADENI HATDATTU CO-OPERATIVE STORES UNION, LTD. *v.* YAGODA 327

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PAGE

5. *Rent Restriction Ordinance, No. 60 of 1942—Sections 7 and 14—Premium illegally received by landlord—His right to retain it—Illegal contract.*

Quaere, whether a premium paid by a tenant to his landlord in contravention of the Rent Restriction Ordinance of 1942 and of the later Act of 1948 is recoverable in every case ? Scope of the applicability of the maxim *in pari delicto potior est conditio defendentis* considered.

AMARASEKARA *v.* ABEYGUNAWARDENA 361

6. *Privy Council—Contract—Sale of goods—C. I. F.—Bill of lading—Tender of goods—Tender of documents.*

(i) Although a written contract for the sale of textile goods cited, on the face of it, a price in terms " c.i.f. Colombo " and " Payment " was expressed to be by " Cash against documents " Clause 1 diverged sharply from the typical c.i.f. terms in so far as it provided for " Payment to be made in cash on or before arrival of the goods . . . . Any tender or delivery of the goods, or of the bill of lading or of such delivery order or other document or documents as will enable the buyers to obtain possession of the goods shall in every case constitute a valid tender or delivery ". Clause 4 stated, *inter alia,* that " Notwithstanding that the price of the goods may be expressed to be fixed on c.i.f. or equivalent terms, the buyers shall not be entitled to demand nor shall the sellers be bound to tender or deliver to the buyers any insurance policy, bill of lading invoice or other document or documents whatsoever but any such tender or delivery as described in Clause 1 hereof shall be a good and valid tender or delivery ". Under Clause 2, on receiving notice of the arrival of the goods the buyers undertook to pay all landing or similar charges and remove the goods from the " ship or wharf or store " within two days, and presumably to pay the price which was payable " on " (if not paid before) arrival.

The sellers shipped the goods at Rotterdam on the s.s. " Laurenskerk " taking a bill of lading from its owners for the transit from Rotterdam to Colombo. The Bill of Lading provided, *inter alia,* that the carrier could, if he thought it necessary or expedient, arrange for the goods to be transhipped at any stage of the voyage under a fresh contract with the subsequent carrier. It purported to absolve the owners of " Laurenskerk " from all liability in respect of the goods if transhipped, as from the time of transhipment. It was also subject to the Hague Rules of October, 1923, " unless otherwise provided for in this Bill of Lading ".

Near Genoa, an explosion occurred on board the " Laurenskerk " and the goods were transhipped to the s.s. " Triport ". There was no evidence that there was a contract of carriage with the " Triport " or that the " Triport " issued bills of lading to the " Laurenskerk " or to anyone at all in respect of the goods transhipped into her. On arrival at Colombo the " Triport " did not wait for presentation of any document. She had the goods landed and placed in a customs warehouse at the Port, and departed. The buyers, however, refused to take delivery of the goods in spite of notice given to them by the sellers not only as soon as the " Triport " reached Colombo harbour but also when the goods had been placed in the customs warehouse. There was also evidence that, on February 26, 1948—shortly after the transhipment and before the " Triport " reached Colombo—and subsequently, the sellers demanded payment from the buyers against documents and that the tender of the documents was rejected by the buyers. In the circumstances the sellers instituted action for damages for non-acceptance of the goods, and the issues, stated shortly, were (1) whether there was a valid tender by the sellers to the buyers of documents against which they were bound to pay the purchase price, or, alternatively (2) whether there was a valid tender of the goods themselves, creating an obligation to pay such price.

Held, (*a*) that a contract containing the formula " c.i.f. " is not necessarily such in substance or effect. The contract of sale in the present case was clearly not a c.i.f. contract.

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PAGE

(*b*) that, in view of Clause 2 of the contract, there was a valid tender of the goods themselves, entitling the sellers to payment of the contract price. The sellers were not bound to clear the arrived goods from the customs warehouse before offering them to the buyers.

Semble : As the contract was not a c.i.f. contract, the real question, quoad documents, was whether there was a sufficient tender of documents within the terms of the actual, non c.i.f. contract. The tender of the Bill of Lading issued by the " Laurenskerk " was a good documentary tender under this particular contract.

Obiter : Assuming that the contract was c.i.f. the Bill of Lading offered on February 26, 1948, and re-offered subsequently was not a document against tender of which the buyers were bound to pay. A Bill of Lading with a transhipment clause is not necessarily a bad tender under a c.i.f. contract : but it must in some way give " continuous documentary cover " in respect of the goods over the whole transit ; and a Bill of Lading issued by a shipowner who by the transhipment terms in it disclaims all liability in respect of the goods in the event and as from the time of transhipment, gives no such " continuous " cover. Further, the Bill of Lading was not so affected by the Hague Rules as to become part of a good documentary tender under a c.i.f. contract.

(ii) By Clauses 26 and 27 of the aforementioned Bill of Lading it was provided as follows :—

" 26. *Law of Application.*—In so far as anything has not been dealt with by the provisions of this Bill of Lading the Law of the Netherlands shall apply.

27. *Jurisdiction.*—All actions under this contract of carriage shall be brought before the Court at Amsterdam or Rotterdam and no other Court shall have jurisdiction with regard to any such action unless the carrier appeals to another jurisdiction or voluntarily submits himself thereto. "

Held, that the Clauses might well be important if the action were one between shipper and carrier based on the Bill of Lading viewed as a contract of carriage or affreightment. But in proceedings between seller and buyer, the exclusive jurisdiction of Dutch Courts and the residual application of Dutch law would not be attracted, the action not being on the contract of carriage but on that of sale.

HOLLAND COLOMBO TRADING SOCIETY, LTD. *v.* ALAWDEEN .. 385

7. *Income tax—C.i.f. contract—Payment of purchase price—Void* ab initio—*Liability of the seller or his agent to be taxed in respect of the assumed profits.*

When money is paid by A to B under a mutual mistake as to the substance of the whole consideration, B is not liable to pay income tax in respect of the money received by him.

SAVUNDRANAYAGAM *v.* COMMISSIONER OF INCOME TAX .. 457

8. *Privy Council—Contract—Novation—Delegation.*

The names given to different kinds of novation in Roman-Dutch law introduce no principle which would not equally operate in similar circumstances under the law of contract in England.

S (the plaintiff appellant) had for several years been employed as leading jeweller in a business owned by P. There was also employed in the business S's brother-in-law, W, whom S had earlier introduced into the business. In 1944, S decided to retire from his employment and an agreement was entered into on January 29, 1944, between P, S and W the effect of which was to give S a conditional annuity of Rs. 150 a month during his life and to put W into his place as leading jewellery maker also on certain conditions. The agreement which was duly signed by all the contracting parties expressly provided, *inter alia*, that (1) towards the payment of the aforesaid monthly sum of Rs. 150 by P to S, W should contribute a sum of Rs. 75 monthly from his remuneration, (2) in the event of W dying or being dismissed from service the payment to S

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PAGE

of the " said sum of Rs. 150 shall immediately cease anything herein contained to the contrary notwithstanding ". S thereafter received the sum of Rs. 150 monthly in terms of the agreement.

On June 27, 1946, a private limited company (the defendant respondent) was formed, with P as managing director and chairman of the Board of Directors. It was not in dispute that this company took over the business that had been owned by P. When the company took over the business, W ceased to be in P's employment and became an employee of the Company. In July, 1946, soon after the company was formed, S spoke to P, who then, as managing director of the Company, undertook to make the payments due to S under the agreement. Following on this undertaking, S continued to receive his monthly payments of Rs. 150 which were made by Company cheques, occasionally sent to him under covering letters from the Company.

P died on March 23, 1948. The Company then took the view that there was no longer any liability on it to make payments to S under the agreement of January 29, 1944. S thereupon instituted the present action claiming from the Company payment of Rs. 150 per month.

Held, that, irrespective of any condition with regard to W's employment, a completely new form of contract was made between the Company and the appellant (S) when the Company undertook to pay the appellant for his life an annuity of Rs. 150 per month. Such a contract might be regarded as a mixture of novation and delegation.

T. A. K. DE SILVA *v.* HIRDRAMANI, LTD. 481

9. *Privy Council—Sale of goods—Wrongful refusal to accept the goods—Measure of damages—Special damage—Sale of Goods Ordinance, s. 49.*

Where, in a contract of sale of goods, the buyer wrongfully refuses to take delivery of the goods and there is no available market for the rejected goods at the time of the refusal to accept, then the goods may be sold as soon as buyers can be found. In such a case the amounts realised later, if reasonable steps are taken, are the best measure of their value at the date of the breach of contract ; the prima facie measure of damages that can be claimed under section 49 of the Sale of Goods Ordinance is the difference between the contract price and the value at the date of the breach.

ABDUL HAMID *v.* ODHAVJI ANANDJI & CO., LTD. 505

Control of Prices Act—

See MENS REA.

Co-operative Societies—

1. *Co-operative Societies Ordinance—Dispute between co-operative society and an officer—Arbitrator's award—Cannot be set aside for too technical reason.*

Defendant was the manager of a co-operative society. A dispute between him and the co-operative society was referred to arbitration, but the arbitrator's award itself did not state what office the defendant held under the co-operative society.

Held, that the mere failure to describe the defendant in the award as the ex-manager of the co-operative society did not make the award bad on the face of it.

VALACHENAI CO-OPERATIVE STORES *v.* VELLACUDDY .. 171

2. *Guarantee—Fidelity bond—Misbehaviour of employee—Duty of employer to inform guarantor about it immediately—Co-operative Societies.*

In the case of a continuing guarantee for the honesty of a servant there should be read into the contract " an implied term between the employer and the fidelity guarantor that the former will inform the latter of such

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PAGE

cases of dishonesty in the servant as will entitle the employer to dismiss him and that the surety is then entitled to call upon the employer either to dismiss the servant or to discharge him (the surety) from further liability ".

By a bond dated January 14, 1946, the 1st, 2nd and 3rd defendants bound themselves jointly and severally in a sum of Rs. 4,000 to indemnify a registered Co-operative Society against the loss of its property or monies through defalcation or other breach of duty on the part of the 1st defendant during the period of his stewardship as Manager of the Society's Wholesale Department. On March 21, 1946, a shortage of Rs. 1,500 was detected for which the 1st defendant was unable to account. The offence was, however, condoned upon the replacement of the money within a week. Subsequently, on June 30, 1947, it was discovered that 1st defendant had been committing a series of misappropriations to the extent of Rs. 13,701·52 between March 21, 1946, and June 30, 1947. The Co-operative Society thereupon sued all three defendants on the bond dated January 14, 1946, for the recovery of Rs. 4,000.

Held, that the conduct of the Co-operative Society in condoning, without the knowledge or approval of the 2nd and 3rd defendants, the misappropriation brought to light in March, 1946, had the effect of discharging the 2nd and 3rd defendants from liability to indemnify the Society in respect of subsequent acts of dishonesty.

DAMBADENI HATPATTU CO-OPERATIVE STORES UNION, LTD. *v.* YAGODA 327

3. *Co-operative Societies Ordinance (Cap. 107)—Section 46 (2) (f)—Award of arbitrator—Procedure for its enforcement—Civil Procedure Code, s. 224.*

When a party makes application to Court to enforce an arbitrator's award under the provisions of the Co-operative Societies Ordinance notice must first be issued to the party against whom the award is sought to be enforced. In such a case an *ex parte* application under section 224 of the Civil Procedure Code is inappropriate.

Kandy Co-operative Urban Bank v. Senanayake (1937) 39 N. L. R. 352, not followed.

JAYASINGHE *v.* BORAGODAWATTA CO-OPERATIVE STORES .. 462

Co-owners—

1. *Co-owners—Mortgage of his undivided share by one co-owner—Amicable partition among the co-owners thereafter—Effect of it on the earlier mortgage—Equitable considerations involved—Rule against "unjust enrichment".*

In Ceylon, the rights of a mortgagee, to whom a co-owner has hypothecated his undivided share of the common property, continue to attach exclusively to that share notwithstanding a subsequent "amicable partition" of the property into divided allotments. The mortgage does not automatically attach to any share of the divided allotment conveyed to the mortgagor which had not been previously covered by the bond.

A, B and C who were co-owners effected an "amicable partition" of the common property, implemented by cross-conveyances. The basis of the arrangement was that each should become the sole owner of an unencumbered divided allotment in exchange for his original undivided share in the larger land which each (apart from the implied warranty against eviction) expressly warranted to be unencumbered. In fact A had previously mortgaged his undivided $\frac{1}{3}$ share in the common property to D, but fraudulently suppressed this from B and C.

Held, that, in an action by D to enforce his mortgage bond, D was entitled to a hypothecary decree in respect of the whole land to the extent of A's original interest therein which had been mortgaged. In the result, B and C received less than they had bargained to receive from A in the "amicable partition".

By the acquiescence of all parties, however, the execution-purchaser (who became the owner of an undivided $\frac{1}{3}$ share of the larger land) adopted the earlier "amicable partition" and went into occupation of

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PAGE

A's divided allotment, leaving B and C in continued occupation of the other allotments; and this mode of possession continued for approximately nine years.

Held, that the *status quo* could not be disturbed at the instance of A's heirs. The rule against "unjust enrichment" prevented them from now asserting title to the unencumbered $\frac{2}{3}$ share of the divided allotment possessed by the execution-purchaser, because this relief could not be granted without causing prejudice to B and C whose interests in the other allotments A and A's heirs were under a contractual obligation to protect. The form of decree asked for by A's heirs would be "unjust" because it would indirectly have the effect of diverting the execution purchaser into occupation as a co-owner of the allotments conveyed to B and C which A had warranted to be free from encumbrances.

JAYATILLEKE *v.* SIRIWARDENA 75

2. *Co-owner—Owner also of adjoining land—His right to go over the common property to reach the adjoining land.*

Where in the partition of a land owned in common a portion of it is reserved as common property for use as a lane, a co-owner is entitled to use the lane in order to reach an adjoining land which belongs solely to him if by doing so he does not interfere with the substantial rights of the other co-owners.

CHELLAN *v.* PONNAN 95

3. *Co-owner—Right to build on the common land—Order for demolition of building—Propriety of seeking it in partition action.*

In a partition action, the Court is entitled to order the demolition of a building constructed by a co-owner contrary to the protests of the other co-owners and in violation of their rights as co-owners.

Where a co-owner puts up a building on the common land, he cannot compel any of his co-owners to take over such buildings and pay compensation.

AGNES PERERA *v.* EDWARD PERERA 241

4. *Co-owners—Amicable partition—Plan made by a co-owner—Its value as evidence of divided possession—Prescription—Ouster.*

A plan made at the instance of a co-owner purporting to cause a division of the common land of which the other co-owners apparently had no notice does not form the basis of divided possession. Exclusive possession on the footing of such a plan does not terminate the co-ownership of the land, and no presumption of an ouster can be inferred from such possession.

"When a land is amicably partitioned among the co-owners it is usual to execute cross deeds among themselves or at least that all the co-owners should sign the plan of partition."

CITHOHAMY *v.* KARANAGODA 250

5. *Co-owners—Amicable partition—Right of way—Express grant or reservation necessary.*

When land which is owned in common has been amicably partitioned, a former co-owner is not, as a general rule, entitled to claim a right of way over a portion allotted to another co-owner unless it has been expressly granted or reserved in the cross-conveyances executed by the co-owners, even though a well-defined footpath had existed prior to the severance of the common property.

RODRIGO *v.* NARAYANASAMY 402

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PAGE

6. *Co-owners—Prescription—Adverse possession—Distinction between possession by a co-owner and possession by a stranger.*

Where a stranger enters into possession of a divided allotment of land claiming to be sole owner, although his vendor in fact had legal title only to a share, *Corea v. Appuhamy* (1911) 15 N. L. R. 65 has no application unless his occupation of the whole was reasonably capable of being understood by the other co-owners as consistent with an acknowledgment of their title.

C, who was entitled to only an undivided 1/10 share of a land, entered into a notarial agreement with a stranger, M. By this agreement, C, purporting to be sole owner, employed M to cultivate the entire land as planter for a period of six years expiring on August 21, 1877, after which C undertook to separate a half of the land and the new plantations and to grant the same (i.e., the soil as well as the plantations) to M. M carried out his part of the agreement, but C did not apparently execute a formal conveyance of any part of the common land to M in implementation of his contractual obligation. Nevertheless, the land was in fact divided up into two allotments, Nos. 1 and 2, and lot 2 and the plantations standing on it were openly and exclusively occupied *ut dominus* by M and his heirs after the expiry of the six-year period.

Held, that M and his heirs acquired prescriptive title to the entirety of lot 2, although its area far exceeded the extent which C had legal title to convey to a stranger.

FERNANDO *v.* PODI NONA 491

7. *Improvements made by a co-owner—Scope of his right to be allotted portion which contains the improvements* 546

See PARTITION ACTIONS (7).

8. *See also* PARTITION ACTIONS.

Costs—

1. *Customs Ordinance—Section 146—Security for costs of action—Form in which it may be given—Meaning of word "security"* .. 39

See CUSTOMS ORDINANCE.

2. *Court of Requests—Costs—Taxation as between party and party—Witnesses' expenses—Discretion of Court—Civil Procedure Code, Part 3 of Schedule II.*

Under Part 3 of Schedule II of the Civil Procedure Code, a party who has been awarded costs in a decree in his favour in the Court of Requests is not entitled to claim a sum paid to a lawyer-witness to compensate him for the loss of his professional income while attending the Court in obedience to summons.

V. E. DE SILVA *v.* MERVYN FERNANDO 406

Court of Criminal Appeal Decisions—

1. *Evidence—Child—Capacity to give evidence—Procedure for ascertaining it.*

In a trial before the Supreme Court the questioning of a child with a view to considering whether that child is of sufficient mental power and fit to give evidence must be done in the presence of the jury.

R. *v.* SUMANASENA 11

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PAGE

2. *Culpable homicide—Provocation—Intoxication—Scope of its relevancy—Penal Code, s. 294, Exception 1.*

When considering, in a prosecution for murder, whether the accused was deprived of the power of self-control by grave and sudden provocation the jury must apply an objective test, i.e., whether in the particular case under consideration a reasonable or average man with the same background and in the circumstance of life as the accused would have been provoked into serious retaliation. The effect of this proposition is that the intoxication of the accused is not to be regarded as affecting the gravity of the provocation offered, and should only be taken into account, together with the idiosyncrasies of health and temperament, when the jury determine subjectively whether or not the accused lost his self-control under the stress of the provocation.

The King v. Punchirala (1924) 25 N.L.R. 458, overruled.

R. *v.* Muthu Banda 217

3. *Criminal Procedure—Evidence of accused—Contradictory of previous statement to Police—Right to prove such statement—Evidence in rebuttal—Impeaching credit of witness—Evidence Ordinance, ss. 120 (6), 155 (c)—Criminal Procedure Code, ss. 122 (3), 237 (1).*

The accused in a trial for murder gave evidence on his own behalf which differed from a statement that had been made by him to an Inspector of Police to the effect that about a month prior to the deceased's murder the deceased and his brother had assaulted the accused. Although oral evidence of that statement to the Police could have been adduced by the prosecution as part of its case on the basis that the statement was an admission by the accused relating to a probable motive for the commission of the alleged murder, there were certain circumstances which deterred the prosecution from adducing evidence of it in the first instance. When, however, the accused denied in cross-examination that he had made such a statement, the trial Judge permitted the Crown to call the Inspector of Police to give evidence of the statement for the purpose, as stated by him, of showing that " the witness made a different statement to the Police ". The jury were also warned, in the summing-up, that the effect of the evidence of the accused's statement to the Police could not properly be treated as substantive evidence of any fact.

Held (by the majority of the Court), that the trial Judge was not wrong in permitting the Crown, after the case for the defence had been closed, to lead evidence of the statement made by the accused to the Inspector of Police.

" As was pointed out in the case of *Rasiah v. Suppiah* [(1949) 50 N. L. R. 265] the right given to a party under Section 155 (c) of the Evidence Ordinance of impeaching the credit of a witness by proving a former statement which is inconsistent with his evidence is, strictly speaking, not a right to adduce rebutting evidence for which, by leave of the Judge (in the case of a trial before the Supreme Court), special provision is contained in Section 237 (1) of the Criminal Procedure Code. "

Thuraisamy v. The Queen (1952) 54 N. L. R. 449, distinguished.

R. *v.* Ruparatne 353

4. *Evidence—Dog trained in criminal investigation—Its behaviour and reactions at scene of crime—Relevancy as evidence—Evidence Ordinance, s. 11 (b).*

Very convincing expert evidence should be placed before a Court which is invited to conclude that the mere behaviour of a Police dog by itself renders the existence of any relevant fact in a criminal trial so " highly probable or improbable " as to justify the application of Section 11 (*b*) of the Evidence Ordinance.

R. *v.* Kanapathipillai 397

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PAGE

5. *Trial before Supreme Court—Failure of prisoner to disclose his defence before trial—Liability to be cross-examined on it—Summing-up—Misdirection—Criminal Procedure Code, s. 160.* ..

It is improper to cross-examine a prisoner in regard to his failure to disclose his defence before trial, in the course of the statutory statement made by him under section 160 of the Criminal Procedure Code.

In a trial for murder, the prisoner gave evidence stating that the offence was in fact committed in his presence by one of the witnesses for the prosecution. In spite of protest by his Counsel questions were permitted by Court to be put in cross-examination conveying to the Jury that the defence raised by the prisoner was false by reason of the fact that in his statutory statement he had merely said " I am not guilty " and had not stated that the deceased was stabbed by the witness for the prosecution.

Held, that the cross-examination was improper and that the trial Judge having failed to uphold the objection against it, should have warned the jury most explicitly, in the summing-up, that the accused was well within his rights in not elaborating his defence at the time he made the statutory statement and that he did not thereby put himself in peril of having his defence rejected.

R. *v.* Geeris Appu 409

6. *Charge of murder—Plea of sudden fight—Not specifically raised—Disclosure in evidence—Summing-up.*

In a trial for murder, although it was an integral part of the accused person's defence that the deceased came by his death in the course of a sudden fight, it was not specifically raised as a defence that the accused was the person who inflicted the fatal injury in the course of that fight.

Held, that, having regard to the evidence, the fact that sudden fight was not specifically raised as a defence did not relieve the trial Judge of the duty of placing before the Jury that aspect of the case.

R. *v.* Luvis 442

Court of Requests—

1. *Prescription—Action instituted in Court of Requests—Claim in reconvention beyond jurisdiction—Transfer to District Court—Date of action in respect of the claim in reconvention—Courts Ordinance (Cap. 6), s. 79—Prescription Ordinance, s. 10* 361

See Prescription (5).

2. *Court of Requests—Costs—Taxation as between party and party* .. 406

See Costs (2).

Courts Ordinance—

1. *Proctor—Malpractice—Courts Ordinance, s. 17.*

See Proctor (2), (6).

2. *Prescription—Action instituted in Court of Requests—Claim in reconvention beyond jurisdiction—Transfer to District Court—Date of action in respect of the claim in reconvention—Courts Ordinance (Cap. 6), s. 79—Prescription Ordinance, s. 10* 361

See Prescription (5).

3. *Injunction—Power of Supreme Court to grant injunctions—Courts Ordinance (Cap. 6), s. 20* 537

See Injunctions.

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PAGE

Criminal Law—

1. *Unlawful assembly—Conviction of less than five persons—In what circumstances permissible—Penal Code, s. 140* 22

See UNLAWFUL ASSEMBLY.

2. *Penal Code—Cheating—Section 403—Meaning of term "property"* .. 71

See CHEATING.

3. *Defamation—Charge of criminal defamation—Burden of proof—Newspapers Ordinance, s. 7—Penal Code, s. 479.*

In a prosecution for criminal defamation as defined by section 479 of the Penal Code, the burden is on the Crown to establish *inter alia :*

(1) that the accused made or published the particular imputation complained of ;

(2) that he did so with the requisite intention or knowledge.

VAIKUNTHAVASAN *v.* THE QUEEN 102

4. *Mischief*—Bona fide *vindication of a right—Valid defence—Penal Code, s. 408.*

Accused was charged with committing mischief by breaking down a wall erected by the complainant two days earlier. The evidence showed that the accused demolished the wall in the *bona fide* belief that it obstructed a public cartway and that there was no spite or malice on the part of the accused.

Held, that the facts did not disclose the offence of mischief.

FONSEKA *v.* CHANDRASEKERA 114

5. *Grievous hurt—"Potential danger to life"—Not the same thing as endangering life—Penal Code, ss. 311, 317.*

An injury which causes "a potential danger to life" is not grievous hurt within the meaning of section 311 of the Penal Code.

EKMON *v.* SUGATHADASA 191

6. *Culpable homicide—Provocation—Intoxication—Scope of its relevancy—Penal Code, s. 294, Exception 1* 217

See COURT OF CRIMINAL APPEAL DECISIONS (2).

7. *Motor vehicle—Negligent driving—Definition of term "driving"—Penal Code, s. 298* 228

See MOTOR VEHICLES (3).

8. *Unlawful possession of house-breaking instruments—Several accused—Possession of implements by one accused—Inference of common possession—Penal Code, s. 449.*

Where several persons are charged under section 449 of the Penal Code with having in their possession without lawful excuse instruments of house-breaking, evidence of possession of the implements by one of them is evidence of possession by each if there can be no doubt as to their common purpose of using the implements for house-breaking.

LEWIS SINGHO *v.* LIYANAGE 428

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PAGE

9. Mens rea—*Applicability to statutory offences—Mistake of fact—Validity of such defence—Penal Code, ss. 38 (2), 72—Control of Prices Act, No. 29 of 1950, s. 8 (1) and (6)* 433

See MENS REA

10. *See also* COURT OF CRIMINAL APPEAL DECISIONS ; PENAL CODE.

Criminal Procedure—

1. Habeas corpus—*Power of Court to remand a girl to the Salvation Army Home—Courts Ordinance (Cap. 6), s. 45.*

A Court has no jurisdiction to remand a girl to the Salvation Army Home during the pendency of a case of kidnapping her.

IN RE NOOR JEHAN 29

2. *Absence of complainant—Acquittal of accused—Power of Magistrate to cancel order—Right of appeal if cancellation is refused—Criminal Procedure Code, ss. 194, 336.*

An order of acquittal entered under section 194 of the Criminal Procedure Code may be cancelled if the complainant subsequently satisfies the Magistrate that his absence was due to a genuine misunderstanding as to the date fixed for his appearance.

An appeal can be preferred as of right against an order refusing to vacate an order of acquittal passed under section 194 of the Criminal Procedure Code.

SEEVARATNAM *v.* GOPALASAMY 66

3. *Criminal Procedure Code—Proviso to section 297—Scope of its applicability—Sections 151 (1), proviso 2, 151B, 407.*

By Section 297 of the Criminal Procedure Code,

" Except as otherwise expressly provided all evidence taken at inquiries or trials under this Ordinance shall be taken in the presence of the accused or when his personal attendance is dispensed with in the presence of his pleader :

Provided that if the evidence of any witness shall have been taken in the absence of the accused whose attendance has not been dispensed with, such evidence shall be read over to the accused in the presence of such witness and the accused shall have a full opportunity allowed him of cross-examining such witness thereon."

Held, that the proviso does not enable the prosecution to utilize as part of its case at a trial evidence taken in the accused's absence before he was charged.

JAMALDEEN *v.* P. J. DE SILVA 68

4. *Criminal Procedure—Evidence of accused—Contradictory of previous statement to Police—Right to prove such statement—Evidence in rebuttal—Impeaching credit of witness—Evidence Ordinance, ss. 120 (6), 155 (c)—Criminal Procedure Code, ss. 122 (3), 237 (1)* 353

See COURT OF CRIMINAL APPEAL DECISIONS (3).

5. *Search warrant—Disposal of property taken thereunder—Requirement of notice to parties—Criminal Procedure Code, ss. 29, 77, 419.*

Under section 419 of the Criminal Procedure Code an order for disposal of property brought into Court by an accused person in consequence of the issue of a search warrant can only be made after due notice to both complainant and accused.

SOLOMON PERERA *v.* THOMAS FERNANDO 380

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PAGE

6. *See also* APPEAL; COURT OF CRIMINAL APPEAL DECISIONS; CRIMINAL PROCEDURE CODE.

Criminal Procedure Code—

Section 29 380
Section 77 380
Sections 121, 122 60
Section 122 (3) 353
Section 151 (1), proviso 2, 151B 68
Section 160 409
Section 171 143
Section 184 234
Section 187 (1) 234
Section 194 66
Section 237 (1) 353
Section 297, Proviso 68
Section 336 66
Section 340 (2) 366
Section 385 193
Section 407 68
Section 419 380
Section 440A (1) and (2) 193

See also COURT OF CRIMINAL APPEAL DECISIONS; CRIMINAL PROCEDURE.

Customs Ordinance—

1. *Customs Ordinance (Cap. 185)—Section 146—Security for costs of action—Form in which it may be given—Meaning of word "security".*

Security for costs of action required under section 146 of the Customs Ordinance may be furnished in some other form than cash. In the context, the word *security* includes "every document or transaction by which the payment of money is assured, or its recovery facilitated". Security may therefore be given in the form of the personal guarantee of a surety coupled with a mortgage in favour of the Crown of the surety's interest in a specified allotment of land.

SINGARAYER *v.* ATTORNEY-GENERAL 39

2. *Carrier by trade—Action for failure to deliver goods—Quantum of proof necessary*—Vis major—"*Boat note*"—*Customs Ordinance, s. 40.* .. 470

See CARRIERS.

Damages—

See CONTRACTS (9).

Dangerous or Offensive Trades—

Dangerous or offensive trade—Requirement of licence—By-laws—Local Government Ordinance (Cap. 195), ss. 164, 168 (10) (k)—Urban Councils Ordinance, No. 61 of 1939, s. 248 445

See LOCAL AUTHORITIES (6).

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PAGE

Decree—

See EXECUTION OF DECREES.

Defamation—

Defamation—Charge of criminal defamation—Burden of proof—Newspapers Ordinance, s. 7—Penal Code, s. 479.

In a prosecution for criminal defamation as defined by section 479 of the Penal Code, the burden is on the Crown to establish *inter alia :*

(1) that the accused made or published the particular imputation complained of ;

(2) that he did so with the requisite intention or knowledge.

VAIKUNTHAVASAN *v.* THE QUEEN 102

Delicts—

1. *Delict—Inducement of breach of contract—Ingredients of the wrong.*

A. sued B. in delict alleging that B. had induced A's employer C. to break A.'s contract of service with C. C. was an incorporated Company and B. was the Manager of the Ceylon Branch of that Company. It was established that B. acted within the scope of his authority as agent of C. when he terminated A.'s services.

Held, that, even if C. had unlawfully terminated the contract, B. was not personally liable for any damage resulting to A.

BARRETT *v.* ALTENDORFF 25

2. *Malicious prosecution—Prosecution by Police—Acquittal—Liability in tort of person who gave first information of alleged offence—Criminal Procedure Code, ss. 121, 122—" Reasonable and probable cause ".*

Where the Police institute a prosecution in consequence of information given to them by a person under section 121 of the Criminal Procedure Code and the accused is acquitted at the trial, the first information given to the Police (as distinct from a statement made under section 122 of the Criminal Procedure Code after the commencement of the Police inquiry) is sufficient to found an action for malicious prosecution if it actually contains a clear allegation that the plaintiff committed an offence, or, in other words, if it formulates a charge against the plaintiff. In such a case, the informant cannot be permitted to plead that the Police should not have acted upon his allegation.

In an action for malicious prosecution the plaintiff has the burden of proving a negative, i.e., that the defendant acted without reasonable and probable cause. In determining whether the burden has been discharged, regard should be had to all the circumstances in which the defendant acted.

HATURUSINGHE *v.* KUDADURAYA 60

3. *Delict—Action for " injurious falsehood "*—Dolus *or* animus injuriandi *is necessary ingredient—Negligence—Incidence of liability—Duty of care.*

If A, in discharge of a contractual obligation which he owes to B, makes to B a negligent but honest and non-defamatory statement in relation to a third party C, A is not liable to C for pecuniary loss sustained by him in consequence of the statement.

Cable and Wireless Ltd. employed the defendant, who was a medical practitioner, to examine the plaintiff and report whether the plaintiff, who had been accepted for service as a telegraphist-apprentice, was physically fit for permanent employment as a telegraphist. Defendant

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PAGE

examined the plaintiff, but reported that he was unable to recommend him for service with the Company. As a direct consequence of this report, the plaintiff's engagement as an apprentice was abruptly but lawfully terminated by the Company. Plaintiff then instituted the present action claiming damages from the defendant. He alleged that he was perfectly fit for employment as telegraphist in Cable and Wireless Ltd., and that the defendant's unfavourable report was "due to gross negligence and/or incompetence". He made no allegation that the defendant had acted maliciously or dishonestly in the matter.

Held, that the action was not maintainable, even if the defendant's medical opinion concerning the plaintiff's suitability to undertake the duties of a telegraphist had been negligently arrived at.

Held further, that in regard to the question of negligence the law did not impose any duty of care on the defendant towards the plaintiff, other than the duty not to cause him physical injury.

Conflicting medical evidence discussed.

CHISSEL *v.* CHAPMAN 121

4. *Injunction—Liability of a servant of the Crown.*

A servant of the Crown purporting to act in his official capacity on behalf of the Crown can be restrained from so acting by an injunction issued against him as an individual.

BUDDHADASA *v.* NADARAJA 537

Divorce—

See HUSBAND AND WIFE.

Donations—

See COLLATION.

Election Petitions—

See PARLIAMENTARY ELECTIONS.

Equity—

Rule against unjust enrichment 73

See CO-OWNERS (1).

Escrow—

See VENDOR AND PURCHASER (1).

Estate Labour (Indian) Ordinance—

See WORKMEN'S COMPENSATION ORDINANCE (3).

Estoppel—

See RES JUDICATA.

Evidence—

1. *Court of Criminal Appeal—Evidence—Child—Capacity to give evidence—Procedure for ascertaining it.*

In a trial before the Supreme Court the questioning of a child with a view to considering whether the child is of sufficient mental power and fit to give evidence must be done in the presence of the jury.

SUMANASENA *v.* THE QUEEN 11

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PAGE

2. *Evidence—Marriage contracted in a foreign country—Way of proving it—Decree for judicial separation—Scope of its relevancy as evidence—Estoppel*—Res judicata—"*Privies in interest*"—*Evidence Ordinance, s. 41 (2) (c).*

In proceedings taken to administer the intestate estate of one R., each of two persons, K. and P., claiming to be the widow of the deceased, applied for letters of administration. K. alleged that she married the deceased in India on the 11th December, 1929, under the provisions of the Indian Christian Marriage Act. P. alleged that K. was not validly married and that she was the lawful widow by reason of her marriage to the deceased which was registered on the 3rd March, 1930, and solemnized according to Hindu rites in September of the same year. The principal contest was whether K. had contracted a valid marriage with the deceased. The trial Judge held that K., as widow, was entitled to letters of administration.

In a suit brought by P. in 1937 against the deceased for separation *a mensa et thoro* the deceased had admitted that he was lawfully married to P. and counterclaimed a dissolution of the marriage on the ground of malicious desertion. In his evidence the deceased had also admitted that he had been intimate with K. both before and after he was married to P. K. also gave evidence. She admitted sexual intimacy with the deceased but, in order to save the deceased from a prosecution for bigamy, falsely denied that she was married to him. A decree for separation was then entered as between P. and the deceased.

Held, (i) that although the evidence given by the deceased and K. in the suit for judicial separation raised a strong presumption that they had not contracted a marriage in 1929, evidence could be given in the present administration proceedings so as to displace that presumption.

(ii) that it was not essential that K. should lead expert evidence to prove that all the provisions of the Indian Christian Marriage Act requisite for a valid marriage had been complied with. If the certificate of marriage in the form prescribed by the Indian Christian Marriage Act was properly produced, the Court was entitled to hold upon that certificate and the oral evidence that K. contracted a valid marriage with the deceased.

(iii) that the decree entered in the suit for judicial separation was not one which could come within the terms of section 41 (2) (*c*) of the Evidence Ordinance; it could not, therefore, operate in the present action as conclusive proof that P. was the lawful wife of the deceased.

(iv) that the conduct of K. in wilfully concealing her marriage in the suit for judicial separation could not operate as an estoppel against her in the present action.

(v) that the decree entered in the suit for judicial separation could not operate as *res judicata* against K.'s children.

SIVAKKOLUNTHU *v.* KAMALAMBAL 52

3. *Conflicting medical evidence* 121

See DELICTS (3).

4. "*Escrow*"—*Evidence Ordinance, s. 92, Proviso (3).*

A deed may be delivered on a condition that it is not to be operative until some event happens or some condition is performed. In such a case it is until then an escrow only.

BAIYA *v.* KARUNASEKERA 265

5. *Admission—Weight to be attached to it—Evidence Ordinance, ss. 17 (1), 18 (3) (b).*

An admission within the meaning of sections 17 (1) and 18 (3) (*b*) of the Evidence Ordinance does not create a conclusive estoppel; the weight to be attached to it in any particular case depends on many considerations.

REV. MORAGOLA SUMANGALA *v.* REV. KIRIBAMUNE PIYADASSI .. 322

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PAGE

6. *Sale of immovable property—Contract of re-purchase—Parol evidence of a mortgage—Admissibility—Evidence Ordinance, s. 92—Trusts Ordinance, s. 5 (3)* 337

See VENDOR AND PURCHASER (2).

7. *Evidence of accused—Contradictory of previous statement to Police—Right to prove such statement—Evidence in rebuttal—Impeaching credit of witness—Evidence Ordinance, ss. 120 (6), 155 (c)—Criminal Procedure Code, ss. 122 (3), 237 (1)* 353

See COURT OF CRIMINAL APPEAL DECISIONS (3).

8. *Evidence—Dog trained in criminal investigation—Its behaviour and reactions at scene of crime—Relevancy as evidence—Evidence Ordinance, s. 11 (b)* 397

See COURT OF CRIMINAL APPEAL DECISIONS (4).

9. *Postponement—Conflict of medical certificates—Proper assessment* .. 495

See POSTPONEMENT.

10. *Motor vehicle—Charge of using it without revenue licence—Burden of proof—Motor Traffic Act, No. 14 of 1951, ss. 25, 226—Evidence Ordinance (Cap. 11), ss. 105, 106* 509

See MOTOR VEHICLES (7).

11. *See also* EVIDENCE ORDINANCE.

Evidence Ordinance—

Section 11 (*b*) 397
Sections 17 (1), 18 (3) (*b*) 322
Section 41 (2) (*c*) 52
Section 92 .. .. .. 265 ; 337
Section 92, Proviso 3 265
Sections 101, 103 345
Sections 105, 106 509
Section 120 (6) 353
Section 130 (1) 550
Section 155 (*c*) 353

See also EVIDENCE.

Excess Profits Duty—

See INCOME TAX (3).

Excise Ordinance—

1. *Excise Ordinance—Possession of unlawfully manufactured liquor—Proof.*

A conviction for possession of unlawfully manufactured liquor cannot be based on an inconclusive report of the Government Analyst.

SURABIEL *v.* EKANAYAKE 167

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PAGE

2. *Excise Ordinance (Cap. 42)—Possession of excisable article—Difference between s. 43 (a) and s. 44—Misjoinder of charges.*

The charge against the accused was that he had in his possession seven bottles of unlawfully manufactured arrack in breach of section 43 (*a*) of the Excise Ordinance, but the penal section under which the offence was punishable was stated to be section 44 of the Ordinance.

Held, that sections 43 (*a*) and 44 created two distinct and separate offences, and that the reference to these two sections in respect of one and the same charge had the effect of a joinder of two separate charges.

DON SEEMON *v.* DIAS 232

3. *Excise Ordinance (Cap. 42)—Section 55—Is a Vedarala a "medical practitioner"?—Medical Practitioners Ordinance (Cap. 90), ss. 35, 40.*

Where, in a prosecution under the Excise Ordinance, the accused, who was a Vedarala, pleaded that as a "medical practitioner" he was entitled to rely on the provisions of section 55 of that Ordinance—

Held, that a Vedarala was not a "medical practitioner" within the meaning of that term in section 55 of the Excise Ordinance.

FERNANDO *v.* GOONEWARDENE 238

4. *Excise Ordinance—Section 44—Possession of unlawfully manufactured liquor—Proof.*

In a prosecution under section 44 of the Excise Ordinance for possessing unlawfully manufactured liquor the Excise Commissioner or the proper licensing authority must furnish evidence excluding the possibility of the liquor seized having been manufactured under a licence.

RAMASAMY KONE *v.* GINIGATHENA POLICE 404

5. *See also* POISONS, OPIUM AND DANGEROUS DRUGS ORDINANCE.

Execution of Decrees—

1. *Jurisdiction—Execution of proprietary decree—Right to challenge validity of decree—Civil Procedure Code, ss. 325, 394.*

Execution proceedings to enforce a judgment are collateral to the judgment, and no inquiry into the regularity or validity of the judgment can be permitted in such proceedings.

In a suit between A and B, B died pending the action and B's devisees under his last will were substituted in his place. Subsequently decree was entered ordering A to be placed in posssession of the premises which were the subject matter of the action. No appeal was filed against the judgment. When the Fiscal tried to execute the decree he was obstructed by C who had become a tenant of the premises under B during the pendency of the action and, later, under B's widow and the other substituted parties. In proceedings taken by the judgment-creditor under section 325 of the Civil Procedure Code it was contended on behalf of C that the Court had no jurisdiction to enter the decree it did because, under section 394 of the Civil Procedure Code, only the executor or administrator of the deceased B, and not his devisees, could have been substituted in the place of B.

Held, that even assuming that the judgment was based upon a misconception of the true legal position, it was not open to C to impeach the judgment for errors of law or irregularity in procedure.

Muheyadin v. Thambiappah (1945) 46 N.L.R. 370, distinguished.

JAYALATH *v.* ABDUL RAZAK 145

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PAGE

2. *Civil Procedure Code—Execution of money decree—Judgment-debtor's right in a pending action—Liability to seizure and sale—Section 218.*

The right, title and interest of a person in a pending action can be seized and sold under section 218 of the Civil Procedure Code in execution of a decree entered against him.

SUPPIAH *v.* SIVARAJAH 226

Executors and Administrators—

See ADMINISTRATION OF ESTATES.

Extradition—

Extradition—Foreign warrant—Form of endorsement—Same warrant cannot be executed twice—Fugitive Offenders Act, 1881, ss. 3, 13, 14, 26.

A warrant is sufficiently endorsed for the purpose of compliance with sections 13 and 26 of the Fugitive Offenders Act if it bears the mere signature of the authority endorsing; the endorsement need not be specifically directed to the police officers or other officials entitled to execute the warrant.

Once a warrant has been executed, no further action can be taken on it. If, therefore, an offender arrested under it is discharged on the ground that there is not enough proof that it was issued by a person having lawful authority to issue it, he cannot be arrested again on the same warrant even if the officer executing it establishes that it was issued by lawful authority.

ARUMUGAM *v.* VIJAYARATNAM 259

Fideicommissa—

1. *Fideicommissum—Claim by prescription as against fideicommissary—Burden of proof—Evidence Ordinance (Cap. 11), ss. 101, 103—Prescription Ordinance (Cap. 55), proviso to s. 3.*

Where a plaintiff claims title to immovable property by prescriptive possession as against a fideicommissary, the burden is on him to prove the point of time when the fideicommissary acquired, under the fideicommissum, a right of possession to the property in dispute and to establish that from that time he (the plaintiff) has been in possession for a period of ten years or more.

ADAMJEE *v.* SADEEN 345

2. *Fideicommissum—"Power of appointment".*

A fideicommissary deed of gift in which the *fideicommissarii* were all the children of the *fiduciarius* and their descendants, contained the following proviso :—

"Provided always that nothing herein contained shall prevent the said L.M.S. (the *fiduciarius*) by Deed or Testamentary disposition to give and grant the said premises or any part thereof to any person or persons whomsoever he pleases but the same must be given and granted strictly under and subject to all the restrictions as are hereinbefore expressed; otherwise such grant shall be null and void."

Held, that the Proviso did not create a "power of appointment" within the recognised meaning of that expression, but only conferred on the *fiduciarius* a right of disposition which in certain eventualities would have the effect merely of postponing the enjoyment of the fideicommissary interests.

NUHMAN *v.* ABDUL NAKEEM 418

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PAGE

Fiduciary Relations—

1. *Privy Council—Proctor and client—Fiduciary relationship—Conflict between interest and duty—Duty of making full disclosure of relevant facts—Breach of such duty—Equitable claim for damages—Applicability of Prescription Ordinance, s. 10.*

A Proctor's fiduciary relationship to his client renders him liable to indemnify the client in respect of damages incurred by the client in a transaction whereby the Proctor, in breach of his fiduciary duty, gains an advantage and his client suffers loss as the result of advice given by him and taken by the client.

The Prescription Ordinance of Ceylon, unlike the English Statute of Limitations, " governs the whole of a jurisdiction which is general, including law and equity in one system ". It is therefore applicable to an action for damages for breach of a fiduciary duty. None of its sections dealing with special causes of action is applicable to a breach of a fiduciary duty and, therefore, such a breach falls under section 10. Under that section an action is not maintainable " unless the same shall be commenced within three years from the time when such cause of action shall have accrued ".

The defendant-appellant, a Proctor, was employed by the plaintiff-respondent as legal adviser for the purpose of making an investment of a sum of Rs. 15,000. The money was thereafter lent by the respondent to one S. on mortgage bond No. 2308 of the 3rd December, 1942, attested by the appellant. The security afforded by bond No. 2308 was the primary mortgage of certain lands at Panwila and the secondary mortgage of a land known as Fincham's land. The primary mortgage in favour of one M. of the latter property was for a sum of Rs. 35,000. It was sold on an order of Court on a decree on the primary mortgage obtained by M. and realised a sum of Rs. 16,000 which left no surplus towards the payment of the loan made by the respondent on the secondary mortgage. On a sale on a decree obtained by the respondent on the primary mortgage of the Panwila lands a sum of Rs. 2,250 was realised. The respondent thus lost the greater part of his principal and all interest. He then instituted the present action to recover from the appellant a sum of Rs. 20,000 by way of damages on the ground that the appellant had, while acting as his legal adviser in connection with the investment of the sum of Rs. 15,000, furthered " the interests of others whose interests were adverse to those of the respondent ".

There was evidence that out of the sum of Rs. 15,000 obtained by S. from the respondent, a sum of Rs. 4,500 was utilised to pay a debt due by S. to the appellant's cousin upon a primary mortgage of the Panwila land and a sum of Rs. 6,000 to pay another debt due to the appellant's wife and his brother upon a secondary mortgage of Fincham's land. The respondent had been told of the relationship between the parties and about the mortgages in favour of the appellant's relatives. On his own testimony, however, the appellant had had experience of certain incidents which indicated how undesirable S. was as a borrower.

Held, that in acting for the respondent in a matter in which the appellant's relatives had an interest, the duty arising from the fiduciary relationship between the appellant and the respondent placed upon the appellant the obligation of making a disclosure to the respondent of all facts in detail that might have affected a decision by the respondent to make the loan, or even merely led him to an investigation closer than he had actually made as to whether the proposed loan could prudently be made. " A man may have a duty on one side and an interest on another. A man who puts himself in that position takes upon himself a grievous responsibility ". In the present case the appellant had not discharged the heavy burden which lay upon him to establish that he made a full disclosure to the respondent of information in his possession relevant to the loan. For this failure of duty he was liable in damages, although he had honestly done all that he thought he was bound to do in dealing with the respondent.

Held further, that, for the purpose of applying section 10 of the Prescription Ordinance, a cause of action " accrued " to the respondent at the time when the Panwila lands were sold under mortgage decree, namely, on the 9th March, 1946. It was only on that day that the respondent could be said to have suffered the damage that he did in fact suffer.

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PAGE

2. *See also* TRUSTS (3).

Fraudulent Alienation—

See PAULIAN ACTIONS.

Fugitive Offenders—

See EXTRADITION.

Gifts—

See DONATIONS.

Grievous Hurt—

See CRIMINAL LAW (5).

Guarantee—

See CONTRACTS (4).

Habeas Corpus—

1. Habeas corpus—*Power of Court to remand a girl to the Salvation Army Home—Courts Ordinance (Cap. 6), s. 45.*

A Court has no jurisdiction to remand a girl to the Salvation Army Home during the pendency of a case of kidnapping her.

IN RE NOOR JEHAN 29

2. Habeas corpus—*Custody of child—Parent's right thereto—Factors for consideration—Adoption of Children Ordinance, 1941—Children and Young Persons Ordinance of 1939, ss. 34, 35.*

Petitioner claimed the custody of her daughter (1st respondent) aged 15. The 2nd respondent, the Mother Superior of a Convent, claimed no right to custody, but her position was that the girl was placed at the Convent by her father in order to prevent contact between the girl and the petitioner and that the girl herself wished to remain at the Convent.

Held, that the child's own wishes were by reason of her age and education worthy of consideration and that the Court should be guided by the test whether a change in the *status quo* would be prejudicial to the interests of the child. In such a case the question of registration under the Adoption of Children Ordinance did not arise. Moreover, sections 34 and 35 of the Children and Young Persons Ordinance recognized that the parent's right to custody was not absolute and enabled a Court to deprive a parent of this right if, for reasons specified in those sections, the parent was unfit to exercise care and guardianship over the child.

IN RE EVELYN WARNAKULASURIYA 525

Homicide—

See COURT OF CRIMINAL APPEAL DECISIONS.

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PAGE

Housebreaking—

See CRIMINAL LAW (8).

Housing and Town Improvement Ordinance—

Cap. 199—Section 13 (1) (b)—Offence thereunder—Continuing fine—Circumstances when it may be imposed 42

See LOCAL AUTHORITIES (1).

Husband and Wife—

1. *Maintenance—Child—Order made in divorce proceedings—Jurisdiction of Magistrate's Court to award maintenance subsequently.*

Where an order for the maintenance of a child entered in divorce proceedings has been carried out by the deposit of a certain sum of money in the District Court, the jurisdiction of a Magistrate to make a subsequent order for the maintenance of that child becomes ousted to that extent.

W. J. SILVA *v.* L. KARUNAWATHIE 93

2. *See also* MAINTENANCE ; MARRIAGE.

Improvements—

1. *Co-owner—Right to build on the common land—Order for demolition of building—Propriety of seeking it in partition action.*

In a partition action, the Court is entitled to order the demolition of a building constructed by a co-owner contrary to the protests of the other co-owners and in violation of their rights as co-owners.

Where a co-owner puts up a building on the common land, he cannot compel any of his co-owners to take over such buildings and pay compensation.

AGNES PERERA *v.* EDWARD PERERA 241

2. *See also* PARTITION ACTIONS (7).

Income Tax—

1. *Income Tax—Law Society—Annual grant received from Government—Assessable to income tax—Meaning of terms " Business ", " Annuity ", " Income "—Ordinance No. 33 of 1947, ss. 3, 7—Income Tax Ordinance (Cap. 188), ss. 5, 6 (1) (a), (f), (h), 7 (1) (c).*

The annual grant of Rs. 50,000 received by the Incorporated Law Society of Ceylon from the Government under section 7 of Ordinance No. 33 of 1947 is chargeable with tax under one or all of the following sub-heads of section 6 (1) of the Income Tax Ordinance :—

(*a*) the profits from any business ;

(*f*) annuity ;

(*h* income from any other source whatsoever, not including profits of a casual and non-recurring nature.

INCORPORATED LAW SOCIETY OF CEYLON *v.* COMMISSIONER OF INCOME TAX 97

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PAGE

2. *Income tax—Proceedings for recovery before Magistrate—Power of Magistrate to grant an adjournment—Certificate of Commissioner—Necessary particulars—Income Tax Ordinance (Cap. 188), ss. 76 (5), 80 (1) and (2).*

Acting under section 80 (1) of the Income Tax Ordinance the Commissioner of Income Tax issued a certificate to a Magistrate certifying that a person had made default in payment of income tax. The total tax in default and the sums added for non-payment under section 76 (5) were mentioned as particulars at the foot of the certificate. When the assessee appeared before the Magistrate his application for an adjournment was refused on the ground that an appeal against the assessment was pending.

Held, that under section 80 (2) of the Income Tax Ordinance the power of a Magistrate to grant an adjournment was restricted and could not be exercised in a case where an appeal against the assessment had been filed.

Held further, that the particulars given in the certificate of the Commissioner were sufficient. Even if they were not sufficient, the Magistrate had jurisdiction in his discretion to order further particulars to be furnished.

WILLIAM *v.* COMMISSIONER OF INCOME TAX 257

3. *Excess Profits Duty—Proceedings for recovery—Notice of assessment—Time-limit for service—Form of notice—Income Tax Ordinance, ss. 68 (1), 80 (1).*

Notice of assessment of Excess Profits Duty need not be served on the assessee before the last day fixed for assessment; it may be served subsequently.

A defect in the notice would be cured by section 68 (1) of the Income Tax Ordinance if in substance and effect the notice informs the assessee that he is required to pay the amount of the assessed levy.

HAMID MARIKAR *v.* COMMISSIONER OF INCOME TAX .. 359

4. *Income tax—C.i.f. contract—Payment of purchase price—Void* ab initio*—Liability of the seller or his agent to be taxed in respect of the assumed profits.*

When money is paid by A to B under a mutual mistake as to the substance of the whole consideration, B is not liable to pay income tax in respect of the money received by him.

In a c.i.f. contract for the sale of a large quantity of oil it was stipulated that the purchase price of the goods should be paid by the buyer's Bank to the seller's agent, S, on the presentation by S to the Bank of documents relating to the shipment of the oil. S received payment of the purchase price against certain documents but it was subsequently discovered that a person D, who had been entrusted by S with the matter of shipping the oil, had committed a very serious fraud; no oil had in truth been shipped, and every document forwarded by D to S in proof of the purported shipment was a forgery.

Held, that as S's mandate was to secure an *actual* fulfilment of the seller's obligations and to obtain the purchase price in exchange for *genuine* documents S was not liable to pay income tax on any money received by him, as commission or dividend, out of the assumed profits derived by the seller from the contract of sale.

SAVUNDRANAYAGAM *v.* COMMISSIONER OF INCOME TAX .. 457

5. *Income Tax Ordinance—Recovery of tax by seizure and sale—Section 79 (2) (a)* 537

See INJUNCTIONS.

Indian and Pakistani Residents (Citizenship) Act—

See CITIZENSHIP.

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PAGE

Indictment—

See CHARGE.

Informations—

Informations—Power of Attorney-General to exhibit informations—Circumstances when informations may be presented—Criminal Procedure Code, s. 385 193

See TRIAL AT BAR.

Injunctions—

Injunction—Power of Supreme Court to grant injunctions—Conditions precedent—Liability of a servant of the Crown—Courts Ordinance (Cap. 6), s. 20—Income Tax Ordinance (Cap. 188), s. 79 (2) (a).

In an application for an injunction to restrain the respondent, in supposed performance of his functions as Deputy Fiscal, from wrongfully seizing and selling the movable property of the petitioner in alleged pursuance of the provisions of section 79 (2) (*a*) of the Income Tax Ordinance—

Held, that the power of the Supreme Court to grant injunctions under section 20 of the Courts Ordinance "is a strictly limited one to be exercised only on special grounds and in special circumstances". An injunction will not therefore be granted if the petitioner was in a position to apply to the District Court for an injunction at about the time that he filed his application in the Supreme Court or even if between the date of his filing his petition in the Supreme Court and the date of hearing of arguments, the petitioner could have instituted action in the District Court.

Held further, that a servant of the Crown purporting to act in his official capacity on behalf of the Crown can be restrained from so acting by an injunction issued against him as an individual.

BUDDHADASA *v.* NADARAJA 573

Interpretation—

1. *Words in the singular number include the plural—Interpretation Ordinance, s. 2* 80

See LANDLORD AND TENANT (2).

2. *Wages Boards Ordinance, No. 27 of 1941—Section 39 (1)—Prosecutions thereunder—Time-limit—Section 28 of amending Act No. 5 of 1953—Retrospective effect—Interpretation Ordinance, s. 6 (3).*

Section 28 of the Wages Boards (Amendment) Act, No. 5 of 1953, which alters the time-limit for prosecutions from one year to two years in regard to offences punishable under section 39 (1) of the Wages Boards Ordinance No. 27 of 1941, applies not only to prosecutions for offences committed after the amending Act No. 5 of 1953 passed into law, but also to prosecutions for earlier offences other than those which had already become barred by limitation under the provisions of the principal Ordinance.

ATTORNEY-GENERAL *v.* UPLANDS BUS CO., LTD. .. 248

3. *Interpretation Ordinance (Cap. 2)—Section 6—Prosecution under a repealed Ordinance—Retrospective effect on it of repealing statute—Motor Car Ordinance, No. 45 of 1938, ss. 29 (1), 150 (1), 158—Motor Traffic Act, No. 14 of 1951, s. 243.*

Where an offence is committed in contravention of an Ordinance which is subsequently repealed the prosecution in respect of it may, by virtue of section 6 (3) (*b*) of the Interpretation Ordinance, be instituted

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PAGE

even after the repealing statute comes into force, unless the repealing statute expressly prohibits it. Section 6 (3) (*b*) of the Interpretation Ordinance is independent of section 6 (3) (*c*).

The accused was charged on July 3, 1953, with having possessed on April 1, 1950, a motor vehicle without a licence in contravention of section 29 (1) of the Motor Car Ordinance, No. 45 of 1938. The Motor Car Ordinance was, however, repealed on September 1, 1951, by section 243 of the Motor Traffic Act, No. 14 of 1951.

Held, that the prosecution was maintainable.

RAMALINGAM *v.* JAFFNA CENTRAL BUS CO., LTD. .. 501

Interrogatories—

See CIVIL PROCEDURE (8).

Intoxication—

See COURT OF CRIMINAL APPEAL DECISIONS (2).

Jaffna Matrimonial Rights and Inheritance Ordinance—

See THESAVALAMAI (1).

Joinder of Accused—

See CHARGE (4).

Joinder of Charges—

See CHARGE (2), (3).

Jurisdiction—

1. *Jurisdiction—Execution of proprietary decree—Right to challenge validity of decree—Civil Procedure Code, ss. 325, 394.*

Execution proceedings to enforce a judgment are collateral to the judgment, and no inquiry into the regularity or validity of the judgment can be permitted in such proceedings.

In a suit between A and B, B died pending the action and B's devisees under his last will were substituted in his place. Subsequently decree was entered ordering A to be placed in possession of the premises which were the subject matter of the action. No appeal was filed against the judgment. When the Fiscal tried to execute the decree he was obstructed by C who had become a tenant of the premises under B during the pendency of the action and, later, under B's widow and the other substituted parties. In proceedings taken by the judgment-creditor under section 325 of the Civil Procedure Code it was contended on behalf of C that the Court had no jurisdiction to enter the decree it did because, under section 394 of the Civil Procedure Code, only the executor or administrator of the deceased B, and not his devisees, could have been substituted in the place of B.

Held, that even assuming that the judgment was based upon a misconception of the true legal position, it was not open to C to impeach the judgment for errors of law or irregularity in procedure.

Muheyadin v. Thambiappah (1945) 46 N. L. R. 370, distinguished.

JAYALATH *v.* ABDUL RAZAK 145

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PAGE

2. *Court acting beyond its powers—Consent of parties—Validity of compromise* 262

See COMPROMISE.

3. *Action instituted in Court of Requests—Claim in reconvention beyond jurisdiction—Transfer to District Court—Date of action in respect of the claim in reconvention—Courts Ordinance, s. 79—Prescription Ordinance, s. 10* 361

See PRESCRIPTION (5).

Kandyan Law—

1. *Kandyan Law—Child born in* diga *marriage—Death intestate and issueless—Inheritance*—Stare decisis.

When a Kandyan child born in a *diga* marriage dies intestate and without issue, his interests in immovable property inherited from his deceased mother (who had herself inherited the property from her father because, in spite of her *diga* marriage, she had for one reason or another not forfeited her rights of succession) pass absolutely to his father.

Chelliah v. Kuttapitiya Tea and Rubber Co. Ltd. (1932) 34 N. L. R. 89, followed.

Bisona v. Janga (1948) 41 C. L. W. 40, not followed.

It is undesirable to disturb a long-established ruling on any question of law affecting rights of succession.

APPUHAMY *v.* SILVA 247

2. *Kandyan Law—Donation—Revocability—Covenant to render succour to a party other than the donor—Validity—Construction of deed.*

A Kandyan revocable deed of gift is revoked by the donor if he executes a later and inconsistent deed.

Under Kandyan Law a deed of gift in consideration of assistance to be rendered to the donor is revocable subject to compensation for assistance actually rendered.

A convenant in a gift by a brother to a sister that the sister should look after and render succour and assistance to their mother is valid under the Kandyan Law.

A, a Kandyan Sinhalese, donated certain immovable property to her son B in 1916, citing as title to the property a deed of 1855. Subsequently, in 1917, both A and B jointly gifted the same property to C, who was A's daughter and B's sister, and cited as title the deed of gift of 1916 only.

Held, that the deed of gift of 1917, though executed by A and B, was in fact a donation by B alone in favour of C and that, as it was a revocable deed of gift, B was entitled to revoke it.

Held further, that under the deed of gift the donee C was liable to render succour and assistance not only to B but also to A.

LOKUBANDA ARACHCHI *v.* MOHAMED 511

3. *Adoption—Ordinance No. 39 of 1938, s. 7* 529

See TRUSTS (3).

Labour—

See WAGES BOARDS ORDINANCE; WORKMEN'S COMPENSATION ORDINANCE.

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PAGE

Land Acquisition Ordinance—

Land Acquisition Ordinance (Cap. 203)—Libel of reference—Joinder of parties—Sections 3, 5, 32.

Where the Crown desires to acquire a land under the Land Acquisition Ordinance, the proceedings ending with the filing of the libel of reference are not bad if in fact a claimant can satisfy the Court that he owns a divided portion of the land.

A. G. A., MATARA *v.* SIDDIK 575

Land Development Ordinance—

1. *Land Development Ordinance (Cap. 320)—Sections 162 and 163—Disposition of protected holding—Reference in deed to Government Agent's consent—Imperative and not merely directory—Meaning of term "attestation"—Notaries Ordinance (Cap. 91), s. 30 (20) and (21).*

Under section 162 of the Land Development Ordinance the disposition of a protected holding is vitiated by the failure of the notary to refer specifically, in the attestation clause of the deed, to the written consent of the Government Agent to the disposition.

The term "attestation" in section 162 (1) includes both the subscription of the signature and the attestation clause.

EDWIN DE SILVA *v.* KARUNADASA DE SILVA 1

2. *Land Development Ordinance (Cap. 320)—Prosecution thereunder—Right of forest officer to institute it—Sections 3–6, 168 (2)—Criminal Procedure Code, s. 148 (1) (b).*

There is nothing in the Land Development Ordinance to prevent a range forest officer from availing himself of the provision of section 148 (1) (*b*) of the Criminal Procedure Code in order to institute a prosecution for an offence punishable under that Ordinance.

ATTORNEY-GENERAL *v.* ALWISAPPU 254

3. *Land Development Ordinance (Cap. 320)—Permit-holder—His right to maintain* actio rei vindicatio.

A permit-holder under the Land Development Ordinance enjoys a sufficient title to enable him to maintain a vindicatory action against a trespasser.

PALISENA *v.* PERERA 407

Landlord and Tenant—

1. *Rent Restriction Act, No. 29 of 1948—Premium paid as condition of grant of tenancy—Right of tenant to recover it—Illegal contract—Sections 8, 15, 23.*

No claim can be grounded on an illegal contract. A tenant, therefore, is precluded from recovering from the landlord any premium paid by him in contravention of section 8 of the Rent Restriction Act as a condition of the grant of the tenancy.

VITHARNE *v.* ZYLVA 57

2. *Rent Restriction Act, No. 29 of 1948—Joint landlords—"Reasonable requirement" of premises for some only of them—Tenant's liability then to be ejected—Sections 13 (1) (c), 27—Interpretation Ordinance (Cap. 2), s. 2.*

Where there are two joint landlords, they cannot obtain possession of premises under proviso (*c*) of section 13 (1) of the Rent Restriction Act

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PAGE

unless they prove that the premises are reasonably required for occupation as a residence for both of them. The tenant cannot be ejected if there is proof of reasonable requirement of the premises for only one of them.

COREA *v.* MUTTUCUMARU 80

3. *Rent Restriction Act, No. 29 of 1948—" Excepted premises "—Significance of date of assessment of annual value—Distinction between " residential premises " and " business premises "—Sections 2 (4) and (5), 13, 27—Regulations 1 and 2 of Schedule (prior to amendment).*

(i) The annual value of certain residential premises situated within the Municipality of Colombo was assessed in November, 1941, at Rs. 2,750. The premises were, therefore, excepted premises within the meaning of Regulation 2 of the Schedule to the Rent Restriction Act. When the premises were let in May, 1949, and at the time of the institution of the present action to eject the overholding tenant, they were used as business premises.

Held, that the tenant was not entitled to claim the protection of the Rent Restriction Act on the plea that the annual value of the premises, regarded as business premises, did not exceed Rs. 6,000. The character of the premises that was material for the purpose of applying Regulation 2 was their character at the time of the assessment.

(ii) Premises were taken on rent by the proprietor of a school and used by him as a hostel for the students and a place of residence for the warden of the hostel and some of the teachers. The business of the school itself was carried on at another place.

Held, that the premises were " residential premises " within the meaning of section 27 of the Rent Restriction Act.

Hepponstall v. Corea (1952) 54 N. L. R. 214 and *Standard Vacuum Oil Co. v. Jayasuriya* (1951) 53 N. L. R. 22, considered.

GUNATILLEKE *v.* FERNANDO 105

4. *Rent Restriction Act—Applicability to " lease " of a business.*

Where a business of the nature of a hotel and tea kiosk was " leased " by A to B and, under the contract, A gave over to B the management, control and conduct of the business for a term of years—

Held, that at the end of the specified period B was not entitled to the protection of the Rent Restriction Act in regard to the premises in which the business was carried on.

CHARLES APPUHAMY *v.* ABEYESEKERA 243

5. *Landlord and tenant—Merger of titles—Effect—Right of tenant to dispute landlord's title—Meaning of " landlord " in rent restriction law—Rent Restriction Act, No. 29 of 1948, ss. 13 (1) (a), 26, 27.*

Plaintiff-appellant had let certain premises to the defendant-respondent on a non-notarial document. Admittedly he was not the owner of the premises. He brought the present action to have the defendant ejected on the ground that rent was in arrears. Defendant pleaded that he had purchased from the owners a portion of the premises and taken on lease the remainder and that, consequently, the capacities of landlord and tenant had become merged in him.

Held, that even assuming that the defendant had become owner of the entire premises it was not open to him to refuse to surrender possession to his landlord. He must first give up possession, and then it would be open to him to litigate about the ownership.

Meaning of expression " landlord " in sections 26 and 27 of the Rent Restriction Act considered.

VISVALINGAM *v.* GAJAWEERA 111

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PAGE

6. *Rent Restriction Act—Business premises—" Reasonable requirements " of landlord—Factors for consideration.*

Plaintiff was the landlord of the defendants in respect of certain premises. He sought to have them ejected on the ground that he required the premises for his trade and business. The evidence showed that the premises were already being used by the tenants since the year 1938 as the principal place of their chief business of selling sundry goods.

Held, that, when assessing whether the landlord reasonably required the premises, the Court should give due weight to the advantage to the tenant of continuing to occupy the same premises and to the proportionate disadvantage suffered by him by being forced to leave them. The value of a business such as selling sundry goods would depend to a large extent on the length of time that it had been carried on in the same premises.

Held further, that the fact that the plaintiff invested a large sum of money in the purchase of the premises in the expectation of getting vacant possession was not a measure of the reasonableness of his claim.

Quaere, whether it is hardship to the landlord or the tenant alone that must be taken into account, or whether there is a " claim of third persons whose reflected hardship, so to speak, may be taken into account ".

SUPPIAH CHETTIAR *v.* SAMARAKOON 161

7. *Jurisdiction—Court acting beyond its powers—Consent of parties—Validity of compromise—Rent Restriction Act, No. 29 of 1948, s. 13.*

Although parties cannot by agreement give the Courts jurisdiction which the Legislature has enacted that they are not to have, nevertheless a compromise after action which is advantageous to a party and secured to him by a decree subsequently entered of consent is not void as offending the prohibition against waiver. A sub-tenant, therefore, who, after a decree has been entered against the tenant, consents to be bound by it upon conditions advantageous to himself and embodied in the decree by adjustment, cannot subsequently resist enforcement of the decree on the ground that it is invalid for lack of jurisdiction. The sub-tenant, in such a case, forfeits by waiver the protection of section 13 of the Rent Restriction Act.

DEP *v.* NAGARATNAM 262

8. *Rent Restriction Act, No. 29 of 1948—Death of tenant—Continuance of tenancy—Section 18 (2)—Exclusive jurisdiction of Board of Review.*

Where, on the death of a tenant, a person gives notice to the landlord, in terms of section 18 (2) of the Rent Restriction Act, stating that he proposes, in his status as a member of the household of the deceased tenant, to continue in occupation of the leased premises as the tenant thereof, the landlord must, if he objects to the status of such person to give the notice, make an application to the Rent Control Board under section 18 (3) and is not entitled to raise such objection in a court of law in an action to eject the person who claims to be the new tenant.

WICKREMASINGHE *v.* ABDUL RAHEEM 280

9. *Rent Restriction Act, No. 29 of 1948—Section 13 (1) (d)—Nuisance—Nature of responsibility of tenant—" Adjoining " occupiers—Must landlord himself give evidence ?*

Defendant, a limited liability Company carrying on the business of bakers, was a tenant of certain rented premises. One of the rented rooms was being used as a rest room by the Company's workmen. There was evidence that the occupants of the room used to urinate in and pollute the drains on both sides of the road just outside that room. A neighbouring occupier who lived opposite the premises repeatedly complained about the objectionable behaviour of the occupants of the room, but the defendant permitted the nuisance to continue.

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PAGE

Held, that the defendant was guilty of conduct which was a nuisance to adjoining occupiers within the meaning of section 13 (1) (*d*) of the Rent Restriction Act and was therefore liable to be ejected from the premises:

PERERA & SONS, LTD. *v.* PATE 334

10. *Rent Restriction Act—Payment of rent by cheque—Return of cheque after it becomes "stale"—Effect on question of rent being "in arrear"—Tender of rent.*

When a landlord accepts payment of rent by cheque but does not present the cheque at the bank and returns it to the tenant after it becomes "stale", the failure of the tenant to make a fresh payment within a reasonable time after the stale cheque is returned does not have the effect of a forfeiture of the tenant's statutory protection. Rent for any particular month is not "in arrear" within the meaning of the Rent Restriction if it was paid *or tendered* by the tenant within the stipulated period.

THANGADORAI NADAR *v.* ESMAILJEE 343

11. *Landlord and tenant—Donee or vendee of leased premises—His right to sue tenant for rent.*

Where a landlord donates the rented premises reserving a life interest in his favour, the donee is entitled to claim the rent from the tenant on the death of the donor ; it is not open to the tenant to continue to remain in possession and refuse to pay rent to the new owner on the pretext that he never attorned to the new owner.

Zackariya v. Benedict (1950) 53 N. L. R. 311, considered.

SILVA *v.* MUNIAMMA 357

12. *Rent Restriction Ordinance, No. 60 of 1942—Sections 7 and 14—Premium illegally received by landlord—His right to retain it—Illegal contract.*

Quaere, whether a premium paid by a tenant to his landlord in contravention of the Rent Restriction Ordinance of 1942 and of the later Act of 1948 is recoverable in every case ? Scope of the applicability of the maxim *in pari delicto potior est conditio defendentis* considered.

AMARASEKARA *v.* ABEYGUNAWARDENE 361

13. *Rent Restriction Act, No. 29 of 1948—Section 9 (1 and 2)—"Subletting"—Applicability of the term to transfer of a business for a stipulated period.*

Where a tenant who carries on a business in the rented premises transfers the business to a third party for a stipulated period without obtaining the landlord's consent in writing, such transfer does not amount to subletting within the meaning of section 9 of the Rent Restriction Act if the possession of the premises by the transferee is only incidental to the transaction relating to the business.

JAYASINGHE *v.* GOOLAM HUSSEIN 381

14. *Rent Restriction Act—Section 13—Tenant in arrears of rent—Action in ejectment—Notice to quit is condition precedent.*

Section 13 of the Rent Restriction Act does not render notice to quit unnecessary to determine a contract of tenancy where the tenant is in arrears of rent.

CHELLIAH *v.* KADIRAVELU 455

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PAGE

15. *Lease—Non-payment of rent and taxes—Forfeiture.*

In the absence of a forfeiture clause or an express condition a lease is not liable to be cancelled for breach of a covenant to pay rent unless (1) the non-payment of rent is deliberate and persistent or contumacious, (2) the lessee is in arrear of rent for two years and (3) the lessor gives the lessee notice of terminating the lease if the arrears are not paid.

An undertaking by a lessee to pay taxes in respect of the leased premises is a condition for the breach of which the lessor is entitled to a cancellation of the lease.

KANAGALETCHUMY *v.* MARIKAIR 465

16. *Rent Restriction Act, No. 29 of 1948—Section 13—Tender of rent—Landlord's refusal to accept it—Effect of such refusal—" Arrear of rent "—Section 27—" Landlord ".*

When, in a tenancy to which section 13 of the Rent Restriction Act is applicable, the landlord makes it clear to his tenant that he will not accept further payments of rent there is no obligation on the tenant to tender the rents as and when they fall due. The tenant, however, remains liable to pay the rent when demanded and must bring the arrears into Court when an action in ejectment is instituted by the landlord.

When a person purchases from a landlord rented premises to which the Rent Restriction Act applies he becomes the tenant's " landlord " by virtue of the definition of that term in section 27 of the Act.

ANNAMALAI CHETTIAR *v.* GREASY 477

17. *Rent Restriction Act, No. 29 of 1948—Cheques given in payment of rent—Landlord's failure to present them at the Bank—Demand for fresh cheque—Refusal by tenant—Effect on question of rent being " in arrear " —Section 13 (1), proviso.*

When a landlord takes cheques from his tenant as conditional payment of rents due, the cheques operate as payment, and the tenant is not in arrear within the meaning of the proviso to section 13 (1) of the Rent Restriction Act unless the cheques are dishonoured on presentment. Nor is the tenant in default where the reason why his cheques have not been realized is that the landlord elected not to present them for payment. If then the landlord returns the cheques and asks for " a fresh cheque to cover the entire rent due " the tenant's liability would be a liability on the cheques and not a liability to pay rent.

Per GUNASEKARA J.—" Moreover, the rent can be in arrear only from the day on which it became due, which is fixed by the terms of the contract of tenancy and cannot be varied by the unilateral act of the landlord in returning a cheque that he has taken as conditional payment."

SUBBIAH PILLAI *v.* M. A. SHERIFF & CO., LTD. .. 554

18. *Landlord and tenant—Sale of rented premises—Right of vendor to sue tenant for ejectment.*

When a landlord sells the rented premises it is open to him to sue the tenant thereafter in ejectment, in order to give vacant possession to the vendee.

Wijesinghe v. Charles (1915) 18 N. L. R. 168, followed.

DE SILVA *v.* ABEYRATNE 574

Last Will—

See WILLS.

Law Society—

See PROCTORS.

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PAGE.

Lease—

See LANDLORD AND TENANT.

Libel—

See DEFAMATION.

Limitations of Actions—

See PRESCRIPTION.

Liquid Claims—

Liquid claim—Summary procedure—Instrument must bear stamp—Civil Procedure Code, ss. 703, 705 (2), 706.

A condition precedent to the issue of summons in an action by summary procedure on a liquid claim is that the document on which the action is based should be properly stamped, as required by section 705 (2) of the Civil Procedure Code.

CENTRAL UNION INSURANCE CO., LTD. *v.* BOTEJU 149

Local Authorities—

1. *Housing and Town Improvement Ordinance (Cap. 199)—Section 13 (1) (b)—Offence thereunder—Continuing fine—Circumstances when it may be imposed.*

Under section 13 (1) of the Housing and Town Improvement Ordinance a person who commits any offence set out in clauses (*a*), (*b*), (*c*), (*d*), (*e*) or (*f*) " shall be liable on summary conviction to a fine not exceeding Rs. 300, and to a daily fine of Rs. 25 for every day on which the offence is continued after conviction ".

Held, that a continuing fine cannot be imposed for an offence under the section unless there is some indication in the charge itself or evidence is led in the case that the offence is being continued.

PERERA *v.* RASANAYAKAM 42

2. *Municipal Council of Colombo—General Meeting—Notice of motion by member—Chairman's refusal to include motion in agenda—Remedy of member—Municipal Councils Ordinance, No. 29 of 1947—Section 21—By-law 10—Amending Act No. 39 of 1951, s. 15 (2)*—Mandamus—*Effect of alternative remedy—Necessary parties.*

A writ of *mandamus* is not available where there is another remedy open to the party seeking it. The alternative remedy need not be an action at law ; it may be by way of an appeal to a *forum domesticum*.

The petitioner, a member of the Colombo Municipal Council, gave notice of a motion for the removal of the respondent from the office of Mayor, and desired that the matter should be put up for discussion at a general meeting of the Council. The respondent, who was the Chairman of the Council, purporting to act under By-law 10 (*c*), ruled that the motion was out of order, and the Secretary so informed the petitioner. The Secretary accordingly omitted to place the motion on the Agenda of the meeting. On an application by the petitioner for a writ of *mandamus* on the Mayor—

Held, that *mandamus* was not available for the reason that the petitioner had an alternative remedy, namely, an appeal to the Council itself under section 21 of the Municipal Councils Ordinance.

Held further, (i) that if *mandamus* was available the proper party respondent to the application was the Mayor and not the Secretary.

(ii) that the discretion of the Mayor under By-Law 10 to allow or disallow a motion must not be exercised arbitrarily.

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(iii) that the proposed motion was a question affecting the Municipal Administration of Colombo within the meaning of By-Law 10 (*d*).

(iv) that a writ of *mandamus*, if available, could be issued although the date of the meeting had already passed.

COORAY *v.* GRERO 87

3. *Urban Council—Contract entered into by Chairman—Liability of Council —Urban Councils Ordinance, No. 61 of 1939, ss. 34 (2), 47 (f).*

Where the Chairman of an Urban Council ordered a quantity of fish and received it on behalf of the Council—

Held, that the Urban Council was liable to be sued on the contract as the Chairman was, by virtue of section 34 (2) of the Urban Councils Ordinance, the chief executive officer of the Council.

Held further, that buying and selling fish fell within the permitted activities of an Urban Council, within the meaning of section 47 (*f*).

URBAN COUNCIL, NAWALAPITIYA *v.* ATTORNEY-GENERAL .. 169

4. *Town Councils Ordinance, No. 3 of 1946—Section 183—Arrears of rates—Procedure for recovery—Distress warrant—Must contain necessary particulars—Municipal Councils Ordinance, No. 29 of 1947, s. 252— Penal Code, ss. 182, 314.*

When the Chairman of a Town Council authorises an officer to distrain the goods of a rate-payer who is in arrears with his rates, the warrant must specify the name of the defaulter, the description and situation of the properties and the amount of rate in arrears, as required by section 183 of the Town Councils Ordinance read with section 252 of the Municipal Councils Ordinance. Such particulars are an essential part of the warrant, and resistance to the execution of a warrant which does not contain the particulars is not punishable under sections 183 and 314 of the Penal Code.

PERERA *v.* DHARMATILLAKE 214

5. *Village Communities Ordinance (Cap. 198)—Section 45 (3) (b)—Acreage tax—" Land which is situated outside a built-up locality ".*

The passing of a resolution declaring a particular area to be a built-up locality is not a condition precedent to the imposition of an acreage tax under section 45 (3) (*b*) of the Village Communities Ordinance.

NAVARATNAM *v.* VILLAGE COMMITTEE OF KANDUKARA IHALA KORALE 430

6. *Dangerous or offensive trade—Requirement of licence—By-laws—Local Government Ordinance (Cap. 195), ss. 164, 168 (10) (k)—Urban Councils Ordinance, No. 61 of 1939, s. 248.*

By-law 1 made by an Urban Council under section 168 (10) (*k*) of the Local Government Ordinance declared the manufacture of tiles or bricks to be included within the category of " dangerous or offensive trades ". By-law 2 prohibited the carrying on of a " dangerous or offensive trade without an annual licence which the Chairman shall issue to all persons complying with the conditions provided for the issue of such licences ". There were, however, no by-laws prescribing the conditions applicable to the manufacture of tiles.

Held, that the requirement of a licence under by-law 2 could not be said to apply to the trade of manufacturing tiles unless and until " the conditions provided for the issue of annual licences " for that particular trade were duly prescribed.

JANSEN *v.* SANITARY INSPECTOR, DEHIWELA-MT. LAVINIA U. C. .. 445

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PAGE

7. *Town Councils Ordinance, No. 3 of 1946—Special meetings of Council—Section 39 (2)—Its provisions are peremptory—By-laws—Scope of their effect*—Mandamus—*Alternative remedy—Effect of such remedy in regard to issue of writ.*

Mandamus lies to compel the Chairman of a Town Council to convene a special meeting of the Council in terms of section 39 (2) of the Town Councils Ordinance. Any by-law which is inconsistent with the provisions of the main Ordinance must give way to the latter. Further, an alternative remedy which is provided by a by-law but which is not as convenient, beneficial and effectual as *mandamus* cannot be a bar to the application for *mandamus*.

SEENIVASAGAM *v.* KIRUPAMOORTHY 450

Local Government Ordinance—

Dangerous or offensive trade—Requirement of licence—By-laws—Local Government Ordinance (Cap. 195), ss. 164, 168 (10) (k)—Urban Councils Ordinance, No. 61 of 1939, s. 248 445

See LOCAL AUTHORITIES (6).

Maintenance—

1. *Maintenance—Child—Order made in divorce proceedings—Jurisdiction of Magistrate's Court to award maintenance subsequently.*

Where an order for the maintenance of a child entered in divorce proceedings has been carried out by the deposit of a certain sum of money in the District Court, the jurisdiction of a Magistrate to make a subsequent order for the maintenance of that child becomes ousted to that extent.

SILVA *v.* KARUNAWATHIE 93

2. *Maintenance—Order of court in favour of wife—Subsequent covenant in a deed of separation—Effect thereof on maintenance suit—Maintenance Ordinance, ss. 2, 5.*

Where a married woman obtains an order for maintenance against her husband, a subsequent deed of separation between them puts an end, in effect, to the wife's rights and the husband's liability under the order. In such a case, the husband would be entitled to claim a cancellation of the order under section 5 of the Maintenance Ordinance.

Parupathipillai v. Arumugam (1944) 46 N. L. R. 35, not followed.

SIMON APPU *v.* SOMAWATHIE 275

3. *Maintenance—Destitute parent—Right to maintenance from children.*

The Roman Dutch Law rule that children are liable to support their parents who are in indigent circumstances obtains in Ceylon.

AMBALAVANAR *v.* NAVARATNAM 422

4. *Maintenance—Application by wife—Presence of husband's mother—Is it a valid ground?*

In an application for maintenance made by a wife—

Held, that the bare fact that the husband's mother was in the same house was not a sufficient reason for the wife's refusal to live with him.

FERNANDO *v.* MILLY NONA 549

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PAGE

Malicious Prosecution—

See DELICTS (2).

Mandamus—

See WRIT OF MANDAMUS.

Marriage—

Marriage contracted in a foreign country—Way of proving it—Decree for judicial separation—Scope of its relevancy as evidence—Estoppel— Res judicata—" *Privies in interest* "—*Evidence Ordinance, s.* 41 (*2*) (*c*). 52

See EVIDENCE (2).

Matrimonial Rights and Inheritance Ordinance—

Cap. 47—Section 35—Collation—Donee's right to keep his gift and renounce share in donor's estate 176

See COLLATION.

Maxims—

See WORDS, PHRASES AND MAXIMS.

Medical Evidence—

See EVIDENCE (3), (9).

Mens rea—

Mens rea—*Applicability to statutory offences—Mistake of fact—Validity of such defence—Penal Code, ss. 38 (2), 72—Control of Prices Act, No. 29 of 1950, s. 8 (1) and (6).*

Section 72 of the Penal Code which enacts that " nothing is an offence which is done by any person . . . who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it " applies to all offences alike, including every statutory offence whose definition does not contain a particular state of mind or knowledge as one of its elements. In the latter case the accused will be entitled to an acquittal if he can prove on a balance of probability that by reason of a mistake of fact, and not by reason of a mistake of law, he had in good faith believed himself to be doing something which was not published by law.

The appellant was charged with having sold a loaf of bread weighing 15¼ ounces at a price fixed for a 16 ounce loaf; this sale at a price beyond the controlled price constituted, it was alleged, a contravention of section 8 (1) of the Control of Prices Act. The appellant gave evidence to the effect that he himself believed that the weight of the offending loaf was in fact 16 ounces and that in demanding and receiving 26 cents for its sale, he acted in good faith and intended to charge only what was in truth the controlled price fixed for a 16 ounce loaf.

Held, that it was not open to the trial Court to convict the appellant unless it rejected the appellant's evidence that he believed in good faith, and by reason of a mistake of fact, that he was justified in law in charging 25 cents for a loaf of bread which he honestly but erroneously believed to be 16 ounces in weight.

PERERA *v.* MUNAWEERA 433

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PAGE

Mischief—

See CRIMINAL LAW (4).

Misjoinder of Charges and Accused—

See CHARGE.

Mistake—

See MENS REA.

Mortgage—

1. *Co-owners—Mortgage of his undivided share by one co-owner—Amicable partition among the co-owners thereafter—Effect of it on the earlier mortgage—Equitable considerations involved—Rule against unjust enrichment* 73

See CO-OWNERS (1).

2. *Sale of immovable property—Contract of re-purchase—Parol evidence of a mortgage—Admissibility—" Moratuwa mortgage "—Evidence Ordinance, s. 92—Trusts Ordinance, s. 5 (3)* 337

See VENDOR AND PURCHASER (2).

Motor Traffic Act—

See MOTOR VEHICLES.

Motor Vehicles—

1. *Omnibus Service Licensing Ordinance, No. 47 of 1942—Sections 4, 7, 14 (3)—Route licence—Competing applicants—Matters to be considered when selecting a particular applicant—Stage carriage permit—Motor Traffic Act, No. 14 of 1951, s. 246 (5).*

Three omnibus companies—A., B. and C.—were applicants for a route licence under the Omnibus Service Licensing Ordinance. The Commissioner of Motor Transport granted the licence to A. On appeals taken by B. and C., the Tribunal of Appeal set aside the order of the Commissioner and granted the licence to B. In two cases stated by the Tribunal of Appeal at the instance of the Commissioner (on behalf of A.) and C., respectively—

Held, (i) that cases stated on questions of fact should not be decided on a meticulous consideration of facts of minor importance. The question was whether on vital matters the Tribunal of Appeal had erred to such a degree that its decision was unsustainable.

(ii) that the person on whom the duty was cast in the first instance to decide on the respective merits of claimants to a route was the Commissioner and that the Tribunal was an appellate body.

(iii) that in the issue of a route licence the needs of the public were of paramount consideration. If a particular company could give the best service, it should not be shut out solely on the ground that it was endeavouring to increase its profits by enlarging its existing operations.

(iv) that it was not a serious objection to a new operator providing a service along a route near to an existing one that the old operator would suffer a diminution of profits. It would, however, be against the public interest if, as a result of the new licence, the old operator had to forego profits to the extent of rendering his service unremunerative from a business standpoint.

IN RE SOUTH WESTERN BUS CO., LTD. 30

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PAGE

2. *Motor Traffic Act, No. 14 of 1951—Right of appeal to Supreme Court—Appealable period—Computation—Sections 210, 211, 212.*

The appealable period of twenty-one days in section 212 (2) of the Motor Traffic Act runs from the date of the determination or order of the Transport Appeals Tribunal and not from the date on which notice of the determination or order is served on the appellant.

North-Western Blue Line Bus Co., Ltd. *v.* Green Line Omnibus Co., Ltd 116

3. *Motor vehicle—Negligent driving—Definition of term "driving"—Penal Code, s. 298.*

A person who is merely steering a motor vehicle while it is being towed by another motor vehicle is not "driving" it and therefore cannot be convicted under section 298 of the Penal Code upon an indictment charging him with causing death by an act of negligent driving.

Fernando *v.* The Queen 228

4. Certiorari—*Petitioner must be a person aggrieved—Necessary parties—Delay—Jurisdiction—Acquiescence to patent want of jurisdiction—Difference in effect between patent and latent want of jurisdiction—Estoppel—Duty of applicant to disclose all material facts—Difference between judicial function and administrative function—Omnibus Service Licensing Ordinance, No. 47 of 1942, ss. 6 (2), 13 (4)—Motor Traffic Act, No. 14 of 1951, ss. 243 (1), 246 (1), (4) and (7)—Interpretation Ordinance (Cap. 2), s. 6 (3) (c).*

Kandy Omnibus Co., Ltd. *v.* Roberts 293

See Writ of Certiorari.

5. *Motor Traffic Act, No. 14 of 1951—Sections 88 (1)—and 89 (1)—Lorry—Carriage of goods—Public carrier's permit—Effect of words "may be granted".*

The grant of a public carrier's permit under section 89 (1) (*b*) of the Motor Traffic Act is a matter which lies within the discretion of the Commissioner of Motor Traffic. The word "may" in that section has a permissive, and not a directory, meaning.

De Silva *v.* Commissioner of Motor Traffic .. 447

6. *Interpretation Ordinance (Cap. 2)—Section 6—Prosecution under a repealed Ordinance—Retrospective effect on it of repealing statute—Motor Car Ordinance, No. 45 of 1938, ss. 29 (1), 150 (1), 158—Motor Traffic Act, No. 14 of 1951, s. 243* 501

See Interpretation (3).

7. *Motor vehicle—Charge of using it without revenue licence—Burden of proof—Motor Traffic Act, No. 14 of 1951, ss. 25, 226—Evidence Ordinance (Cap. 11), ss. 105, 106.*

In a prosecution for using a motor vehicle without revenue licence, in contravention of section 25 (1) of the Motor Traffic Act, the burden lies on the accused to prove that there is a licence in force, once evidence of user has been led by the complainant.

Sinnathurai *v.* Sub-Inspector of Police, Vavuniya .. 509

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PAGE

8. *Motor Traffic Act, No. 14 of 1951—Sections 38, 45 (1), 216, 226—Charge of unauthorised plying for hire—Driver accused—Right of owner of car to withhold production of revenue licence—Evidence Ordinance, s. 130 (1).*

Where the driver of a private motor car is prosecuted for carrying passengers for hire in contravention of the conditions of the revenue licence issued in respect of the car, the registered owner of the car is not entitled, when he is summoned to produce the revenue licence, to refuse to produce the licence on the ground that it would tend to incriminate him. If the owner refuses to hand over the document to Court, secondary evidence of the contents of the document would be admissible.

SENARATNE *v.* SIMON APPU 550

9. *Motor Traffic Act, No. 14 of 1951—Section 153 (1)—" Driving when under the influence of alcohol ".*

By section 153 (1) of the Motor Traffic Act—

" No person shall drive a motor vehicle on a highway when he is under the influence of alcohol or any drug."

Held, that no offence is committed unless the person driving the vehicle has brought himself under the influence of alcohol or drugs to such an extent that he cannot safely be entrusted with its control while in that condition.

DON CARTHELIS *v.* IBRAHIM 561

Municipal Councils—

1. *Municipal Council of Colombo—General meeting—Notice of motion by member—Chairman's refusal to include motion in agenda—Remedy of member—Municipal Councils Ordinance, No. 29 of 1947—Section 21—By-law 10—Amending Act No. 39 of 1951, s. 15 (2)*—Mandamus—*Effect of alternative remedy* 87

See LOCAL AUTHORITIES (2).

2. *Municipal Councils Ordinance, No. 29 of 1947—Section 252* .. 214

See LOCAL AUTHORITIES (4).

Murder—

See COURT OF CRIMINAL APPEAL DECISIONS.

Negligent Driving—

See MOTOR VEHICLES (3).

Negotiable Instruments—

1. *Rent Restriction Act—Payment of rent by cheque—Return of cheque after it becomes " stale "—Effect on question of rent being " in arrear "—Tender of rent* 343

See LANDLORD AND TENANT (10).

2. *Promissory note—Subsequent additional security—Does not amount to discharge by novation—Negotiability—Bills of Exchange Ordinance, s. 36 (1).*

The maker of a promissory note who subsequently creates a mortgage to secure the repayment of his debt is nevertheless liable to an indorsee

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PAGE

for value without notice unless he shows that the mortgage bond was not merely an additional security but had superseded the obligation founded on the promissory note.

MISSO *v.* MOHAMEDALLY 370

3. *Liquid claim—Summary procedure—Instrument must bear stamp—Civil Procedure Code, ss. 703, 705 (2), 706.*

A condition precedent to the issue of summons in an action by summary procedure on a liquid claim is that the document on which the action is based should be properly stamped, as required by section 705 (2) of the Civil Procedure Code.

CENTRAL UNION INSURANCE CO., LTD. *v.* BOTEJU .. 149

4. *Rent Restriction Act, No. 29 of 1948—Cheques given in payment of rent—Landlord's failure to present them at the Bank—Demand for fresh cheque—Refusal by tenant—Effect on question of rent being "in arrear"—Section 13 (1), proviso.*

When a landlord takes cheques from his tenant as conditional payment of rents due, the cheques operate as payment, and the tenant is not in arrear within the meaning of the proviso to section 13 (1) of the Rent Restriction Act unless the cheques are dishonoured on presentment. Nor is the tenant in default where the reason why his cheques have not been realized is that the landlord elected not to present them for payment. If then the landlord returns the cheques and asks for "a fresh cheque to cover the entire rent due" the tenant's liability would be a liability on the cheques and not a liability to pay rent.

Per GUNASEKARA J.—"Moreover, the rent can be in arrear only from the day on which it became due, which is fixed by the terms of the contract of tenancy and cannot be varied by the unilateral act of the landlord in returning a cheque that he has taken as conditional payment."

SUBBIAHPILLAI *v.* M. A. SHERIFF & CO., LTD. 554

Notaries—

1. *Meaning of term "attestation"—Notaries Ordinance, s. 30 (20 and 21)* .. 1

See LAND DEVELOPMENT ORDINANCE.

2. *Auction sale—Notarial fees—Exorbitant sum charged—Payment made under mistake of fact—Remedy of purchaser* 122

See PROCTORS (5).

Omnibus—

See MOTOR VEHICLES.

Parliamentary Elections—

1. *Privy Council—Election petition—Appeal to Supreme Court—Decision of Supreme Court is final—No appeal to Privy Council—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 81, 82, 82A–D, as amended by Act No. 19 of 1948.*

Where a party who is dissatisfied with the determination of an election judge prefers an appeal to the Supreme Court on questions of law under section 82A of the Parliamentary Elections Order in Council, no appeal will be entertained by the Privy Council from the decision of the Supreme Court, even if the jurisdiction of the election judge to deal with the subject-matter at issue is challenged.

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PAGE

"The peculiar nature of the jurisdiction and the importance in the public interest of securing at an early date a final determination of the matter and the representation in Parliament of the constituency affected make it clear that it was not the intention of the Order-in-Council to create a tribunal with the ordinary incident of an appeal to the Crown."

SENANAYAKE *v.* NAVARATNE 5

2. *Parliamentary Election—Agency—Principles applicable—Proof of agency—Election offences—Degree of proof required.*

In Parliamentary elections the relationship between a candidate and his agent is similar to that between master and servant. A candidate is liable for the corrupt acts of his agent, provided they were done within the scope of his authority, even though the candidate may have taken the precaution of warning the agent against such acts.

Agency may arise not only by express appointment but also may be implied from circumstances. But before the Court can infer agency from surrounding circumstances it must be satisfied that that is the only inference which can be drawn from the facts proved. The mere non-interference by a candidate with persons who on their own work for him is not sufficient to saddle him with the consequences of the corrupt acts of which he was ignorant.

Election offences must be strictly proved. The degree of proof required is the same as in a criminal charge.

CHELVANAYAKAM *v.* NATESAN 271

3. *Parliamentary Election—Corrupt practice—Publication of documents—Omission to state name and address of publisher—"Inadvertence"—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 58 (1) (c), 73A—Amending Act, No. 26 of 1953, ss. 3, 4.*

The petitioner sought to unseat the respondent on the ground that he had published or caused to be published certain pamphlets and handbills which did not bear upon their face the name and address of the publisher. The evidence disclosed that the respondent, who was his own election agent, entrusted the publicity side of his campaign to a committee of supporters whose names and addresses were published to the electorate in a document. In regard to the impugned documents, while there was no express reference to any publisher as such, there appeared an entry from which it could reasonably be inferred that the documents were sponsored by the committee. Moreover, the omissions in question afforded no material benefit to the respondent.

Held, that the omissions complained of were of a trivial nature and arose from inadvertence within the meaning of section 73A of the Parliamentary Elections Order in Council.

ABEYWARDENE *v.* DHARMAPALA 399

Partition Actions—

1. *Co-owners—Mortgage of his undivided share by one co-owner—Amicable partition among the co-owners thereafter—Effect of it on the earlier mortgage—Equitable considerations involved—Rule against "unjust enrichment"* 73

See CO-OWNERS (1).

2. Res judicata—*Partition action—Sole defendant—Agreement by plaintiff to pre-pay costs before a given date—Dismissal of action for default—Legal effect of the dismissal.*

In a partition action instituted by A. as sole plaintiff against B. as sole defendant, B. claimed the entirety of the corpus without conceding any share to A. The action was, however, dismissed because

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PAGE

the plaintiff had committed a breach of an agreement to pre-pay certain costs before a given date. Thereupon A. filed another partition action in respect of the identical land.

Held, that the dismissal of the first action dertermined once for all B.'s title to the entirety of the land as against A. A. was not entitled, in the second action, to agitate the same question of title as was in issue in the previous action.

Held further, that the transfer by B. of the entire land to C. during the pendency of the second action was valid.

SEDARAHAMY *v.* ABUBUCKER 83

3. Res judicata—*Several previous but conflicting decisions—Principles applicable then—Partition action* 182

See RES JUDICATA (3).

4. *Co-owner—Right to build on the common land—Order for demolition of building—Propriety of seeking it in partition action.*

In a partition action, the Court is entitled to order the demolition of a building constructed by a co-owner contrary to the protests of the other co-owners and in violation of their rights as co-owners.

Where a co-owner puts up a building on the common land, he cannot compel any of his co-owners to take over such buildings and pay compensation.

AGNES PERERA *v.* EDWARD PERERA 241

5. *Co-owners—Amicable partition—Plan made by a co-owner—Its value as evidence of divided possession—Prescription—Ouster* .. 250

See CO-OWNERS (4).

6. *Partition Ordinance (Cap. 86)—Section 9—Finding of fraud and collusion—Final decree cannot be set aside on that ground.*

Fraud and collusion on the part of the parties to a partition action does not entitle the person defrauded to an order setting aside the decree entered in that action ; his only remedy, according to section 9 of the Partition Ordinance, is an action for damages.

ADAMJEE *v.* SADEEN 345

7. *Partition action—Improvements made by a co-owner—Scope of his right to be allotted portion which contains the improvements—Partition Ordinance, No. 10 of 1863, ss. 4, 5.*

In an action for the partition of a land owned in common the rule that a co-owner should be allotted the portion which contains his improvements is not an invariable rule ; it will not be followed if it involves substantial injustice to the other co-owners.

Where, therefore, co-owner A wrongfully demolishes a building put up by co-owner B and erects on its foundation another building, A will not, in preference to B, be allotted the portion of the land on which the building stands. The question as to who should get the lot with the building may be decided at the stage of partition if there is no provision in regard to it in the interlocutory decree.

LIYANAGE *v.* THEGIRIS 546

8. *See also* CO-OWNERS.

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PAGE

Paulian Actions—

1. *Paulian action—Conveyance of property in fraud of creditors—Several colourable transactions—Civil Procedure Code, s. 247.*

Alienation of property in fraud of creditors may consist of a series of colourable transactions in respect of the same property.

JUSTIN DE SILVA *v.* NICULAS 439

Payment—

1. *Rent Restriction Act—Payment of rent by cheque—Return of cheque after it becomes "stale"—Effect on question of rent being "in arrear"—Tender of rent* 343

See LANDLORD AND TENANT (10).

2. *Rent Restriction Act, No. 29 of 1948—Cheques given in payment of rent—Landlord's failure to present them at the Bank—Demand for fresh cheque—Refusal by tenant—Effect on question of rent being "in arrear"—Section 13 (1), proviso* 554

See LANDLORD AND TENANT (17).

Penal Code—

Sections 38 (2), 12 433
Sections 72, 38 (2) 433
Section 140 22
Sections 183, 314 214
Section 294, Exception 1 217
Section 298 228
Sections 311, 317 191
Sections 314, 183 214
Sections 317, 311 191
Section 403 71
Section 408 114
Section 449 428
Section 479 102

See also COURT OF CRIMINAL APPEAL DECISIONS ; CRIMINAL LAW.

Poisons, Opium and Dangerous Drugs Ordinance—

1. *Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172)—Section 32—"Raw or prepared opium."*

In a prosecution for possessing raw or prepared opium in breach of section 32 of the Poisons, Opium and Dangerous Drugs Ordinance it is sufficient for the complainant to establish that the accused had opium in his possession ; he need not give further particulars as to the species of opium.

SAPI NONA *v.* INSPECTOR OF POLICE 119

2. *Charge—Duplicity—Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172), s. 26—Criminal Procedure Code, ss. 171, 425.*

The charge against the accused was that he did "sow, plant or cultivate" hemp plants in breach of section 26 of the Poisons, Opium and Dangerous Drugs Ordinance.

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PAGE

Held that, the charge was not bad for duplicity. Section 26 of the Poisons, Opium and Dangerous Drugs Ordinance created one offence, whether it was committed by sowing, planting or cultivating.

Held further, that, even if there was error in the charge, the error was immaterial.

WIJESINGHE *v.* DON MARTIN 158

3. *See also* EXCISE ORDINANCE.

Postponement—

1. *Postponement—Conflict of medical certificates—Proper assessment.*

Where a medical certificate which was submitted on behalf of the plaintiff in support of an application for a postponement of the hearing of evidence was in conflict with the report of the medical practitioner who examined him on the next day on a commission issued by Court at the instance of the defendant—

Held, that the medical certificate should not be rejected unless it could be said that the medical practitioner who issued it and the plaintiff had conspired to conceal the true facts.

GANAPATHY *v.* RAMASAMY 495

Pre-emption—

See THESAVALAMAI (2).

Prescription—

1. *Privy Council—Proctor and client—Fiduciary relationship—Conflict between interest and duty—Duty of making full disclosure of relevant facts—Breach of such duty—Equitable claim for damages—Applicability of Prescription Ordinance, s. 10* 12

See FIDUCIARY RELATIONS.

2. *Co-owners—Amicable partition—Plan made by a co-owner—Its value as evidence of divided possession—Prescription— Ouster.*

A plan made at the instance of a co-owner purporting to cause a division of the common land of which the other co-owners apparently had no notice does not form the basis of divided possession. Exclusive possession on the footing of such a plan does not terminate the co-ownership of the land, and no presumption of an ouster can be inferred from such possession

GITHOHAMY *v.* KARANAGODA 250

3. *Buddhist ecclesiastical law—Incumbency of temple*—Sisyanusisya paramparawa—*Impostor cannot acquire right to incumbency by prescription—Prescription Ordinance (Cap. 55), s. 10.*

The status of the lawful incumbent of a Buddhist temple under the *sisyanusisya paramparawa* cannot be extinguished by prescription by a *de facto* incumbent who is an impostor.

MORAGOLLE SUMANGALA *v.* KIRIBAMUNE PIYADASSI .. 322

4. *Fideicommissum—Claim by prescription as against fideicommissary—Burden of proof—Evidence Ordinance, ss. 101, 103—Prescription Ordinance, proviso to s. 3* 345

See FIDEICOMMISSA (1).

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PAGE

5. *Prescription—Action instituted in Court of Requests—Claim in reconvention beyond jurisdiction—Transfer to District Court—Date of action in respect of the claim in reconvention—Courts Ordinance (Cap. 6), s. 79—Prescription Ordinance, s. 10.*

When the Supreme Court authorises under section 79 of the Courts Ordinance a transfer of proceedings from the Court of Requests to the District Court by reason of the claim in reconvention being beyond the jurisdiction of the Court of Requests, the action for the recovery of the claim in reconvention in excess of the sum which the Court of Requests has jurisdiction to award does not " commence " within the meaning of the Prescription Ordinance until the transfer of the proceedings to the District Court has been authorised by the Supreme Court ; in regard to the issue of prescription, the action must be regarded as having *commenced* in the Court of Requests and *continued* in the *District Court* in respect only of those claims over which the former Court had jurisdiction to grant relief.

AMARASEKERA *v.* ABEYGUNAWARDENE 361

6. *Co-owners—Prescription—Adverse possession—Distinction between possession by a co-owner and possession by a stranger* 491

See CO-OWNERS (6).

7. *Prescription Ordinance (Cap. 55)—Sections 6, 7, 8—Goods sold and delivered—Action for purchase price—Promissory note as evidence of unwritten promise—Prescriptive period.*

Where a purchaser of goods gave the seller, at the time of delivery of the goods, a promissory note in respect of the balance purchase price due from him, and the seller, in his suit for the balance price, relied on the promissory note as evidence only of an unwritten promise and did not actually base his action on the promissory note—

Held, that, in regard to the issue of prescription, the action was governed by section 8, and not section 7, of the Prescription Ordinance ; the prescriptive period was therefore one year only, and not three years.

DHARMARATNE *v.* FERNANDO 498

Price Control Act—

See MENS REA.

Principal and Agent—

1. *Agency—Principles applicable—Proof of agency* 271

See PARLIAMENTARY ELECTIONS (2).

Privy Council—

1. *Election petition—Appeal to Supreme Court—No appeal to Privy Council—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 81, 82, 82A* 5

See ELECTION PETITIONS (1).

2. *Privy Council—Conditional leave to appeal—Grant in absence of respondent—Right of Court to vacate it subsequently—Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rule 22.*

Where an application for conditional leave to appeal to the Privy Council is allowed in the absence of the party respondent the Court has power to vacate its order subsequently if the party respondent shows

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PAGE

that he had no notice or knowledge of the application and that though he exercised due diligence in attempting to obtain information with regard to any such application, he failed to obtain any.

KANDY OMNIBUS CO., LTD. *v.* SILVERLINE BUS CO., LTD .. 289

3. *See also* PRIVY COUNCIL DECISIONS.

Privy Council Decisions—

1. *Privy Council—Election petition—Appeal to Supreme Court—Decision of Supreme Court is final—No appeal to Privy Council—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 81, 82, 82A–D, as amended by Act No. 19 of 1948.*

SENANAYAKE *v.* NAVARATNE 5

See PARLIAMENTARY ELECTIONS (1).

2. *Proctor and client—Fiduciary relationship—Conflict between interest and duty—Duty of making full disclosure of relevant facts—Breach of such duty—Equitable claim for damages—Applicability of Prescription Ordinance, s. 10.*

FUARD *v.* WEERASURIYA 12

See FIDUCIARY RELATIONS.

3. *Privy Council—Collation—Matrimonial Rights and Inheritance Ordinance (Cap. 47)—Section 35—Donee's right to keep his gift and renounce share in donor's estate—Registration of Documents Ordinance (Cap. 101) —Section 8—"Instrument affecting land".*

MURUGIAH *v.* JAINUDEEN 176

See COLLATION.

4. *Sale of goods—C.i.f.—Bill of lading—Tender of goods—Tender of documents.*

HOLLAND COLOMBO TRADING SOCIETY, LTD. *v.* ALAWDEEN .. 385

See CONTRACTS (6).

5. *Contract—Novation—Delegation.*

T. A. K. DE SILVA *v.* HIRDRAMANI, LTD. 481

See CONTRACTS (8).

6. *Sale of goods—Wrongful refusal to accept the goods—Measure of damages—Special damage—Sale of Goods Ordinance, s. 49.*

ABDUL HAMID *v.* ODHAVJI ANANDJI & CO., LTD.. .. 505

See CONTRACTS (9).

Proctors—

1. *Proctor and Client—Fiduciary relationship—Conflict between interest and duty—Duty of making full disclosure of relevant facts—Breach of such duty—Equitable claim for damages—Applicability of Prescription Ordinance, s. 10* 12

See FIDUCIARY RELATIONS.

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PAGE

2. *Proctor—Application for re-enrolment—Palpable and definite repentance—Condition precedent.*

The petitioner, whose name had been struck off the roll of Proctors in consequence of the commission by him of certain grave offences when he was 31 years of age and of 6 years' standing in the legal profession, made application after 20 years to be re-enrolled as a Proctor. He suggested that the grave offences of which he had been convicted were the result of "youthful indiscretion".

Held, that the petitioner failed to establish the existence on his part of that palpable and definite repentance which was a necessary pre-requisite of the consideration of the question whether the grave offences committed by him could even after 20 years be condoned.

IN RE JAYATILLEKE 49

3. *Income Tax—Law Society—Annual grant received from Government—Assessable to income tax—Meaning of terms "Business", "Annuity", "Income"—Ordinance No. 33 of 1947, ss. 3, 7—Income Tax Ordinance (Cap. 188), ss. 5, 6 (1) (a) (f) (h), 7 (1) (c)* 97

See INCOME TAX (1).

4. *Civil Procedure Code—Proctor—Appointment—Requirement of writing signed by the client—Section 27.*

When the petition of appeal was filed on behalf of the defendants, the Proctor who presented it had not been appointed in writing, as required by section 27 of the Civil Procedure Code, to act for some of the appellants. He was so appointed after the appealable time had expired. He had, however, without objection from any of the parties, represented all the defendants at various stages of the proceedings earlier.

Held, that the irregularity in the appointment of the Proctor was cured by the subsequent filing of a written proxy.

KADIRGAMADAS *v.* SUPPIAH 172

5. Condictio indebiti—*Auction sale of immovable property—Notarial fee—Exorbitant sum charged—Payment made under mistake of fact—Remedy of purchaser.*

A purchaser at a public auction of immovable property is entitled to sue a notary for the refund of exorbitant fees paid under a mistake of fact to the notary for attesting the conditions of sale. The obligation in such a case arises out of quasi-contract.

SARNELIS APPUHAMY *v.* RAM ISWARA 221

6. *Proctor—Suspension from office—Courts Ordinance, s. 17.*

Proctor suspended from office for three years for issuing false certificates to certain persons enabling them to obtain Emergency or Identity Certificates.

IN RE DE SOYZA 287

Promissory Notes—

See NEGOTIABLE INSTRUMENTS.

Provocation—

See COURT OF CRIMINAL APPEAL DECISIONS (2).

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PAGE

Proxy—

See PROCTOR (4).

Punishment—

See SENTENCE.

Purchase and Sale—

See VENDOR AND PURCHASER.

Registration of Documents—

1. *Registration of Documents Ordinance (Cap. 101)—Section 8—"Instrument affecting land"* 176

See COLLATION.

2. *Registration—Will—Probate—Failure to register it—Effect as against person claiming adverse interest under subsequently registered deed.*

The non-registration of the probate of a will affecting immovable property renders it void as against a person claiming an adverse interest under a duly registered deed of a subsequent date. Therefore, where property of the estate is disposed of by a devisee, who is also an heir of the deceased, or is sold against him in execution, upon an instrument which is registered prior to the probate of the will, the transferee obtains, in respect of any share or interest to which the devisee would have been entitled by law but for the will, a title superior to that of the executor or a party claiming under him.

ADAMJEE *v.* SADEEN 345

Rent Restriction—

See LANDLORD AND TENANT.

Res Judicata—

1. *Marriage contracted in a foreign country—Way of proving it—Decree for judicial separation—Scope of its relevancy as evidence—Estoppel—* Res judicata—*"Privies in interest"—Evidence Ordinance, s. 41 (2) (c).*

In proceedings taken to administer the intestate estate of one R., each of two persons, K. and P., claiming to be the widow of the deceased, applied for letters of administration. K. alleged that she married the deceased in India on the 11th December, 1929, under the provisions of the Indian Christian Marriage Act. P. alleged that K. was not validly married and that she was the lawful widow by reason of her marriage to the deceased which was registered on the 3rd March, 1930, and solemnized according to Hindu rites in September of the same year. The principal contest was whether K. had contracted a valid marriage with the deceased. The trial Judge held that K., as widow, was entitled to letters of administration.

In a suit brought by P. in 1937 against the deceased for separation *a mensa et thoro* the deceased had admitted that he was lawfully married to P. and counterclaimed a dissolution of the marriage on the ground of malicious desertion. In his evidence the deceased had also admitted that he had been intimate with K. both before and after he was married to P. K. also gave evidence. She admitted sexual intimacy with the deceased but, in order to save the deceased from a prosecution for bigamy, falsely denied that she was married to him. A decree for separation was then entered as between P. and the deceased.

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PAGE

Held, (i) that although the evidence given by the deceased and K. in the suit for judicial separation raised a strong presumption that they had not contracted a marriage in 1929, evidence could be given in the present administration proceedings so as to displace that presumption.

(ii) that it was not essential that K. should lead expert evidence to prove that all the provisions of the Indian Christian Marriage Act requisite for a valid marriage had been complied with. If the certificate of marriage in the form prescribed by the Indian Christian Marraige Act was properly produced, the Court was entitled to hold upon that certificate and the oral evidence that K. contracted a valid marriage with the deceased.

(iii) that the decree entered in the suit for judicial separation was not one which could come within the terms of section 41 (2) (*c*) of the Evidence Ordinance ; it could not, therefore, operate in the present action as conclusive proof that P. was the lawful wife of the deceased.

(iv) that the conduct of K. in wilfully concealing her marriage in the suit for judicial separation could not operate as an estoppel against her in the present action.

(v) that the decree entered in the suit for judicial separation could not operate as *res judicata* against K's children.

SIVAKKOLUNTHU *v.* KAMALAMBAL 52

2. Res judicata—*Partition action—Sole defendant—Agreement by plaintiff to pre-pay costs before a given date—Dismissal of action for default — Legal effect of the dismissal.*

In a partition action instituted by A. as sole plaintiff against B. as sole defendant, B. claimed the entirety of the corpus without conceding any share to A. The action was, however, dismissed because the plaintiff had committed a breach of an agreement to pre-pay certain costs before a given date. Thereupon A. filed another partition action in respect of the identical land.

Held, that the dismissal of the first action determined once for all B.'s title to the entirety of the land as against A. A. was not entitled, in the second action, to agitate the same question of title as was in issue in the previous action.

SEDARAHAMY *v.* ABUBUCKER 83

3. Res judicata—*Several previous but conflicting decisions—Principles applicable then—Partition action.*

In an action for the partition of what was described by the plaintiff as a land consisting of two portions (A and B) the contesting defendants took up the position that the two portions were distinct and separate lands in one of which the plaintiff had no share and, therefore, that the two lands could not be joined in one action for partition.

There had been three earlier actions—Cases Nos. 1, 2 and 3—in regard to the same point in dispute. In case No. 1 it was held that portions A and B constituted one land. On this question it was decided in Case No. 2 that the previous decree in Case No. 1 was *res judicata*. The question arose again in Case No. 3 where the defendants pleaded the decree in Case No. 1 as *res judicata*, but the decree in Case No. 2 was not pleaded as *res judicata*. It was, however, decided in Case No. 3 that A and B were two separate adjoining lands. In Case No. 3 the predecessors in title of the plaintiff and contesting defendants of the present action were parties.

Held, that, for the purpose of deciding the present action, the decisions in Cases Nos. 1 and 2 were superseded by the decision in the later Case No. 3 which was *res judicata* as between the plaintiff and the contesting defendants. Two principles governed the matter, viz., (1) A judgment of a Court of competent jurisdiction directly upon the point in dispute is a bar between the same parties or those claiming through them if pleaded ; but if not so pleaded, the matter is left at large. (2) Where there are conflicting judgments *inter partes*, the later adjudication should be taken as superseding the earlier.

SILINDUHAMY *v.* VEERAPERUMA 182

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PAGE

4. *Buddhist ecclesiastical law—Incumbency of temple*—Sisyanusisya paramparawa—*Impostor cannot acquire right to incumbency by prescription—Prescription Ordinance (Cap. 55), s. 10*—Res judicata—*Two important principles—Privity between pupil and tutor.*

The status of the lawful incumbent of a Buddhist temple under the *sisyanusisya paramparawa* cannot be extinguished by prescription by a *de facto* incumbent who is an impostor.

For the purpose of adjudicating upon a plea of *res judicata* raised in a dispute concerning rights to the incumbency of a Buddhist temple no privity of estate or interest can be assumed between a pupil and his tutor who is not proved to have been the lawful incumbent.

Two important tests must be applied whenever a plea of *res judicata* is raised : (1) whether the judicial decision in the earlier litigation was, or at least involved, a determination of the same question as that sought to be controverted in the later litigation in which the estoppel is raised, and, if so, (2) whether the parties to the later litigation are the parties or the privies of the parties to the earlier decision.

REV. MORAGOLLE SUMANGALA *v.* REV. KIRIBAMUNE PIYADASSI.. 322

Revision—

See APPEAL (4).

Right of Way—

See SERVITUDES.

Sale—

See VENDOR AND PURCHASER.

Sale of Goods—

See CONTRACTS (6), (9).

Sentence—

1. Habeas Corpus—*Power of Court to remand a girl to the Salvation Army Home—Courts Ordinance, s. 45.*

A Court has no jurisdiction to remand a girl to the Salvation Army Home during the pendency of a case of kidnapping her.

IN RE NOOR JEHAN 29

2. *Housing and Town Improvement Ordinance (Cap. 199)—Section 13 (1) (b)—Offence thereunder—Continuing fine—Circumstances when it may be imposed.*

Under section 13 (1) of the Housing and Town Improvement Ordinance a person who commits any offence set out in clauses (*a*), (*b*), (*c*), (*d*), (*e*) or (*f*) " shall be liable on summary conviction to a fine not exceeding Rs. 300, and to a daily fine of Rs. 25 for every day on which the offence is continued after conviction ".

Held, that a continuing fine cannot be imposed for an offence under the Section unless there is some indication in the charge itself or evidence is led in the case that the offence is being continued.

PERERA *v.* RASANAYAKAM 24

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PAGE.

3. *Brothels Ordinance—Charge of "Keeping or managing a brothel"—Sentence.*

If a person keeps in a place even one solitary prostitute to be supplied to all comers, that person may be convicted of "keeping or managing a brothel".

Where a Magistrate chooses to impose a sentence of imprisonment rather than a fine for a first offence under the Brothels Ordinance, he must give reasons for so doing, or at least the proceedings must show that he has exercised his discretion properly.

PODINONA PERERA *v.* HANIFFA 165

Servitudes—

1. *Co-owner—Owner also of adjoining land—His right to go over the common property to reach the adjoining land* 95

See CO-OWNERS (2).

2. *Co-owners—Amicable Partition—Right of way—Express grant or reservation necessary* 402

See CO-OWNERS (5).

Stamps Ordinance—

1. *Stamps Ordinance—Business—Agreement to sell it—Movable assets—Liability to duty—Meaning of "business"—Section 26A—Schedule, Items 4 (c) and 23 (2a) (vii).*

An agreement for the sale of a business is chargeable to duty as such under Item 23 (2*a*) (vii) of the Schedule to the Stamps Ordinance notwithstanding that the various assets of the business are separately specified in the agreement.

Where such an agreement includes a provision for the sale of the goods, wares and merchandise belonging to the business the exemption in Item 4 (*c*) is not applicable.

CARGILLS (CEYLON), LTD. *v.* COMMISSIONER OF STAMPS .. 187

2. *Stamps—Trust in favour of Company which is not yet in existence—Conveyance by trustee to Company after grant of incorporation—Amount of stamp duty payable—Stamps Ordinance, Schedule, Part I, Items 23 (1) (b), 23 (4), 23 (8), 27 (Proviso)—Trusts Ordinance, s. 84.*

Property can be held by a person in trust to convey it to a Company which is to come into existence in the future. When immovable property thus held in trust is conveyed by the trustee to the Company when formed, the deed of transfer is a conveyance "by a trustee without consideration to the person beneficially entitled", and as such attracts only the duty chargeable under Item 23 (4) of Part I of the Schedule to the Stamps Ordinance.

SALAHUDEEN *v.* COMMISSIONER OF STAMPS 351

Summary Procedure—

See LIQUID CLAIMS.

Surety—

See CONTRACTS (4).

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PAGE

Thesavalamai—

1. Thesavalamai—Tediatetam—*Devolution on death of non-acquiring spouse—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), ss. 19, 20, 21—Amending Ordinance No. 58 of 1947, ss. 5, 6—Retroactive effect.*

The rights of a wife, to whom the *Thesavalamai* applies, in respect of *tediatetam* property acquired by her husband before the Jaffna Matrimonial Rights and Inheritance Amendment Ordinance of 1947 came into operation are governed by section 20 of the principal Ordinance of 1911 and are not affected by sections 5 and 6 of the amending Ordinance. If she predeceases her husband subsequent to the date when the amending Ordinance became operative, the devolution of her share of that property is regulated solely by section 21 of the principal Ordinance because the new section 20 has no application to the case; accordingly, the entirety of her vested interest in the property passes to the children of the marriage as her heirs, to the exclusion of the husband.

K. Kumaraswamy *v.* K. Subramaniam 44

2. Thesavalamai—*Pre-emption—"Partners"—Requirements of* plenum dominium—*Cap. 51, Part 7, s. 1.*

A person whose title to a share in a common property is limited by rights of occupation enjoyed to his exclusion by someone else is not a "partner" within the meaning of section 1 of Part 7 of the *Thesavalamai* (Cap. 51) and is not entitled, therefore, to claim rights of pre-emption. In this context the word "partners" is necessarily confined to co-owners who exercise (or are at least entitled to exercise) *plenum dominium* over the common property.

Sivagurunathan *v.* Visaladchi 376

Torts—

See Delicts.

Town Councils—

1. *Town Councils Ordinance, No. 3 of 1946—Section 183—Arrears of rates—Procedure for recovery—Distress warrant—Must contain necessary particulars—Municipal Councils Ordinance, No. 29 of 1947, s. 252—Penal Code, ss. 183, 314* 214

See Local Authorities (4).

2. *Town Councils Ordinance—Special meetings of Council—Section 39 (2)—Its provisions are peremptory—By-laws—Scope of their effect*—Mandamus—*Alternative remedy—Effect of such remedy in regard to issue of writ* 450

See Local Authorities (7).

Trial at Bar—

1. *Informations—Power of Attorney-General to exhibit informations—Circumstances when informations may be presented—Criminal Procedure Code, s. 385.*
2. *Trial at Bar—Direction of Minister of Justice—Jurisdiction of Court to adjudicate upon its validity—"Disturbance of public feeling"—Test of its existence—How far justiciable—Criminal Procedure Code, s. 440A (1) and (2).*

Information was exhibited by the Attorney-General against the defendant on August 5, 1954, charging her with criminal defamation in

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PAGE

respect of a defamatory statement published on July 1, 1954, in a newspaper called " Trine ", concerning a person who had held high office in Government for many years in various capacities and who, on the day previous to the date of publication of the statement, had ceased to hold office as Minister of Finance and was Governor-General designate. The alleged libel was to the effect that the Governor-General designate had been engaged in swindles on an international scale and that a public trial of the gang—of which presumably he was a member—was imperative.

On August 6, 1954, the Chief Justice received from the Minister of Justice a written communication dated the previous day and purporting to be a direction under Section 440A of the Criminal Procedure Code that the defendant should be tried at Bar by three Judges without a Jury.

Before defendant pleaded to the information her Counsel moved that the information be quashed on the ground that it was one which the Attorney-General could not validly exhibit, and also contended that the direction of the Minister of Justice was invalid.

Held, that if the Attorney-General in whom rested the discretion either to proceed by indictment or information took the view that the imputations which were the subject of the information tended to disturb or endanger the Government, it was impossible to hold, assuming that the Court had the power to review that discretion, that that view was wrong. The speedy process of information was designed not to vindicate the personal honour of the officer libelled but to counteract what was essentially a public mischief. In the circumstances the Attorney-General had the power under Section 385 of the Criminal Procedure Code to file the information, and the application to quash it must accordingly fail.

Quaere, whether in any event the Court had the power to quash an *ex officio* information ?

Held further, (i) that the Court had jurisdiction to adjudicate upon the question whether the direction given by the Minister of Justice was a valid direction in the sense that it complied with the requirements of Section 440A of the Criminal Procedure Code. The circumstance that the Minister had purported to direct that the information " shall be tried before the Supreme Court at Bar by three Judges without a Jury " did not have the effect that a Bench of three Judges which assembled to hear the information ceased to be the Supreme Court and became a different tribunal created by the Minister.

(ii) that there was no requirement to give the Minister of Justice an opportunity of being heard in support of the direction given by him.

(iii) (by the majority of the Court) that in a case of disturbance of public feeling, before the Minister of Justice proceeds under Section 440A (1) (*b*) to the consideration of the question as to whether the matter is appropriately triable by three Judges without a Jury there must be reasonable grounds for his belief that there is a disturbance of public feeling. The sole test to be applied in such a case is whether, in the opinion of the Court, a reasonable man occupying the seat of the Minister could reasonably come to the conclusion that there existed a disturbance of public feeling.

(iv) (by the majority of the Court) that the principle *omnia praesumuntur rite esse acta* was applicable to the Minister's order.

(v) that the phrase " disturbance of public feeling " was not (in the opinion of the majority of the Court) limited to cases where there was an open manifestation of public feeling. One of the tests which could be applied to determine whether or not a disturbance of public feeling exists would be to consider the reactions to the matter in question of the ordinary citizen in various walks of life. Applying that test in the present case, the question as to whether there was reasonable ground for the belief that there existed a disturbance of public feeling in consequence of the publication of the defamatory statement should be answered (by the whole Court) in the affirmative.

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PAGE

Trusts—

1. *Sale of immovable property—Contract of re-purchase—Parol evidence of a mortgage—Admissibility—" Moratuwa mortgage "—Evidence Ordinance, s. 92—Trusts Ordinance, s. 5 (3).*

It is never open to a party who executes a conveyance which is unambiguously a deed of sale to lead parol evidence to show that in reality it is a deed of mortgage and not of sale. This rule equally applies where there is an agreement in the deed itself whereby the vendee undertakes to retransfer the property for consideration within a specified period and also where there is a separate agreement to the same effect, whether notarial or not.

Per GRATIAEN J.—" The respondent did not rely on any proviso to section 92 of the Evidence Ordinance. Nor did he allege a trust of the kind which section 5 (3) of the Trusts Ordinance permits to be established by oral evidence. In the result, the learned trial Judge should not have admitted evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of two notarial instruments each of which unambiguously purported to record a transaction between a vendor and his purchaser (not between a mortgagor and his mortgagee)."

SETUWA *v.* UKKU 337

2. *Stamps—Trust in favour of Company which is not yet in existence—Conveyance by trustee to Company after grant of incorporation—Amount of stamp duty payable—Stamps Ordinance, Schedule, Part I, Items 23 (1) (b), 23 (4), 23 (8), 27 (Proviso)—Trusts Ordinance, s. 84* .. 351

See STAMPS ORDINANCE (2).

3. *Fiduciary relations—Administrator and beneficiary—Gaining of " pecuniary advantage " by fiduciary—Constructive trust—Trusts Ordinance (Cap. 72), s. 90—Kandyan Law—Adoption—Ordinance No. 39 of 1938, s. 7.*

A, the administratrix of her deceased husband's estate, was entitled, under the Kandyan Law, to a life-interest in the entire property of the deceased, who died issueless. Although, according to her application for letters of administration, the only other heir was B, the adopted child of the deceased, two other persons (C and D) who were the children of the deceased's sister, intervened in the testamentary action and claimed that they were the sole intestate heirs of the deceased (subject to the widow's admitted life-interest); C. and D denied that the " adoption " of B was of a kind which entitled her to claim the status of an intestate heir. B, being a minor, was represented in the action by her natural father.

A was advised about the difficulty of establishing by oral evidence B's adoption for purposes of inheritance under the Kandyan law (prior to the enactment of Section 7 of Ordinance No. 39 of 1938). Accordingly, negotiations took place for a settlement of the dispute, and in due course the trial Judge, having given consideration to the circumstances placed before him and to the special interests of the minor B, gave his judicial approval on October 9, 1930, to the following bona fide settlement:

(1) B, C and D each received absolute title to a $\frac{1}{4}$ share of the estate free of a life-interest in favour of A.
(2) A thus waived her undisputed and indisputable life-interest in $\frac{3}{4}$ of the estate, and agreed to accept instead absolute title to a $\frac{1}{4}$ share (in which she already enjoyed a life-interest).

Twenty years later B's heir instituted the present action alleging that B was in fact the adopted child of the deceased in the testamentary case. He claimed that the share which was allotted to A under the settlement and which was subsequently donated by A to the defendant was impressed with a trust in favour of B and her heirs.

Held, that it could not be said that A was guilty of express fraud in regard to the settlement in the testamentary case or that she had abused her fiduciary position and thereby derived a pecuniary advantage at the expense of B within the meaning of section 90 of the Trusts Ordinance.

HERAT *v.* AMUNUGAMA 529

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PAGE

4. *Civil Procedure Code—Necessary party—Refusal to join in action—Duty of Court to add such party—Sections 17, 18 (1), 473.*

Section 473 of the Civil Procedure Code provides that where there are several trustees they shall all be made parties to an action instituted by one or more of them. Hence, if one of them refuses to join in the action it is the duty of the Court, acting under section 18 (1), to add him as a party defendant.

SINNATHAMBY *v.* KANDIAH 535

5. *Privy Council—Proctor and client—Conflict between interest and duty—Duty of making full disclosure of relevant facts—Breach of such duty—Equitable claim for damages* 12

See FIDUCIARY RELATIONS (1).

Unjust Enrichment—

See CO-OWNERS (1).

Unlawful Assembly—

1. *Unlawful assembly—Conviction of less than five persons—In what circumstances permissible—Penal Code, s. 140.*

Where, according to the charge and the case for the prosecution, not more than six persons in all were members of an unlawful assembly, and four of them are acquitted, the conviction of the two remaining accused under section 140 of the Penal Code cannot be sustained even if the court finds that four persons other than those acquitted constituted an unlawful assembly along with those convicted.

JAYARAM *v.* SARAPH 22

Urban Councils—

1. *Contract entered into by Chairman—Liability of Council—Urban Councils Ordinance, No. 61 of 1939, ss. 34 (2), 47 (f)* 169

See LOCAL AUTHORITIES (3).

2. *Dangerous or offensive trade—Requirement of licence—By-laws—Local Government Ordinance, ss. 164, 168 (10) (k)—Urban Councils Ordinance s. 248* 445

See LOCAL AUTHORITIES (6).

Vendor and Purchaser—

1. *Vendor and purchaser—Sale of immovable property—Tender of price by purchaser—Sufficiency of guarantee that is reasonably adequate—"Escrow"—Proviso (3) to s. 92 of Evidence Ordinance.*

In the absence of an agreement on the point, a purchaser of immovable property would make a sufficient tender of the purchase price if he offers security which effectively guarantees payment of the price immediately upon the vendor's complete fulfilment of his reciprocal obligations.

Held further, that a deed may be delivered on a condition that it is not to be operative until some event happens or some condition is performed.

In such a case it is until then an escrow only.

BAIYA *v.* KARUNASEKERA 265

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PAGE

2. *Sale of immovable property—Contract of re-purchase—Parol evidence of a mortgage—Admissibility—" Moratuwa mortgage "—Evidence Ordinance, s. 92—Trusts Ordinance, s. 5* (3).

It is never open to a party who executes a conveyance which is unambiguously a deed of sale to lead parol evidence to show that in reality it is a deed of mortgage and not of sale. This rule equally applies where there is an agreement in the deed itself whereby the vendee undertakes to retransfer the property for consideration within a specified period and also where there is a separate agreement to the same effect, whether notarial or not.

Per GRATIAEN J.—" The respondent did not rely on any proviso to section 92 of the Evidence Ordinance. Nor did he allege a trust of the kind which section 5 (3) of the Trusts Ordinance permits to be established by oral evidence. In the result, the learned trial Judge should not have admitted evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of two notarial instruments each of which unambiguously purported to record a transaction between a vendor and and his purchaser (not between a mortgagor and his mortgagee). "

SETUWA *v.* UKKU 337

3. *Vendor and Purchaser—Sale of immovable property—Doubt as to whether it was* ad quantitatem *or* ad corpus*—Construction of deeds.*

Defendants executed an agreement undertaking to sell to the plaintiffs fifty-five acres and thirty-eight perches of land the boundaries of which were specified in the schedule to the agreement. Shortly afterwards a surveyor was requested by the plaintiffs to prepare a plan of the land in question. Despite the fact that the Plan disclosed the extent as forty-four odd acres only, the defendants executed a conveyance in favour of the plaintiffs and the description of the land conveyed was identical with that contained in the schedule to the agreement to sell, with the only difference that the extent was referred to as being " of about 55 acres ". Plaintiffs took this conveyance although they were fully aware, from the plan that had been prepared, that the defendants were in no position to deliver possession of an estate of 55 acres. Subsequently the plaintiffs were actually able to obtain possession of only 38 acres 2 roods and 12 perches and, thereupon, sued the defendants in the present action to have themselves placed in possession of an extent of 16 odd acres to make up the 55 acres conveyed to them or, in the alternative, to recover the sum of Rs. 10,000 as damages.

Held, that in regard to the issue whether the sale was *ad corpus* or *ad quantitatem* the correct answer was that the sale was *ad quantitatem*, but in respect only of 44 odd acres. As the defendants were able to place the plaintiffs in possession only of 38 odd acres, the defendants were liable to compensate the plaintiffs for the value of the shortfall of 5 odd acres.

THEOBALD *v.* ARAMBEPOLA 563

4. *See also* SALE OF GOODS.

Village Communities Ordinance—

Village Communities Ordinance (Cap. 198)—Section 45 (3) (b)—Acreage tax—" Land which is situated outside a built-up locality ". 430

See LOCAL AUTHORITIES (5).

Wages Boards Ordinance—

1. *Wages Boards Ordinance, No. 27 of 1941—Section 39 (1)—Prosecutions thereunder—Time-limit—Section 28 of amending Act No. 5 of 1953—Retrospective effect—Interpretation Ordinance, s. 6 (3).*

Section 28 of the Wages Boards (Amendment) Act, No. 5 of 1953, which alters the time-limit for prosecutions from one year to two years in regard to offences punishable under section 39 (1) of the Wages Boards

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Ordinance, No. 27 of 1941, applies not only to prosecutions for offences committed after the amending Act, No. 5 of 1953, passed into law, but also to prosecutions for earlier offences other than those which had already become barred by limitation under the provisions of the principal Ordinance.

ATTORNEY-GENERAL *v.* UPLANDS BUS CO., LTD. .. 248

Wills—

Probate—Failure to register it—Effect as against person claiming adverse interest under subsequently registered deed 345

See REGISTRATION OF DOCUMENTS (2).

Words, Phrases and Maxims—

1. *Escrow* 265
2. *In pari delicto potior est conditio defendentis* 361
3. *Condictio indebiti* 221

Workmen's Compensation Ordinance—

1. *Workmen's Compensation Ordinance (Cap. 117)—Clause 1 of Schedule II—" Workman "—Proof of manual labour not essential—Section 16 (2)—" Sufficient cause ".*

(i) A person was employed in an omnibus company as a Senior Traffic Inspector whose duty it was to check the number of passengers carried by each omnibus operating in the area allotted to him and the ticket books. He had also to supervise the field staff which included checkers, time-keepers, stand supervisors, drivers and conductors. In the event of the breakdown of an omnibus he had to make a report to the proper official of the company although it was not part of his duty personally to attend to any repairs.

Held, that the employee was a workman within the meaning of section 2 of the Workmen's Compensation Ordinance read with clause 1 of Schedule II, although he did not fall within the category of manual labourers.

(ii) Ignorance of the legal requirements of section 16 (1) of the Workmen's Compensation Ordinance is not a sufficient cause within the meaning of section 16 (2) for failure to make a claim within the prescribed time. Nor does the fact that notice of the claim was given to the employer have any bearing on the question of sufficient cause for failure to claim in time.

SOUTH-WESTERN OMNIBUS CO. LTD. *v.* JAMES SILVA .. 330

2. *Workmen's Compensation Ordinance—Appeal—Form of petition of appeal—Sections 48 (1), 49 (1), 51—Criminal Procedure Code, s. 340 (2).*

A point of law stated in a petition of appeal filed under section 48 (1) of the Workmen's Compensation Ordinance need not be certified by an advocate or proctor in terms of section 340 (2) of the Criminal Procedure Code.

Thomas v. Ceylon Wharfage Co., Ltd. (1948) 49 N. L. R. 397, overruled.

SARNELIS *v.* CIVILIAN LABOUR ADMINISTRATIVE OFFICER .. 366

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PAGE

3. *Workmen's Compensation Ordinance (Cap. 117)—Section 2 (1)—Superintendent of an estate—Maintainability of claim against him—Is he an "employer"?—Estate Labour (Indian) Ordinance (Cap. 112), ss. 3, 11-15.*

In considering whether a claim for compensation under the Workmen's Compensation Ordinance can be maintained by a workman against the superintendent of the estate in which he works it is not permissible to call in aid the meaning of the word "employer" appearing in the Estate Labour (Indian) Ordinance. The Superintendent who has himself taken employment on a contract of service at a fixed salary under the owners of the estate is not an "employer" within the meaning of that term in section 2 (1) of the Workmen's Compensation Ordinance.

SUPERINTENDENT, YATADOLA ESTATE, MATUGAMA *v.* MUTHURAMAN 523

Writ of Certiorari

1. Certiorari—*Petitioner must be a person aggrieved—necessary parties—Delay—Jurisdiction—Acquiescence to patent want of jurisdiction—Difference in effect between patent and latent want of jurisdiction—Estoppel—Duty of applicant to disclose all material facts—Difference between judicial function and administrative function—Omnibus Service Licensing Ordinance, No. 47 of 1942, ss. 6 (2), 13 (4)—Motor Traffic Act, No. 14 of 1951, ss. 243 (1), 246 (1), (4) and (7)—Interpretation Ordinance (Cap. 2), s. 6 (3) (c).*

Although a person applying for a writ of *certiorari* is required to be a person aggrieved, it is sufficient if he has a substantial interest in the decision in respect of which the writ is sought.

Whether there has been unreasonable delay or not in making an application for a writ of *certiorari* depends on the circumstances of each case.

When an aggrieved party applies for *certiorari* in respect of an order made by a quasi-judicial body in a matter where it totally lacked jurisdiction, he is entitled to the writ as of right ; but where there was only a contingent want of jurisdiction, acquiescence or waiver or similar conduct would place even an aggrieved party in the same position as a stranger and the grant of relief is discretionary. It is only in the latter case that the applicant is bound to make a full and fair disclosure of all material facts.

The petitioner and the 4th to 9th respondents respectively were the holders of certain road service licences issued by the Commissioner of Motor Transport under the Omnibus Service Licensing Ordinance, No. 47 of 1942. In consequence of certain complaints made by the petitioner to the Comimissioner to the effect that the 4th to 9th respondents were picking up and setting down passengers within the Municipal Limits of Kandy to the prejudice of the petitioner, the Commissioner, after holding due inquiry, made order under section 6 (2) of Ordinance No. 47 of 1942, that the conditions attached to the licences of the 4th to 9th respondents should be varied so as to debar them from picking up and setting down passengers within the Municipal Limits of Kandy.

The 4th to 9th respondents appealed to the Tribunal of Appeal against the Commissioner's decision. All the appeals were heard together and on the 10th October, 1952, the Tribunal of Appeal reversed the decision of the Commissioner. Thereupon the present application for a writ of *certiorari* was filed by the petitioner on the 22nd December, 1952, stating that the Tribunal of Appeal consisting of the 1st to 3rd respondents had no jurisdiction to hear the appeals in question after Ordinance No. 47 of 1942 was repealed by the Motor Traffic Act, No. 14 of 1951, which came into operation on the 1st September, 1951.

Held, (i) that the Tribunal of Appeal had a duty to act as a quasi-judicial, and not purely administrative, body and was, therefore, subject to *certiorari* if it acted in excess, or usurpation, of jurisdiction.

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PAGE

(ii) that the Tribunal was competent to hear only appeals preferred against a decision granting or refusing an application for a road service licence, but not against a decision of the Commissioner varying the conditions attached to a licence. The Tribunal suffered, therefore, from a total and patent want of jurisdiction over the subject-matter of the appeal. As this was a case of total want of jurisdiction and not a case of irregularity or want of contingent jurisdiction, the fact that the petitioner had waived objection to the jurisdiction of the Tribunal and taken part in the proceedings thereafter could not disentitle him, despite his acquiescence, to object later that the order made by the Tribunal was void.

(iii) that the petitioner was sufficiently aggrieved by the order of the Tribunal to entitle him to apply for a writ of *certiorari*. It was not necessary that he should have had a statutory right to appear either before the Commissioner or the Tribunal.

(iv) that the failure to make the Commissioner a party was not fatal to the application.

(v) that the joinder of the 4th to 9th respondents in one application for *certiorari* was not improper, although they had shown cause separately and filed separate applications before the Tribunal.

(vi) that the interval of about two months in filing the application for *certiorari* did not constitute unreasonable delay, as the case involved many difficult questions of law which could only be considered after an exhaustive examination of the relevant statutes and numerous precedents.

KANDY OMNIBUS CO., LTD. *v.* ROBERTS 293

Writ of Mandamus—

1. *Municipal Council of Colombo—General meeting—Notice of motion by member—Chairman's refusal to include motion in agenda—Remedy of member—Municipal Councils Ordinance, No. 29 of 1947—Section 21—By-Law 10—Amending Act No. 39 of 1951, s. 15* (2)—Mandamus—*Effect of alternative remedy—Necessary parties.*

A writ of *mandamus* is not available where there is another remedy open to the party seeking it. The alternative remedy need not be an action at law ; it may be by way of an appeal to a *forum domesticum*.

The petitioner, a member of the Colombo Municipal Council, gave notice of a motion for the removal of the respondent from the office of Mayor, and desired that the matter should be put up for discussion at a general meeting of the Council. The respondent, who was the Chairman of the Council, purporting to act under By-Law 10 (*c*), ruled that the motion was out of order, and the Secretary so informed the petitioner. The Secretary accordingly omitted to place the motion on the Agenda of the meeting. On an application by the petitioner for a writ of *mandamus* on the Mayor—

Held, that *mandamus* was not available for the reason that the petitioner had an alternative remedy, namely, an appeal to the Council itself under section 21 of the Municipal Councils Ordinance.

Held further, (i) that if *mandamus* was available the proper party respondent to the application was the Mayor and not the Secretary.

(ii) that the discretion of the Mayor under By-Law 10 to allow or disallow a motion must not be exercised arbitrarily.

(iii) that the proposed motion was a question affecting the Municipal Administration of Colombo within the meaning of By-Law 10 (*d*).

(iv) that a writ of *mandamus*, if available, could be issued although the date of the meeting had already passed.

COORAY *v.* GRERO 87

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PAGE

2. *Town Councils Ordinance, No. 3 of 1946—Special meetings of Council—Section 39 (2)—Its provisions are peremptory—By-laws—Scope of their effect*—Mandamus—*Alternative remedy—Effect of such remedy in regard to issue of writ.*

Mandamus lies to compel the Chairman of a Town Council to convene a special meeting of the Council in terms of section 39 (2) of the Town Councils Ordinance. Any by-law which is inconsistent with the provisions of the main Ordinance must give way to the latter. Further, an alternative remedy which is provided by a by-law but which is not as convenient, beneficial and effectual as *mandamus* cannot be a bar to the application for *mandamus.*

SEENIVASAGAM *v.* KIRUPAMOORTHY 450

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THE NEW
LAW REPORTS OF CEYLON

VOLUME LVI

1954 *Present :* **Rose C.J. and Sansoni J.**

K. T. EDWIN DE SILVA, Appellant, *and* D. K. KARUNADASA DE SILVA, Respondent

S. C. 254—D. C. Galle, 4,358 L

Land Development Ordinance (Cap. 320)—Sections 162 and 163—Disposition of protected holding—Reference in deed to Government Agent's consent—Imperative and not merely directory—Meaning of term " attestation "—Notaries Ordinance (Cap. 91), s. 30 (20) and (21).

Under section 162 of the Land Development Ordinance the disposition of a protected holding is vitiated by the failure of the notary to refer specifically, in the attestation clause of the deed, to the written consent of the Government Agent to the disposition.

The term " attestation " in section 162 (1) includes both the subscription of the signature and the attestation clause.

APPEAL from a judgment of the District Court, Galle.

N. E. Weerasooria, Q.C., with *T. P. P. Goonetilleke*, for the defendant appellant.

E. G. Wikramanayake, Q.C., with *Sir Edwin Wijeratne, K. Herat* and *H. L. de Silva*, for the plaintiff respondent.

Cur. adv. vult.

August 4, 1954. ROSE C.J.—

In this matter the plaintiff-respondent sought to eject the defendant-appellant from a land described in the schedule attached to the plaint and to recover from him certain sums as arrears of rent and damages on the footing that the appellant, who was an allottee from the Crown under the Land Development Ordinance, Chapter 320, of the premises referred to, had by Deed P1 of the 9th August, 1947, transferred the land in question to the plaintiff-respondent with the consent and approval of

2——J. N. B 38465–1,592 (9/54)

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the Government Agent, as required by the Ordinance, duly obtained. By Deed P2 of the same date the plaintiff-respondent purported to lease the said land to the defendant-appellant on certain terms and conditions which by a subsequent agreement P3 of the 27th of January, 1948, was varied to allow the defendant-appellant to possess and enjoy the land for a period of three years at a monthly rental of Rs. 300 subject to the conditions that if the respondent was in default in the payment of rent for a period exceeding six months the agreement P3 was to become null and void.

Counsel for the appellant confined himself before us to two points which arise under Section 162 of the Land Development Ordinance. In the first place he contends that the Deed P1 is of no effect for the reason that the written consent of the Government Agent had not been previously obtained.

Section 162 of the Ordinance reads as follows :

(1) " A notary shall not attest any deed operating as a disposition of a protected holding unless the written consent of the Government Agent to such disposition shall have been previously obtained nor unless such deed shall have attached thereto the document by which the Government Agent granted his consent to the disposition sought to be effected by such deed. Such document of consent shall be specifically referred to by the notary in the attestation of such deed."

(2) " A deed executed or attested in contravention of the provisions of this section shall be null and void for all purposes."

It is to be noted that the learned District Judge took the view that as the written consent of the Government Agent was referred to in the body of the lease P2, which was executed on the same day as P1, the omission to refer to it in P1 was not fatal as in the circumstances of the particular case P1 and P2 could properly be regarded as forming a single document. Moreover, the consent of the Government Agent was attached to P1, although no reference to it is made in the body of the document.

I find it difficult to accept this view as it seems to me that the document P1 is undoubtedly a transfer contemplated by the Ordinance and as such should in itself satisfy the requirements of Section 162. While it is true that P2 was executed on the same day and probably very shortly after P1, it seems to me that it should properly be regarded as a separate document and indeed such a lease could well have been entered into at any date subsequent to P1. Moreover, I am inclined to agree with the appellant's contention that the mere attaching of the consent to the document P1 does not necessarily demonstrate that the consent was obtained prior to the execution of the deed, as it may well, of course, have been attached upon its receipt subsequent to the execution ; and this, in fact, was the appellant's suggestion of what occurred in the present matter.

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Apart from this, I am of opinion that the appellant's second point is entitled to succeed. He relies on the second sentence of Section 162 (1) :

> " Such document of consent shall be specifically referred to by the notary in the attestation of such deed."

and Sub-Section (2) which provides that a deed executed or attested in contravention of the provisions of sub-section (1) shall be null and void for all purposes.

The learned District Judge, perhaps not unnaturally anxious to obviate the rigours of the section, held that the provision contained in the second sentence of Section 162 (1) was directory only and was therefore not governed by sub-section (2).

Learned counsel for the respondent endeavoured to draw a distinction between the word " Attestation " and the act of attesting. He submitted that the Deed was " attested " as soon as the signatures of the Notary and the witnesses were subscribed and that, provided the consent of the Government Agent had been previously given and had been attached to the Deed, sub-section (2) would have no operation in the event of the Notary failing specifically to refer to such document of consent in the " Attestation ", which he submits, means the Attestation Clause.

It would seem to be straining the language of the Section so to limit the meaning of the word " Attestation ". The more natural interpretation seems to me to be that the Legislature intended to use the word " Attestation " as the noun describing the act of attesting which latter term, it would appear, should include both the subscription of the signature and the attestation clause. Moreover, support for this view is supplied by Section 30, sub-section (20) of the Notaries Ordinance, Chapter 91, where the side note " Attestation " appears opposite the sub-section which begins :—

> " He shall without delay duly attest every deed or instrument . . . . and shall sign and seal such attestation."

Sub-section (21) reads :—

> " Every such attestation shall be substantially in the form E in the Second Schedule . . . .."

Form E sets out a specimen attestation clause.

No Ceylon authority was cited to us by counsel for either party at the hearing of the appeal but after the close of the argument learned counsel for the respondent drew our attention to an English case—*Ex Parte Bolland ; in re Roper*, Law Journal 1883 New Series Volume 52, Equity, at page 113—in which in the course of the judgment a discussion took place as to the proper interpretation of Section 10 (1) of the Bills of Sale Act, 1878.

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The sub-section reads :

" The execution of every Bill of Sale shall be attested by a Solicitor of the Supreme Court, and the attestation shall state that before the execution of the Bill of Sale the effect thereof has been explained to the Grantor by the Attesting Solicitor . . . . "

Lord Justice Cotton, in one of three judgments which were delivered by the Court of Appeal, says :

" As to the other point, the whole argument arises from an inaccurate use of language in section 10. The word ' Attestation ' is used in sub-section (1) as meaning the ' Attestation Clause ', and sub-section (2) as meaning the fact of attestation, that the deed has been attested by the attesting witness. The only thing required by the Act as to the mode in which the execution of the deed has to be attested, is that it is to be attested by a Solicitor of the Supreme Court. The explanation is something collateral, which must be done before the deed is executed."

Terms such as " attest " and " attestation", when they are not defined in the Ordinance in which they appear, should, it seems to me, be given the meaning which is in accord with the context. In the interpretation of that particular sub-section of the Bills of Sale Act, the learned Lords Justices of the Court of Appeal no doubt had good reason for drawing the distinction that they did. Having regard, however, to the position in the section which the second sentence of Section 162 (1) of the Land Development Ordinance occupies, it would seem that to draw such a distinction as the learned Lords Justices drew in the above case would make nonsense both of Section 162 itself (as well as the penalty clause, Section 163, which immediately follows it) and the section of the Notaries Ordinance to which I have already referred. It is for these reasons that I am of opinion, as I have already stated earlier, that the term " attestation " in Section 162 (1) must reasonably be taken to include both the subscription of the signature and the attestation clause.

No doubt the provisions of Section 162 are drastic and may operate harshly in certain cases. Presumably, however, the Legislature intended strictly to limit and protect dispositions of land which have been allotted by the Crown under the Land Development Ordinance. In any event, it is not for the Courts to endeavour to mitigate the severities of a piece of legislation in cases where the language used would seem to admit of no ambiguity.

These matters are sufficient to determine the present appeal. The appeal is therefore allowed and the plaintiff-respondent's action dismissed. The appellant will receive the costs of this appeal and of the proceedings in the court below.

SANSONI J.—I agree.

Appeal allowed.

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[IN THE PRIVY COUNCIL]

1954 *Present :* **The Lord Chancellor, Lord Cohen and Mr. L. M. D. de Silva**

E. L. SENANAYAKE, Appellant, *and* H. M. NAVARATNE *et al.*, Respondents

PRIVY COUNCIL APPEAL NO. 17 OF 1954

Election Petition 3 of 1952, Kandy

Privy Council—Election petition—Appeal to Supreme Court—Decision of Supreme Court is final —No appeal to Privy Council—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 81, 82, 82A–D, as amended by Act No. 19 of 1948.

Where a party who is dissatisfied with the determination of an election judge prefers an appeal to the Supreme Court on questions of law under section 82A of the Parliamentary Elections Order in Council, no appeal will be entertained by the Privy Council from the decision of the Supreme Court, even if the jurisdiction of the election judge to deal with the subject-matter at issue is challenged.

"The peculiar nature of the jurisdiction and the importance in the public interest of securing at an early date a final determination of the matter and the representation in Parliament of the constituency affected make it clear that it was not the intention of the Order-in-Council to create a tribunal with the ordinary incident of an appeal to the Crown."

APPEAL from a judgment of the Supreme Court reported in (*1953*) *55 N. L. R. 193.*

Sir Hartley Shawcross, Q.C., with *Kenneth Diplock, Q.C.*, *R. K. Handoo* and *Walter Jayawardene*, for the appellant.

S. Nadesan, with *Sirimevan Amerasinghe* and *P. B. Tampoe*, for the respondent.

Cur. adv. vult.

June 21, 1954. [*Delivered by* THE LORD CHANCELLOR]—

The Supreme Court of Ceylon by judgment dated the 18th December, 1953, affirmed by a majority an Order of the election judge (de Silva P.J.) dated the 13th February, 1953, determining that the appellant's election to the House of Representatives, Ceylon, as the member for the Kandy Electoral District was void.

The election judge found that the appellant had committed two corrupt practices. The Supreme Court reversed his decision on one of them but affirmed his determination that the election was void on the ground that the appellant in breach of para. (*f*) of section 58 of the Ceylon (Parliamentary Elections) Order-in-Council 1946 had knowingly made the declaration as to election expenses required by section 70 of the Order-in-Council falsely.

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Before the Supreme Court the appellant argued that the determination of the election judge ought to be reversed on two grounds: (1) that there was not evidence to support the finding of the election judge; (2) that he had no jurisdiction to hear the Petition since, although the Petition had been presented in accordance with section 83 (1) of the Order-in-Council, the application for leave to amend the Petition by alleging a false declaration as to election expenses had not been made within twenty-one days of the date on which the result of the election had been published in the *Government Gazette* in accordance with section 50.

The Supreme Court rejected both pleas, the second by a majority on the ground that the case fell within the proviso to section 83 (1), the original Petition (which raised other charges of corrupt practices) having been presented within the specified period of twenty-one days and the amendment raising the charge now in question having been made within twenty-eight days after the transmission to the returning officer of the allegedly false return of election expenses.

The appellant applied to this Board for leave to appeal from this decision. The respondents did not appear on the hearing of the Petition but the appellant's counsel very properly called the Board's attention to certain authorities which raised a doubt whether the Appeal could be entertained having regard to the subject-matter, the validity of a Parliamentary Election with which it dealt. Leave was granted on the 10th February, 1954, but "without prejudice to the right of the Attorney-General of Ceylon or the respondents to argue the question as to the jurisdiction of the Lords of the Committee to entertain the Appeal".

The Case lodged on behalf of the respondents contained no reference to the question thus reserved, but the respondents shortly before the hearing gave notice of their intention to raise it, and it was argued before their Lordships as a preliminary point.

Having regard to the conclusion which their Lordships have reached thereon, it will not be necessary to set out in great detail the provisions of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, or Acts of the Ceylon Legislature amending the same but it will be convenient to refer to a few sections which may throw some light on the preliminary point.

Section 81 of the Order-in-Council in its original form was as follows:—

> "At the conclusion of the trial of an election petition the election judge shall determine whether the Member whose return or election is complained of, or any other and what person was duly returned or elected, or whether the election was void, and shall certify such determination to the Governor. Upon such certificate being given, such determination shall be final; and the return shall be confirmed or altered, or the Governor shall within one month of such determination by notice in the *Government Gazette* order the holding of an election in the electoral district concerned, as the case may require, in accordance with such certificate."

By section 82 (1) of the Order-in-Council the election judge was also required to report in writing to the Governor whether any corrupt or illegal practice had or had not been committed by or with the knowledge

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of any candidate at the election or by his agent and by section 82 (3) when an election judge reported that a corrupt or illegal practice had been committed by any person, that person was to be submitted to the same incapacities as if at the date of the said report he had been convicted of that practice pursuant to section 58 of the Order-in-Council.

Sections 81 and 82 of the Order-in-Council were repealed by section 3 of the Parliamentary Elections (Amendment) Act, No. 19 of 1948, and new sections 81, 82, 82A, 82B, 82C and 82D were substituted therefor. Their Lordships need not set out the new sections in full. Suffice it to say that they confer a right of appeal to the Supreme Court on a person dissatisfied with the determination of an election judge on a question of law but not otherwise. The Appeal has to be presented before the expiry of a period of one month next succeeding the date of the determination against which the Appeal is preferred. Section 82B (3) provides that the decision of the Supreme Court is to be final and conclusive.

A right of appeal from a determination of the election judge having been given the provisions in the original section 81 directed to securing an early election to fill any vacancy created by the determination had to be modified, but the substituted sections 82C and 82D contain provisions securing that the Governor-General shall direct the holding of a new election within one month after receiving notice of the final determination that an election was void.

In support of his preliminary point Mr. Nadesan for the respondents relied on three decisions of this Board, *Theberge v. Laudry* [1], *Strickland v. Grima* [2], and *de Silva v. Attorney-General* [3]. In *Theberge v. Laudry* (supra) their Lordships were considering a petition for leave to appeal from a decision of the Superior Court of Quebec declaring the appellant's election to the House of Assembly void on the ground of corrupt practices. The Jurisdiction of the Superior Court in election matters had been established by the Quebec Controverted Elections Act (38 Vict. c. 8 Quebec Statutes) which had transferred to the Superior Court a jurisdiction previously exercised by the Assembly itself and which contained a provision that the Judgment of the Superior Court in such cases should not be susceptible of appeal. Refusing leave to appeal Lord Cairns delivering the judgment of the Board said :

> " Their Lordships wish to state distinctly, that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words ; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative. But, in the opinion of their Lordships, a somewhat different question arises in the present case. These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights ; they are Acts creating an entirely new, and up to that time unknown,

[1] (*1876*) *2 A. C. 102.* [2] (*1930*) *A. C. 285.*

[3] (*1949*) *50 N. L. R. 481.*

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jurisdiction, in a particular Court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known. "

In *Strickland v. Grima* (supra) a similar issue arose as to the constitution of the Senate of Malta. Leave to appeal had been granted but the question of their Lordships' jurisdiction was raised at the hearing of the appeal. Lord Blanesburgh delivering the judgment of the Board said :—

" Although special leave to appeal had been granted by His Majesty in Council it was recognised that it was not thereby intended that the Board, with all the facts before it, should be precluded from reconsidering whether the appeal was competent. "

The statutory provisions as to the composition of the Senate were complicated and it is sufficient for present purposes to say that letters patent governing the matter contained a provision in these terms :—

" All questions which may arise as to the right of any person to be or remain a member of the Senate or the Legislative Assembly shall be referred to and decided by our Court of Appeal in Malta. "

Their Lordships applying *Theberge v. Laudry* (supra) held that upon the construction of the letters patent an appeal would not lie and accordingly refused further to entertain the appeal.

In *de Silva v. Attorney-General* (supra) their Lordships were considering an application for leave to appeal from a determination of the election judge under the original section 81 of the Order-in-Council now before their Lordships. The determination had been given before the passing of Act No. 19 of 1948 and there was therefore no right of appeal to the Supreme Court. Their Lordships advised Her Majesty to refuse leave to appeal. Delivering the judgment of the Board, Lord Simonds after referring to *Theberge v. Laudry* (supra) continued :—

" It is no doubt true, as counsel for the petitioner urged, that the prerogative right to entertain an appeal is ' taken away only by express words or the necessary intendment of a statute or other equivalent act of state ' (see *Renouf v. A. G.* (1936) A.C. 445 at 460) but as was pointed out in *Theberge v. Laudry*, the preliminary question must be asked whether it was ever the intention of creating a tribunal with the ordinary incident of an appeal to the Crown. In this case as in that it appears to their Lordships that the peculiar nature of the

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jurisdiction demands that this question should be answered in the negative. It was contended for the petitioner that different considerations apply where, as here, the jurisdiction of the election judge to hear election petitions is not substituted for that of the legislative body itself but is created *de novo* upon the establishment of that body. But this appears to their Lordships to be an unsubstantial distinction and in effect to be met by the later case of *Strickland v. Grima*. Such a dispute as is here involved concerns the rights and privileges of a legislative assembly, and, whether that assembly assumes to decide such a dispute itself or it is submited to the determination of a tribunal established for that purpose, the subject-matter is such that the determination must be final, demanding immediate action by the proper executive authority and admitting no appeal to His Majesty in Council. This is the substance of the authorities to which reference has been made, and it is noteworthy that in accordance with them an appeal in such a dispute has never yet been admitted. "

Since *de Silva v. Attorney-General* was decided, the Ceylon Order-in-Council has been amended by allowing an appeal to the Supreme Court on questions of law but their Lordships cannot regard that amendment as effecting the application to the present case of the principle laid down in the cases cited.

In none of these cases was the jurisdiction of the tribunal to deal with the subject-matter at issue challenged whereas in the present case Sir Hartley Shawcross on behalf of the appellant seeks to challenge the jurisdiction of the election judge on the second ground raised by the appellant before the Supreme Court, namely, that the application for leave to amend the petition was not made within twenty-one days after the publication of the result of the election in the *Government Gazette*.

The jurisdiction of the election judge being challenged the Judicial Committee, so the argument ran, must have jurisdiction to determine whether his Order was a nullity.

In support of this argument he relied on the observations of Viscount Simon L.C. in *Nawaz v. King-Emperor* [1] where, dealing with the question of the class of criminal cases in which the Judicial Committee will give leave to appeal, he said at p. 128: " Another and obvious example would arise if the Courts had no jurisdiction either to try the crime, or to pass the sentence ". But in that case their Lordships were considering not whether an appeal to the Judicial Committee was competent but whether in a class of cases in which admittedly an appeal was competent their Lordships should in their discretion grant leave to appeal. Here as was pointed out in *de Silva v. Attorney-General* (supra) their Lordships are dealing with " the peliminary question whether it was ever the intention of creating a tribunal with the ordinary incident of an appeal to the Crown ".

Sir Hartley Shawcross mainly relied, however, on some observations of Lord Esher in *R. v. Commissioners for Special Purposes of The Income*

[1] *L. R. 68 I. A. 126.*

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Tax [1] where Lord Esher was dealing with the powers which an Act of Parliament may confer on an inferior court or tribunal or body when first creating it. He said:

> "It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

Sir Hartley said that the Courts, in determining into which class a particular tribunal falls, should lean against the second alternative since it might leave the subject at the mercy of an arbitrary tribunal without any right of appeal. Such he said would have been the position in Ceylon before the amending Act No. 19 of 1948. Their Lordships must point out that Lord Esher was dealing with a case where the statute had made the existence of a special set of facts a condition precedent to the exercise of jurisdiction by a tribunal whereas their Lordships have to deal with a case where the question of jurisdiction depends on the construction of the statute itself. Their Lordships are therefore unable to derive much assistance from the case last cited. They are satisfied that the election judge as established by the Order-in-Council of 1946 was a tribunal with a jurisdiction not only to determine finally the question whether the corrupt practices alleged in the petition had been committed but also to determine finally whether upon the true construction of the Order-in-Council it was competent in the circumstances for the petitioner to maintain his amended petition. Their Lordships do not desire to repeat what was said by their predecessors in the cases cited. Suffice it to say that in their Lordships' opinion the peculiar nature of the jurisdiction and the importance in the public interest of securing at an early date a final determination of the matter and the representation in

[1] *21 Q. B. D. 313 at p. 319.*

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Parliament of the constituency affected make it clear that it was not the intention of the Order-in-Council to create a tribunal with the ordinary incident of an appeal to the Crown.

It is for these reasons that their Lordships have humbly tendered their advice to Her Majesty that the appeal ought not to be further entertained.

The appellant must pay the respondents' costs of this appeal less the appellant's costs of the respondents' two applications made on the 15th July, 1954, and the 20th July, 1954, respectively.

Appeal rejected.

[COURT OF CRIMINAL APPEAL]

1954 *Present :* **Rose C.J. (President), de Silva J. and Sansoni J.**

T. SUMANASENA, Appellant, *and* THE QUEEN, Respondent

C. C. A. 31 OF 1954, WITH APPLICATION 60

S. C. 19—M. C. Matara, 33,135

Evidence—Child—Capacity to give evidence—Procedure for ascertaining it.

In a trial before the Supreme Court the questioning of a child with a view to considering whether that child is of sufficient mental power and fit to give evidence must be done in the presence of the jury.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

M. M. Kumarakulasingham, with *S. Saravanamuttu*, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Crown.

August 3, 1954. ROSE C.J.—

In this matter the appellant was convicted of the offence of rape against a small girl who is stated to be about 6 years of age. One of the questions which the learned Commissioner had to consider was whether this child was of sufficient mental power to be able to be affirmed to enable her to give evidence. Now, unfortunately, before deciding that question, which was eminently a matter for the learned Commissioner, no jury having yet been empanelled the whole panel of the jury for that Assize were asked to withdraw from the precincts of the Court. The learned Commissioner then proceeded to consider the point. He put certain questions to this child and as a result of her answers to those

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questions he decided that she was fit to be affirmed and that her evidence should therefore be received. Thereupon the panel of the jury returned to the Court, the selection of this particular jury was made and the trial began.

Now, Counsel for the appellant contends that the fact that this child was questioned on these preliminary matters in the absence of the jury is a fatal irregularity. It seems to us—had the matter not been covered by authority—that this is a point that might well be argued with substantial cogency either way. But this very problem has been considered by the Court of Criminal Appeal in England by a Bench presided over by the Lord Chief Justice in the case of *Ernest Albert Reynolds* [1]. The Lord Chief Justice there said that in the view of the Court it was essential that the questioning of a witness with a view to considering whether that witness was fit to give evidence must be done in the presence of the jury. Moreover, that has, we understand, been the general practice in Ceylon. It seems to us that that is an authority which we should follow. It follows therefore that the appeal must succeed.

The only other question that remains for consideration is whether we should order a new trial. In all the circumstances of this case we think that it is not desirable to do so. The appeal is therefore allowed and the conviction quashed.

Appeal allowed.

[IN THE PRIVY COUNCIL]

1954 *Present :* **Lord Porter, Lord Asquith of Bishopstone, Lord Keith of Avonholm and Mr. L. M. D. de Silva**

A. M. M. FUARD, Appellant, *and* A. R. WEERASURIYA, Respondent

Privy Council Appeal No. 41 of 1953

S. C. 387—D. C. Colombo, 18,596

Proctor and client—Fiduciary relationship—Conflict between interest and duty—Duty of making full disclosure of relevant facts—Breach of such duty—Equitable claim for damages—Applicability of Prescription Ordinance, s. 10.

A Proctor's fiduciary relationship to his client renders him liable to indemnify the client in respect of damages incurred by the client in a transaction whereby the Proctor, in breach of his fiduciary duty, gains an advantage and his client suffers loss as the result of advice given by him and taken by the client.

The Prescription Ordinance of Ceylon, unlike the English Statute of Limitations, "governs the whole of a jurisdiction which is general, including law and equity in one system". It is therefore applicable to an action for damages for breach of a fiduciary duty. None of its sections dealing with special causes of action is applicable to a breach of a fiduciary duty and, therefore, such a

[1] *(1950) 34 Criminal Appeal Reports 60.*

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breach falls under section 10. Under that section an action is not maintainable " unless the same shall be commenced within three years from the time when such cause of action shall have accrued ".

The defendant-appellant, a Proctor, was employed by the plaintiff-respondent as legal adviser for the purpose of making an investment of a sum of Rs. 15,000. The money was thereafter lent by the respondent to one S. on mortgage bond No. 2308 of the 3rd December, 1942, attested by the appellant. The security afforded by bond No. 2308 was the primary mortgage of certain lands at Panwila and the secondary mortgage of a land known as Fincham's land. The primary mortgage in favour of one M. of the latter property was for a sum of Rs. 35,000. It was sold on an order of Court on a decree on the primary mortgage obtained by M. and realised a sum of Rs. 16,000 which left no surplus towards the payment of the loan made by the respondent on the secondary mortgage. On a sale on a decree obtained by the respondent on the primary mortgage of the Panwila lands a sum of Rs. 2,250 was realised. The respondent thus lost the greater part of his principal and all interest. He then instituted the present action to recover from the appellant a sum of Rs. 20,000 by way of damages on the ground that the appellant had, while acting as his legal adviser in connection with the investment of the sum of Rs. 15,000, furthered " the interests of others whose interests were adverse to those of the respondent ".

There was evidence that out of the sum of Rs. 15,000 obtained by S. from the respondent, a sum of Rs. 4,500 was utilised to pay a debt due by S. to the appellant's cousin upon a primary mortgage of the Panwila land and a sum of Rs. 6,000 to pay another debt due to the appellant's wife and his brother upon a secondary mortgage of Fincham's land. The respondent had been told of the relationship between the parties and about the mortgages in favour of the appellant's relatives. On his own testimony, however, the appellant had had experience of certain incidents which indicated how undesirable S. was as a borrower.

Held, that in acting for the respondent in a matter in which the appellant's relatives had an interest, the duty arising from the fiduciary relationship between the appellant and the respondent placed upon the appellant the obligation of making a disclosure to the respondent of all facts in detail that might have affected a decision by the respondent to make the loan, or even merely led him to an investigation closer than he had actually made as to whether the proposed loan could prudently be made. " A man may have a duty on one side and an interest on another. A man who puts himself in that position takes upon himself a grievous responsibility ". In the present case the appellant had not discharged the heavy burden which lay upon him to establish that he made a full disclosure to the respondent of information in his possession relevant to the loan. For this failure of duty he was liable in damages, although he had honestly done all that he thought he was bound to do in dealing with the respondent.

Held further, that, for the purpose of applying section 10 of the Prescription Ordinance, a cause of action " accrued " to the respondent at the time when the Panwila lands were sold under mortgage decree, namely, on the 9th March, 1946. It was only on that day that the respondent could be said to have suffered the damage that he did in fact suffer.

APPEAL from a judgment of the Supreme Court reported in (*1952*) *54 N. L. R. 49.*

Michael Lee, for the defendant appellant.

Dingle M. Foot, Q.C., with *T. O. Kellock*, for the plaintiff respondent.

Cur. adv. vult.

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July 27, 1954. [*Delivered by* MR. L. M. D. DE SILVA]—

The respondent instituted this action in the District Court of Colombo to recover from the appellant a sum of Rs. 20,000 by way of damages on the ground that the appellant had in November, 1942, while acting as the respondent's legal adviser in connection with the investment of a sum of Rs. 15,000 by the respondent furthered " the interests of others whose interests were adverse to those of the respondent ". He alleged that the appellant had recommended one Samaratunge as a borrower and recommended also the security offered by Samaratunge, fraudulently concealing from the respondent the existence of the adverse interests mentioned. He alleged that the appellant was " fully aware of the facts and circumstances " which rendered the security offered " inadequate and doubtful " but nevertheless in " breach of his duty " to the appellant failed to declare them. He alleged against the appellant " an intentional and deliberate dereliction of his professional duty and a breach of his contract of employment as legal adviser ".

The learned District Judge held that the appellant had not recommended Samaratunge as a borrower or the security offered by Samaratunge. He held that the appellant had not done anything " with a view to furthering the interests of others whose interests were adverse to that of the plaintiff " (respondent). He found that the appellant's conduct had not been fraudulent and dismissed the action.

The Supreme Court on appeal felt bound not to disturb the finding on the facts on the question of fraud. It however awarded to the respondent the sum claimed by him as damages on the ground that there had been a breach by the appellant of his duty to the respondent. In doing so it has taken a view of the facts less favourable to the appellant than the view taken by the learned District Judge.

The learned District Judge who saw and heard the witnesses, although he does not say so in terms, regarded the appellant as a witness of truth. He accepted the evidence of the appellant whenever it was in conflict with other evidence. The judgment of the Supreme Court does not proceed on the basis that there is sufficient reason to disturb the views taken by the learned District Judge on the credibility of witnesses and on the facts generally. In these circumstances their Lordships think that the view of the learned trial judge that the appellant was a truthful witness must be accepted without qualification. When his evidence is accepted it appears that the appellant honestly did all that he thought he was bound to do in dealing with the respondent, his client.

Their Lordships are however in agreement with the Supreme Court that the appellant has failed to perform his duty towards the respondent. They have arrived at this conclusion on the evidence of the appellant himself. It appears to their Lordships that the appellant failed to realise how extensive in law the duty was.

The respondent is a retired government servant. At the time of his retirement in 1941 he had a sum of Rs. 15,000 which he desired to invest. He lent this sum to one Wiswasam on a mortgage bond attested by the appellant. Wiswasam had desired to return the money by raising a loan

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at a lower rate of interest but had been dissuaded at the instance of the appellant by a broker for a time from returning the money. Wiswasam eventually returned the money in 1942 which was then lent by the respondent to one Samaratunge on Mortgage Bond No. 2308 of the 3rd December, 1942, attested by the appellant. It will be seen that in the dealings with Wiswasam the appellant had given the respondent assistance which in character was not purely legal.

It is with regard to the loan to Samaratunge on Bond No. 2308 that a failure of duty on the part of the appellant is suggested. It is clear from the appellant's evidence that a lender could not have regarded Samaratunge as a satisfactory borrower. The appellant says his brother Shamsudeen was instrumental in the negotiations for the loan and that he came to know about it only on 27th November, 1942, six days before the bond was signed. The appellant said :—

> " It is not true that thereafter I negotiated the loan on bond P1 (No. 2308) I deny I did so. It is not true that I recommended to plaintiff the security as being sufficient. I deny I recommended the borrower Samaratunge as being reliable. I attested that bond in the usual course of my business."

Of Shamsudeen the appellant said " He calls himself a land agent. In fact he is an unlicensed broker ". Shamsudeen admittedly transacted business in the appellant's office and used the appellant's stationery with his name typed above the printed name of the appellant. In the course of negotiations he wrote three letters on the 17th, 22nd, and 26th November, 1942, in which amongst other things he said that Samaratunge was a " long standing client of ours " (meaning thereby of the appellant and of Shamsudeen), that Samaratunge would be " very regular " in paying interest and that " the borrower (Samaratunge) is absolutely good ". He gave details of the security offered, he made out that the appellant was in close touch with the negotiations, that the appellant had suggested a secondary mortgage over a land known as Fincham's land and said in terms " Mr. Fuard (the appellant) highly recommends this loan ".

According to the appellant " . . . . it is false what Shamsudeen has stated in his letter that the suggestion to give a secondary mortgage of Fincham's land first came from me ".

The appellant also said :—

> " He has stated in this letter that he consulted me, that is wrong. I never knew anything about these letters he has written, he has been acting behind my back."

and by this he certainly meant that he had not seen them before the day on which the bond was signed. Shamsudeen admitted in evidence that he had made false statements in the letters. The learned trial Judge has accepted the appellant's evidence that he did not see these

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letters and, for the reasons they have already given, their Lordships think the learned trial Judge's view must be accepted. The Supreme Court held that it appeared from the evidence the appellant had failed to correct the false impressions created by the letters, and in so holding the Supreme Court appears to have taken the view that the appellant had seen the letters before the bond was signed. The facilities to transact business afforded to Shamsudeen in the appellant's office and the constant contacts between Shamsudeen and the appellant disclosed by the evidence would give some measure of probability to the view taken by the Supreme Court. It is in their Lordships' view important that the work of a proctor should be free from all contamination or suspicion of contamination and it is undesirable that a person such as Shamsudeen who on his own showing makes deliberately false statements should be allowed to be active in a proctor's office. The letters written in this case tended to compromise the proctor himself. There is however nothing to show that the learned trial Judge did not give full weight to the implications that arose from Shamsudeen's activities in the appellant's office and his view that the appellant had not seen the letters is entitled to prevail.

The security afforded by Bond No. 2308 was the primary mortgage of certain lands at Panwila and the secondary mortgage of a land near Kandy known as Fincham's land. The primary mortgage in favour of one Moolchand of the latter property was for a sum of Rs. 35,000. It was sold on an Order of Court on a decree on the primary mortgage obtained by Moolchand and realised a sum of Rs. 16,000 which left no surplus towards the payment of the loan made by the respondent on the secondary mortgage. On a sale on a decree obtained by the respondent on the primary mortgage of the Panwila lands a sum of Rs. 2,250 was realised. The respondent thus lost the greater part of his principal and all interest.

There is no evidence from either side which seeks to explain how or why Fincham's land mortgaged for Rs. 35,000 realised only Rs. 16,000 on the sale under the decree. There were statements by witnesses in the case to the effect that the value of the property was considerably more than Rs. 35,000 but there is no evidence which reconciles these statements with the price of Rs. 16,000 realised at the sale. The reason why the property fetched Rs. 16,000 has not been established or even sought to be established by evidence.

On the date of the execution of Bond No. 2308 by Samaratunge in favour of the respondent, Samaratunge owed Rs. 4,990 and interest on a decree on a primary mortgage of the Panwila lands to one Naina Marikar, a cousin of the appellant. He also owed a sum of Rs. 6,000 on a secondary mortgage of Fincham's land to Shamsudeen and to the wife of the appellant. Of the sum of Rs. 15,000 obtained by Samaratunge from the respondent, a sum of Rs. 4,500 was utilised to pay the debt due to Naina Marikar and a sum of Rs. 6,000 to pay the debt due to Shamsudeen and the appellant's wife. In these circumstances it must be held that the defendant's wife, brother and cousin, creditors of Samaratunge, were interested in the loan that was being made by the respondent to Samaratunge and it has been rightly conceded by counsel

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for the appellant that it makes no difference in law to the position of the appellant whether the interest shown to exist is that of his relatives or of himself.

Their Lordships are of opinion that in acting for the respondent in a matter in which the appellant's relatives had an interest the duty arising from the fiduciary relationship between the appellant and the respondent placed upon the appellant the obligation of making a disclosure to respondent of all facts in detail that might have affected a decision by the respondent to make the loan, or even merely led him to an investigation closer than any he had actually made as to whether the proposed loan could prudently be made. In a matter where a solicitor who (as a trustee for certain beneficiaries) was selling property, acted also for the purchaser, Lord Cozens Hardy observed " A man may have a duty on one side and an interest on another. A man who puts himself in that position takes upon himself a grievous responsibility " (*Moody v. Cox*[1]). Their Lordships share that view. The appellant in acting for the respondent took upon himself a grievous responsibility. The burden of proving that he discharged that responsibility is upon the appellant. One of the incidents of that responsibility is, as already stated, the duty of making a full disclosure to the respondent. Their Lordships need only refer to certain events, spoken to by the appellant himself, which suffice to satisfy them that the appellant has not discharged the burden resting on him.

It was curious that the sum lent by Moolchand on the primary mortgage was the same as the amount that Samaratunge the borrower had paid for the property mortgaged. According to the appellant Moolchand had originally agreed to lend Rs. 40,000. The appellant said that this fact " surprised " him and that he spoke to Moolchand about it. In examination in chief the appellant said :—

> " I was surprised and asked Moolchand what was the meaning of this. He said that the property belonged to Samaratunge's uncle and Samaratunge had spent about Rs. 10,000 to Rs. 15,000 to bring the property to a proper condition and that Samaratunge feels that the property is now worth about one lac of rupees. Then I told him that if that is so he had better take a valuer. They did not agree to a valuer being sent. Moolchand was satisfied with the property and after inspection he was prepared to lend the Rs. 40,000 with 8 cents rebate on the coupons. About two months after the inspection Moolchand said he could not lend more than Rs. 35,000 and wanted 20 cents rebate on each pound. According to that on every pound of tea coupon Moolchand was to get 20 cents and the balance was to be credited against the principal due on the bond. The interest that Moolchand was getting was 20 cents on each pound of tea coupons."

In cross-examination he said :—

> " Moolchand told me that Samaratunge was going to buy this property from his uncle for Rs. 35,000 and that Samaratunge wanted Moolchand to give him Rs. 40,000. Then I asked Moolchand " How

[1] *(1917) 2 Ch. 71.*

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could you lend Rs. 40,000 on a property purchased for Rs. 35,000 ? ". Then Moolchand said that this property was purchased by Samaratunge's uncle and that Samaratunge has spent nearly Rs. 10,000 to Rs. 15,000 over it with an understanding that Samaratunge's uncle would sell it to him for Rs. 35,000, and that Rs. 35,000 was not the true value. At the time Moolchand entered into this bond he knew all these facts fully."

If the appellant had believed what Moolchand said it would have appeared to the appellant that, making allowance for the " Rs. 10,000 to Rs. 15,000 " owed by the uncle to Samaratunge, the real price at which the property passed from the uncle to Samaratunge was Rs. 45,000 to Rs. 50,000. This may or may not have been the actual value of the land but it was a piece of information of importance to a lender in weighing up a proposal for a loan.

The appellant said further :—

" Moolchand, Samaratunge and I had a talk. Then Moolchand fixed an appointment with me to inspect the land because I told him it was absurd to lend Rs. 40,000 on a property purchased for Rs. 35,000. I suggested to Moolchand that we should take a valuer. He did not want to take a valuer. I was asked to find out the exact position of the land and get a valuer's opinion. Mr. McHeyzer valued the land. He told me that if the estate was in excellent condition with a factory he would value an acre at Rs. 2,000. If it was without a factory he would value it at Rs. 1,000 to Rs. 1,500 an acre. Fincham's land is situated at an elevation of 4,500 feet. It was high grown tea. I did not ask Moolchand not to embark on this venture. Moolchand told me that Samaratunge's valuation of the estate was over Rs. 100,000. I suggested to Moolchand that we take a valuer. Mr. McHeyzer was never taken to the estate. I did not pay Mr. McHeyzer a fee. I took the plan and the report of the estate to Mr. McHeyzer and showed him the plan and report. Then I told him the exact position of the land and its present condition. His was a hypothetical valuation. I told him that my client was going to lend about Rs. 35,000 or Rs. 40,000 and asked him whether it was a safe investment. Mr. McHeyzer recommended and said that it was a safe investment. The estate was in very good condition at the time of my inspection. After consulting Mr. McHeyzer I thought the estate was worth more than Rs. 100,000."

The surprise experienced by the appellant and the way in which it was allayed were important items of information.

The respondent was in their Lordships' opinion entitled to have had disclosed to him the whole history in detail of the Moolchand loan. The appellant does not say, and there is nothing to show, that it was communicated to the respondent. The appellant says that he told the respondent to satisfy himself about the value of the land. He also says

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that as the result of his own valuation, after leaving a comfortable margin, he told the respondent not to accept the proposed security unless Fincham's land was worth at least Rs. 50,000. But these or similar expedients could not in their Lordships' view discharge the obligation of full disclosure with regard to Fincham's land. The appellant had no right to act until he was satisfied that the respondent was informed in detail of the facts referred to above and that the respondent had been placed in a position to decide for himself whether in the light of the information received he should investigate further the soundness of the loan he was about to make, and in particular the soundness as a secondary mortgage of a security which for a reason unestablished in the case has realised a price which is less than half the amount of the principal of the loan made on it on the primary mortgage. The possibility, for one reason or another, of such a price being realised may have occurred to the respondent if he had been placed upon the road to an investigation.

As already stated the appellant in terms disavowed the statement made in a letter from Shamsudeen to the respondent that Samaratunge was a desirable borrower from the point of view of a lender. On his own testimony the appellant had had experience of certain incidents which indicated how undesirable Samaratunge was as a borrower. At the time the negotiations for the loan were proceeding a decree was outstanding on the mortgage bond given by Samaratunge to Naina Marikar (the appellant's cousin referred to earlier) in respect of the Panwila lands. The appellant had acted for Naina Marikar in the action and experienced difficulty in serving summons on Samaratunge. Further according to the appellant Samaratunge had " played a trick ", the definite details of which do not appear in evidence, on him in respect of certain tea coupons. The appellant does not say nor does it appear otherwise, that the facts with regard to the service of summons and the " trick " were disclosed to the respondent. The appellant does say that he told the respondent that " Samaratunge was a difficult customer and would not keep to his words ". But in their Lordships' view a bare statement such as that without the details which gave rise to it would not be a sufficient discharge by the appellant of his duty however much he may have thought he had performed it. Their Lordships think it was not a sufficent discharge even though (as the appellant stated) the respondent said that he was " not lending the money to Samaratunge on his personal security and that he was lending the money on a mortgage of lands ". In the circumstances in which the appellant had placed himself the duty to make a full disclosure of the details with regard to the service of summons and the " trick ", was not brought to an end by the statement made by the respondent. The duty persisted all the more for the reason that the respondent had not been acquainted with the history of the loan by Moolchand on the security of Fincham's land. It is relevant here to mention that the appellant says he told the respondent " that he should not take into consideration the value of the small lands in Panwila as they consisted of several small lots and that he should be fully satisfied with the security of the secondary mortgages of Fincham's land to cover the amount he lent ". This advice appears to have been sound and to have been accepted by the respondent.

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The appellant has stated that at the time when negotiations for the loan were going on the respondent knew that there was a mortgage decree in favour of Naina Marikar in respect of the Panwila land and a secondary mortgage (No. 2205 of the 2nd June, 1941), in respect of Fincham's land in favour of the appellant's wife and Shamsudeen. He says that the respondent knew also of the relationship between the parties. For reasons already stated his evidence must be accepted. There is a matter however which calls for consideration. Bond No. 2205 carried no interest, and accordingly it was to the advantage of the lenders to have it repaid as early as possible. This fact might strike a lender with whose money the mortgage was to be paid as giving rise to an added interest on the part of the mortgagees to have their money back. The fact that Bond No. 2205 carried no interest therefore called for disclosure.

Samaratunge says that it was from the Rs. 6,000 borrowed on Bond No. 2205 in favour of Shamsudeen and the appellant's wife that he paid commission to Shamsudeen and " notarial expenses " to the appellant in respect of his loan transaction (on the primary bond of the same property) with Moolchand. This evidence has not been contradicted or qualified by the appellant or anyone else. This Rs. 6,000 as already stated was paid off by Samaratunge from moneys received on the loan from the respondent. In effect this means amongst other things that the appellant was paid " notarial expenses " (it is not clear what the term includes) with money borrowed by Samaratunge from the appellant's wife and Shamsudeen, and that the appellant's wife and Shamsudeen received the money back from Samaratunge through the loan raised by Samaratunge from the respondent. If the respondent had been told that Bond No. 2205 carried no interest he might have made enquiries which would have led him to the facts just mentioned. These facts may in turn have led him to an investigation closer than the one he had made of the soundness of the security which he had been offered.

For the reasons which they have given their Lordships are satisfied that the appellant has not discharged the heavy burden which lay upon him to establish that he made a full disclosure to the respondent of information in his possession relevant to the loan. For this failure of duty he is liable in damages unless the provisions of the Prescription Ordinance (Cap. 55, vol. 2, Legislative Enactments of Ceylon, p. 86), bar the claim.

In the case of *Nocton v. Ashburton*[1], a solicitor was held to have been guilty of a breach of a fiduciary duty though not of fraud in respect of a transaction whereby he had gained an advantage and his client had suffered loss as the result of advice given by him and taken by the client. It was held in that case that the English Statute of Limitations did not apply to an action against the solicitor. It was argued that equally the Prescription Ordinance of Ceylon did not apply to an action for damages for breach of a fiduciary duty. Their Lordships do not agree. It was held in *Nocton v. Ashburton* that the English Statute of Limitations did not apply to an action in respect of a breach of a fiduciary duty because such an action before the passing of the Judicature Act would have

[1] *House of Lords, 1914, A. C., 932.*

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fallen within the " exclusive jurisdiction " of the Court of Chancery. It was held that although " since the passing of the Judicature Act any branch of the Court may give both kinds of relief " nevertheless the Statute of Limitations would not apply even after the passing of the Act. The course by which rules of limitation became applicable in England to certain causes of action in equity and not to others has had no counterpart in Ceylon. No Court in Ceylon had at any time jurisdiction corresponding to the " exclusive jurisdiction " of the Court of Chancery in England. Their Lordships do not propose to refer to principles of the English law of limitation which led to the decision mentioned above in *Nocton v. Ashburton* as they are of the opinion that those principles are not relevant to the law of Ceylon. The Prescription Ordinance of Ceylon in various sections prescribes a period of limitation for special causes of action and section 10 prescribes a period for " any cause of action " not caught up by the others. The Ordinance is clearly applicable to all causes of action and no basis can be found in the law of Ceylon for excluding its application to all or any causes of action in equity. This view was expressed by the Board in *John v. Dodwell*[1]. In the words of Lord Haldane :—

> " The Prescription Ordinance of Ceylon governs the whole of a jurisdiction which is general, including law and equity in one system."

Their Lordships are of the view that none of the sections of the Prescription Ordinance dealing with special causes of action is applicable to a breach of a fiduciary duty and that therefore such a breach falls under section 10. Under that section an action is not maintainable " unless the same shall be commenced within three years from the time when such cause of action shall have accrued ". By a breach of duty the appellant created a situation which rendered him responsible if damage occurred. In the case before their Lordships it was impossible for the respondent at the time the breach was committed to have assessed the loss which he subsequently suffered. Their Lordships are of opinion that a cause of action " accrued " to the respondent at the time when the Panwila lands were sold under mortgage decree, namely, on the 9th March, 1946. It was only on that day that the respondent can be said to have suffered the damage that he did in fact suffer. The action was instituted on the 23rd October, 1947, and is consequently not barred by the Prescription Ordinance.

The amount of damages claimed by the respondent has not been contested.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the respondent his costs of this appeal.

Appeal dismissed.

[1] *1918 A. C. 503.*

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1954 *Present:* **Pulle J.**

H. JAYARAM *et al.*, Appellants, *and* SARAPH (P. S. 1958), Respondent

S. C. 928-929—M. C. Nuwara Eliya, 8,404.

Unlawful assembly—Conviction of less than five persons—In what circumstances permissible—Penal Code, s. 140.

Where, according to the charge and the case for the prosecution, not more than six persons in all were members of an unlawful assembly, and four of them are acquitted, the conviction of the two remaining accused under section 140 of the Penal Code cannot be sustained even if the court finds that four persons other than those acquitted constituted an unlawful assembly along with those convicted.

APPEAL from a judgment of the Magistrate's Court, Nuwara Eliya.

A. B. Perera, with *J. C. Thurairatnam*, for the 1st and 2nd accused appellants.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

July 19, 1954. PULLE J.—

In this case six accused persons were charged on four counts, the first of which alleged that they did " form members of an unlawful assembly ". The remaining counts charged them with rioting, causing hurt and using criminal force as " members of the unlawful assembly as aforesaid ". In respect of causing hurt and using criminal force the sections of the Penal Code referred to were 314 and 343 read with section 146 in each case. The learned Magistrate convicted the 1st and 2nd accused on all the charges but acquitted the 3rd to 6th accused on the ground that while the 1st accused, the 2nd accused and four others were members of an unlawful assembly he was not satisfied that the four other persons were identified as the 3rd to 6th accused. On behalf of the 1st and 2nd accused it is submitted that the acquittal of the 3rd to 6th destroyed the basis of the convictions of the 1st and 2nd accused who could not by themselves form an unlawful assembly. It was not part of the case for the prosecution that besides the six persons charged there were others who were members of the assembly.

A large number of authorities were cited on behalf of the appellants but it is not necessary to refer to more than two. The rest could be distinguished on the ground that the findings either in the trial court or in appeal were that there was no proof that those who were convicted were so associated with others not charged as to constitute an unlawful assembly.

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In *Jayawardene v. Perera and two others* [1] six persons were charged with committing criminal trespass and rioting. At the trial the 2nd, 5th and 6th accused were acquitted but the remaining three were convicted of rioting. This conviction was set aside and in the course of his judgment Lawrie A.C.J. said,

> " Now if five men together commit criminal trespass it becomes an unlawful assembly, and if force or violence is used, it becomes a riot. The evidence is that a large number of persons assembled ; the charge was that of that large number six had a common unlawful object and had used force or violence, but in the course of the trial the Magistrate acquitted three of the six. Those who were convicted were not of sufficient number to make an unlawful assembly, and, if they committed acts of force or violence, they were not guilty of rioting. "

Referring to this case Abrahams C.J. said in *King v. Mendis* [2],

> " I am by no means certain that the learned Judge in that case meant to lay down as an absolute proposition that if on a trial of a number of persons for being members of an unlawful assembly, so many are acquitted that the remainder of themselves cannot form an unlawful assembly, they must perforce be acquitted even if it can be proved that there are other persons who, though not charged, had the same common object as the persons convicted and were sufficient in number to constitute with those persons an unlawful assembly ".

The learned Chief Justice also referred to *Rex v. Dias et al.* [3] in which Soertsz J. refused to state a case at the end of a trial which resulted in the conviction of four out of five persons who were charged with being members of an unlawful assembly, there being evidence of persons, other than the five charged, being also members of the unlawful assembly. *Jayawardene v. Perera and two others* [1] was cited to him but the report was not then available to him. He thought that the charge was that six persons had a common unlawful object and that " the six men charged formed the unlawful assembly ". He went on to add, " In the present case it is quite different. The charge is definitely that these five accused were members of an unlawful assembly, not that they only constituted the unlawful assembly and the evidence from the very outset was that they were acting in concert with others ".

It will be seen, therefore, that the opinion of Soertsz J. appears to be that if a number of persons are charged as having " formed " the unlawful assembly, a conviction of at least five is necessary to sustain that conviction. Whereas, if the charge against them was that they were members of an unlawful assembly a conviction of less than five of those charged could be supported, if there was evidence that others besides those acquitted constituted an unlawful assembly along with those who were convicted. The decision in *Ram Rup and another v. Emperor* [4] entirely supports the contention of the appellants in the present appeal.

[1] *(1899) 1 Tambayah's Reports 15.*
[2] *(1937) 39 N. L. R. 182. at p. 184.*
[3] *(1935) 17 Ceylon Law Recorder 16.*
[4] *A. I. R. 1945 Allahabad 31.*

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The headnote reads,

" Where not more than eight persons in all have taken part in the occurrence in question and five of them acquitted, conviction of the remaining accused under section 147 or section 149 cannot be sustained. "

Among the cases cited by the Crown reliance was placed mostly on *King v. Suriya Aratchige Fernando et al.* [1]. In my opinion this case can be distinguished. The allegation in the charge against the four appellants and one Daniel Fernando who was acquitted was that they were members of an unlawful assembly. I have verified this by referring to the indictment. In the course of his judgment Wijeyewardene J. (President) stated that it was not the case for the Crown that the five accused who were indicted were the only members of the unlawful assembly. I have no reason to think that the decision in that case would have been the same had the indictment alleged and the evidence sought to prove that the five accused persons and they alone constituted the unlawful assembly.

I would also distinguish *Ramasray Ahir and others v. Emperor* [2]. Although nine accused were charged and five of them acquitted there were some twenty persons who were proved to have made a concerted attack on a constable. There are dicta in *Feroze Din and others v. Emperor* [3] which support the Crown. The circumstances of this case were of a most unusual character. The six appellants who were convicted as members of an unlawful assembly of the offence of wrongful confinement appealed to the Sessions Judge and the latter intended to affirm the convictions of all, but, owing to a mistake, the names of three of the persons who were acquitted by the Magistrate were placed among those convicted and three of those whose convictions were intended to be affirmed were acquitted. I am not surprised that the Court refused to set aside the convictions of the remaining three.

In the present case the charges clearly informed the six accused persons that they formed the unlawful assembly. The evidence was also to the same effect, namely, that only six persons took part in the assault and that these persons were the accused. The finding of fact that the 3rd to 6th accused were not members of any unlawful assembly should have resulted in the verdict that the charges against the 1st and 2nd accused were not proved.

I come to the conclusion, though regretfully, that the appeals succeed. The convictions and sentences are set aside.

Appeals allowed.

[1] *(1947) 48 N. L. R. 200.*

[2] *A. I. R. 1928 Patna 454.*

[3] *A. I. R. 1929 Lahore 59.*

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1954 *Present :* **Gratiaen J. and Fernando A.J.**

G. C. G. BARRETT, Appellant, *and* MRS. A. F. ALTENDORFF, Respondent

S. C. 447—D. C. Colombo, 21,370

Delict—Inducement of breach of contract—Ingredients of the wrong.

A. sued B. in delict alleging that B. had induced A.'s employer C. to break A.'s contract of service with C. C. was an incorporated Company and B. was the Manager of the Ceylon Branch of that Company. It was established that B. acted within the scope of his authority as agent of C. when he terminated A.'s services.

Held, that, even if C. had unlawfully terminated the contract, B. was not personally liable for any damage resulting to A.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *S. J. Kadirgamar* and *B. S. C. Ratwatte*, for the defendant appellant.

N. E. Weerasooria, Q.C., with *J. A. L. Cooray*, for the plaintiff respondent.

Cur. adv. vult.

June 2, 1954. GRATIAEN J.—

The appellant was the Manager of the Ceylon Branch of the Dunlop Rubber Company Ltd. (hereinafter called "the Company"). The respondent had originally been employed in the Colombo office as a member of the Company's temporary staff, but on 31st March 1949 she was confirmed in her appointment as a stenographer. The terms of her employment provided, *inter alia*, that she should receive a monthly salary of Rs. 200 and that the contract could be terminated by either party giving one month's notice to that effect. (P1.)

On 27th May, 1949, according to her evidence, she was reprimanded for arriving late in the office. On the next day, having previously drawn her pay for the current month, she received a letter from the appellant stating that her services would no longer be required by the Company, but that she could immediately draw her "basic salary" for June (P2). This sum was in fact paid to her by cheque on 30th May, 1949, and a few days later she received (and accepted) a further sum of Rs. 107 representing "dearness allowance" for the month of June. There is no evidence as to how or when the amount of this allowance fell to be computed for each ensuing month, or as to whether she was entitled to it *as of right* as part of her remuneration. Indeed, no issue was framed covering these points. My reason for referring to this circumstance will become clear at a later stage of my judgment.

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On 29th June 1949, the respondent sued the appellant in delict for the recovery of Rs. 2,500 as damages from him personally, the cause of action alleged being that he had "*by wrongful and unlawful means maliciously and with intent to injure her* caused the Company to terminate the contract of employment with her without just cause". She preferred no claim against the Company itself for breach of contract, and no such remedy was available to her. The contract had been duly terminated by one month's notice, and the Company's outstanding contractual obligation to pay her the stipulated remuneration (even if it included "dearness allowance") for the month of June had been discharged before the date on which she could strictly have claimed it. (Her corresponding obligation to perform any services during that month had, of course, been waived by the letter P2.)

In *Quinn v. Leatham* [1], Lord Macnaghten, explaining *Lumley v. Gye* [2], said, "It is a violation of legal right to interfere with contractual relations recognised by law, *if there be no justification for the interference*". In a more recent authoritative pronouncement, Lord Simon said that, apart from the effects of combination (or conspiracy) to injure a man in his trade,

> "If C has an existing contract with A, and B is aware of it, and if B *persuades or induces* C to break the contract, with resulting damage to A, this is, *generally speaking*, a tortious act for which B will be liable to A for the injury he has done him. In some cases, however, B may be able to justify his procuring of the breach of contract"—*Veitch's case* [3].

The Roman-Dutch law recognises the same principle—*vide* the South African cases cited in *McKerron's Law of Delict (4th Ed.) p. 310 n. 1.*

The learned District Judge decided that the respondent had established her cause of action, and awarded her damages in a sum of Rs. 614. The basis of his judgment is that the defendant had "without justification" (though not "maliciously" as the plaint alleges) caused the Company to break its contract with the respondent.

Admittedly, the respondent could not succeed in her claim unless the facts proved at the trial justified, *inter alia*, the following conclusions:

1. that the Company had committed a breach of its contractual obligation to employ her; and further
2. that the breach of contract had "without justification" been "induced", "procured" or "caused" by the appellant.

The learned judge took the view that both elements had been established. In my opinion, his decision on each of these issues was vitiated by misdirection on essential matters.

The only reason recorded for deciding that the contract had been wrongfully terminated was that, although the stipulated notice of

[1] *(1901) A. C. 495.* [2] *(1853) 2 E. and B. 216.*
[3] *(1942) A. C. 435.*

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termination was duly given, the Company had nevertheless " committed the fatal blunder " (sic) of not paying or tendering to the respondent the full wages that were due to her for the month of June 1949, when she was served with the notice P2. The theory, apparently, is that, having *expressly* offered her the concession of drawing her " basic salary " from the cashier in advance of the due date, the Company had *inferentially* repudiated in anticipation its (assumed) outstanding obligation to pay her " dearness allowance " at any time thereafter. Starting from that hypothesis, he concluded that the eventual payment of the " dearness allowance " (also, be it noted, before 30th June 1949) could not condone the earlier " blunder " which (in the learned judge's view) was irretrievable.

The learned judge concedes that " in view of this subsequent payment it may appear to be somewhat technical to hold that in point of fact, there was a breach of the contract ". Apart from attracting comment as to its extreme technicality, this part of the judgment also invites the more serious criticism that it suggests a wrong answer to a question which was not raised by either litigant at the trial.

As I have previously pointed out, the Company still remained liable, after the contract had been terminated by due notice, to pay to the respondent her remuneration for June 1949 on or before 30th June ; and this obligation was fully discharged long prior to the due date. No suggestion of any so-called " repudiation in advance " was made in the pleadings. Nor was it specifically put in issue or raised in the course of the appellant's cross-examination. Even the recorded summary of the closing addresses of the respondent's lawyer makes no mention of it. In the result, the appellant had no opportunity at the trial of meeting an argument (based on unascertained facts) which emerged for the first time in the judgment under appeal. I reject this admitted " technicality " as having no bearing on the issues which were framed in the Court below.

The only ground specified in the respondent's evidence to support her allegation that the Company had wrongfully terminated her employment was that, under the terms of P1, the clause providing for " one month's notice " applied only if her work or conduct proved unsatisfactory. This interpretation was, of course, quite untenable, and was rightly rejected by the learned judge. In the result, he should have held that the respondent's cause of action was without foundation.

But let us assume that the Company had committed some technical breach of the contract. Even on that hypothesis, the second element of the cause of action had still to be established before the appellant's liability in delict could arise.

The Company is incorporated in England, and admittedly the appellant was the officer entrusted with the function of employing, and terminating the employment of, the Company's minor employees (including the respondent) in Ceylon. How then is it suggested that, in exercising his delegated authority to terminate the respondent's services, he had " induced ", " procured " or " caused " the Company to do what in reality he, and he alone, had done ?

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The essence of this particular category of actionable wrong is that damage has resulted from unjustifiable interference by an intermeddler who has induced or procured a breach by one of the contracting parties. Under the Roman-Dutch law, " every contract imposes a duty upon *persons extraneous thereto* not to interfere with its due performance, and a breach of this duty gives rise to an action for damages "—*Isaacman v. Miller* [1]. Similarly, in England, McCardie J. pointed out that " in every one of the sets of circumstances before the Courts, the person who procured the breach of contract was in fact a *stranger—that is, a third person who stood outside the area of the bargain* between the two contracting parties "—*Said v. Butt* [2].

An agent or servant who, acting within the scope of his authority or in the exercise of his delegated powers, terminates a contract on behalf of his principal or master, does not stand " wholly outside the area of the bargain " : on the contrary, he is, by virtue of his own appointment, made directly responsible for its due performance or for its termination (as the case may be). He cannot therefore be fixed with personal liability for any damage resulting to the other contracting party. As McCardie J. explains in *Said v. Butt* (*supra*) " he is not a stranger. He is the *alter ego* of his master. His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and an action against the agent under the *Lumley v. Gye* principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract ". These observations were approved by the Judges who heard *Scammel Ltd. v. Hurley* [3] and, as far as I am aware, have never been dissented from since.

The learned District Judge acknowledges this difficulty, but seeks a solution in an interesting theory of " split personality " : namely, that the appellant (in the role of " plain Mr. Barrett ") had *induced himself* (" the District Manager of the Dunlop Rubber Co. Ltd.") to terminate the contract with Mrs. Altendorff. There is really no justification for such sophistry in applying the true legal principle to the facts of this particular case. It was very clearly understood by the respondent that all matters affecting the performance or termination of the contract should be dealt with (as far as the Company was concerned) by the manager, for the time being, of its branch office in Ceylon. In other words, the appellant was the Company's *alter ego* when he terminated the contract.

The matter can perhaps be looked at in another way. Even if it be correct to state that the appellant's actions did constitute an " interference " for the purposes of one element of the cause of action, the " justification " for what he did is found in his delegated authority to represent the Company in the matter. There seems to have been some confusion in the judgment under appeal as to what precisely called for justification as a defence to the action. The true position is (assuming

[1] *(1922) T. P. D. 56 at 65.* [2] *(1920) 3 K. B. 497 at 506.*

[3] *(929) 1 K. B. 419, C. A.*

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the other elements of the cause of action to be established) that the appellant was required only to justify his so-called interference and not to justify the breach itself.

In my opinion the respondent has failed to establish her cause of action against the appellant. Far too much time was taken up in the lower Court in an attempt to probe irrelevant matters—for example, whether there was " moral justification " for the decision to terminate the contract, and whether any underlying motives existed for selecting a particular stenographer to take the respondent's place after her services had been dispensed with. All these are matters with which, in the present state of the law, the Court was in no way concerned. Provided that a man fulfils his contractual obligations with the persons concerned, he is protected from judicial speculation as to why precisely he chose to terminate the services of one personal stenographer and preferred to engage the services of another.

I would allow the appeal and dismiss the respondent's action with costs in both Courts.

FERNANDO A.J.—I agree.

Appeal allowed.

1954 *Present :* **Pulle J.**

IN RE NOOR JEHAN

S. C. 519—In Revision M. C. Colombo 1,211/B

Habeas corpus—*Power of Court to remand a girl to the Salvation Army Home—Courts Ordinance (Cap. 6), s. 45.*

A Court has no jurisdiction to remand a girl to the Salvation Army Home during the pendency of a case of kidnapping her.

Vaithalingam v. Gnanapathipillai (1944) 46 N. L. R. 235, followed.

APPLICATION to revise an order of the Magistrate's Court, Colombo.

M. Markhani, for the petitioner.

April 23, 1954. PULLE J.—

In this case two persons were charged with the offence of having on the 11th March, 1954, kidnapped a girl named Noor Jehan *alias* Nagoor Umma who was born on 26th August, 1938. The learned Magistrate assumed jurisdiction under section 152 (3) of the Criminal Procedure Code and fixed the trial for the 3rd May, 1954. The girl who was produced in Court refused to go with her mother and she was remanded to the Salvation Army Home. The mother moved in revision to have the order of remand set aside on the ground that the Magistrate had no

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jurisdiction to make it. At the time this application first came before me I felt that if the Magistrate had no jurisdiction I should make a further order granting the custody of the girl to the mother. Treating the application as one that should be inquired into under section 45 of the Courts Ordinance I called for a report from the Magistrate who stated that the girl was unwilling to go with the mother and that, therefore, she should not be handed over to her.

Mr. Markhani for the petitioner has drawn my attention to the case of *Vaithalingam v. Gnanapathipillai* [1] in which Soertsz J. held in similar circumstances that a remand to the Salvation Army Home was illegal. I would, therefore, set aside the order of remand and direct that the girl be handed over to the mother who is entitled to have the custody.

Application allowed.

1953 *Present :* **Pulle J.**

In re SOUTH WESTERN BUS CO., LTD. *et al.*

In the matter of cases stated under the provisions of section 4 of the Motor Car Ordinance, No. 45 of 1938, read with section 13 of the Omnibus Service Licensing Ordinance, No. 47 of 1942.

Omnibus Service Licensing Ordinance, No. 47 of 1942—Sections 4, 7, 14 (3)—Route licence—Competing applicants—Matters to be considered when selecting a particular applicant—Stage carriage permit—Motor Traffic Act, No. 14 of 1951, s. 246 (5).

Three omnibus companies—A., B. and C.—were applicants for a route licence under the Omnibus Service Licensing Ordinance. The Commissioner of Motor Transport granted the licence to A. On appeals taken by B. and C., the Tribunal of Appeal set aside the order of the Commissioner and granted the licence to B. In two cases stated by the Tribunal of Appeal at the instance of the Commissioner (on behalf of A.) and C. respectively—

Held, (i) that cases stated on questions of fact should not be decided on a meticulous consideration of facts of minor importance. The question was whether on vital matters the Tribunal of Appeal had erred to such a degree that its decision was unsustainable.

(ii) that the person on whom the duty was cast in the first instance to decide on the respective merits of claimants to a route was the Commissioner and that the Tribunal was an appellate body.

(iii) that in the issue of a route licence the needs of the public were of paramount consideration. If a particular company could give the best service, it should not be shut out solely on the ground that it was endeavouring to increase its profits by enlarging its existing operations.

(iv) that it was not a serious objection to a new operator providing a service along a route near to an existing one that the old operator would suffer a diminution of profits. It would, however, be against the public interest if, as a result of the new licence, the old operator had to forego profits to the extent of rendering his service unremunerative from a business standpoint.

[1] *(1944) 46 N. L. R. 235.*

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CASES stated under the provisions of section 4 of the Motor Car Ordinance, No. 45 of 1938, read with section 13 (8) of the Omnibus Service Licensing Ordinance, No. 47 of 1942.

H. V. Perera, Q.C., with *H. W. Jayewardene* and *A. C. M. Uvais*, for the South Western Bus Co., Ltd.

C. Thiagalingam, Q.C., with *S. E. J. Fernando, P. Somatilakam* and *T. Parathalingam*, for the High Level Road Bus Co., Ltd.

Stanley de Zoysa, with *C. Manohara*, for the Gamini Bus Co., Ltd.

V. Tennekoon, Crown Counsel, for the Commissioner of Motor Transport.

Cur. adv. vult.

September 11, 1953. PULLE J.—

*The questions which arise for determination in this matter are contained in two cases stated by the Tribunal of Appeal under section 13 (8) of the Omnibus Service Licensing Ordinance, No. 47 or 1942, read with section 4 of the Motor Car Ordinance, No. 45 of 1938. The two cases stated bear Supreme Court Nos. 49 and 72 and they relate to the grant of a route licence to operate an omnibus service from the Bambalapitiya coast road at its junction with New Bullers Road through Thurstan Road, Flower Road, General's Lake Road to the Pettah. This route will be described throughout this judgment as route No. 3.

In 1947 the Commissioner of Motor Transport had before him about fifty applications by omnibus companies to operate on various routes the termini of each being within the city of Colombo. The Commissioner selected four routes of which one was almost identical with route No. 3, the difference being that the southern terminus was not the *junction* of Bambalapitiya coast road and New Bullers Road but Bambalapitiya Railway station which is by the sea on the western side of the coastal road. The Commissioner's selection was altered by all the members of the Tribunal of Appeal to the extent that the latter cut out the portion between the railway station and the junction referred to.

The principal claimants to this route (or substantially the same route) are three omnibus companies which I shall refer to as South Western, High Level and Gamini. Really the choice was between South Western and High Level and since 1948 a fierce battle has been fought by them for this route. The statutory provisions under which decisions had to be reached by the Commissioner and the Tribunal did not require them to take any formal evidence. The record consists of the transcript of the speeches of Counsel and the documents marked by them. No considered order setting out the merits of the arguments urged before the Commissioner was delivered with the result that a wide range of topics was discussed both before the Tribunal and this Court.

*Application made to the Privy Council for special leave to appeal from this judgment was refused.—Ed.

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The Commissioner by his order dated the 10th July, 1948, selected the route described earlier with the southern terminus as Bambalapitiya Railway station and stated his reason for granting the licence to South-Western as follows :

> " This is a route almost parallel to the Galle Road. At present people living in the Thurstan Road-Flower Road area who wish to proceed to Pettah would naturally go to Galle Road and take the South Western Bus Company's buses. This company I consider has the best claims to this route and I allow it. "

Appeals were taken to the Tribunal of Appeal by High Level and Gamini. Of the three members constituting the Tribunal only the Chairman was in favour of affirming the order of the Commissioner and the Tribunal directed that the licence in favour of South Western be revoked and a licence granted to High Level subject to the condition " that they run non stop from Slave Island to the Pettah and the Pettah to Slave Island ". This condition had to be inserted because South Western was at this time operating a service between Slave Island and Pettah and it would have been a breach of section 7 (1) of Ordinance No. 47 of 1942 for High Level to provide a service along the entirety of Slave Island-Pettah route held by South Western. The order of the Tribunal was made on the 26th March, 1949, and shortly after the reasons for the Chairman's opinion and the reasons for the majority decision were delivered. Under section 4 (6) (*a*) of the Motor Car Ordinance either Gamini or the Commissioner had the right to ask the Tribunal to state a case but not South Western because that company was not an " Appellant " before the Tribunal. I am aware of the practice of the Commissioner to assist an unsuccessful respondent who had obtained a licence to put his case before the Supreme Court. Case No. 49 was stated at the instance of the Commissioner. In effect the appellant was South Western and learned Crown Counsel who appeared for the Commissioner was more an *amicus curiae* than an advocate for the Commissioner. Case No. 72 was stated at the instance of Gamini. The substantial question which I have to decide in case No. 49 is whether the Tribunal was wrong in reversing the order of the Commissioner who granted the licence to South Western. It is conceded that the Tribunal in giving the licence to High Level has not contravened section 7 (1) of the Ordinance for the reason that High Level has to run " express " from Slave Island to Pettah.

In case No. 72 Gamini took up the position before me that if the choice of the operator lay between them and High Level there was no valid reason for preferring the latter. They have no quarrel with South Western. Counsel for Gamini stated that the fact that South Western was already providing a regular service on a part of the route, namely, Slave Island to Pettah, ought to give them a preferential right as against High Level who had no prior licence to operate an exclusive service between termini lying within route No. 3. If the Tribunal was wrong in setting aside the order of the Commissioner then it is obvious that there is only one claimant to whom the licence must be given and that is the South Western.

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In regard to all four routes I have had to listen to arguments for very many days regarding the policy of the Ordinance in so far as one could gather it from sections 4 and 7. It was the desire of the Counsel engaged in these cases that I should defer my decision until I had heard the arguments touching all four routes. On behalf of High Level and Gamini notes setting out a summary of their respective contentions were sent to me. I do not think that these cases stated on questions of fact should be decided on a meticulous consideration of a number of facts of minor importance. I have to ask myself whether on vital matters the Tribunal has erred to such a degree that its decision is unsustainable. I have further to remember that while the functions of the Tribunal are in the nature of a re-hearing and while it is invested with wide powers under section 14 (3) of the Ordinance the person on whom the duty is cast in the first instance to decide on the respective merits of claimants to a route is the Commissioner and that the Tribunal is an appellate body.

Before I enter on a discussion of the reasons embodied in the two opinions of the Tribunal I desire to make a few observations of a general character. The needs of the public are of paramount consideration. It would not be proper to extend the monopolies envisaged by the Ordinance beyond the limits laid down. If a particular company can give the best service or if any arrangement would ensure the speedy transport of passengers, I do not think it should be shut out solely on the ground that it is endeavouring to increase its profits by enlarging its operations. In the case of route No. 2 I have held that so-called city operators are not always to be preferred to those who enter the city from termini situated outside. That one company is running services on what are called inland routes of the city and another along the coastal belt is indeed relevant but cannot, in my view, be decisive.

It is bound to happen especially in a crowded city that the grant of a licence to operate a service close to an existing one would take away a part of the custom of the earlier licensee. I do not think it is a serious objection to a new operator providing a service along a route near to an existing one that the old operator would suffer a diminution of profits. I quite accede to the argument of learned Counsel for High Level that it would be against the public interest if, as a result of the new licence, the old operator has to forego profits to the extent of rendering his service unremunerative from a business standpoint. He would then have no incentive to provide an adequate and efficient service. I would, however, entirely dissent from the view that if a company operating on a route is making large profits it has, so to speak, a vested right to maintain those profits at the same level and that in the assertion of that right every new competitor must be shut out.

A rough background to the case is provided by the following facts :

South Western buses enter the city of Colombo from the south along the coastal road. Between Wellawatte and Pettah it has a few shuttle services of which one that figures prominently in this case is from Slave Island to Pettah which comprises a part of route No. 3. High Level buses enter Colombo along an inland route the point of entry being a bridge

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which is on the south eastern boundary of Colombo. A number of High Level buses on entering Colombo proceed to Pettah along Havelock Road, Reid Avenue, Alexandra Place, Union Place, Darley Road and McCallum Road. The Tribunal of Appeal has awarded this company route No. 2 the termini of which are entirely within Colombo. This route runs from the junction of Bambalapitiya coast road and New Bullers Road to Maradana via Thurstan Road, Cambridge Place, Albert Crescent, Museum Road, Alexandra Place, Union Place and Darley Road. Gamini buses also traverse Havelock Road. One of their services to Pettah enters Colombo from a village on the southern outskirts of Colombo called Kohuwela and runs parallel with High Level along Havelock Road, Reid Avenue, and Alexandra Place and falls into Maradana via Deans Road. I gather from a list tendered to me of bus services within the Municipal limits of Colombo—which has been accepted as correct—that High Level and Gamini also have what has been described as " shuttle services " within Colombo.

Both High Level and South Western also possess licences limited to carrying school children to various educational institutions in Colombo. These are in the nature of occasional licences.

On the days that the Ceylon Turf Club holds a race meet and on other special occasions when it is desirable to avoid congestion of traffic on Reid Avenue the Gamini and High Level buses are diverted. They get between themselves practically the whole of the passenger traffic to the racecourse. Their buses are allowed to halt in the vicinity of the old Sinhalese Sports Club Grounds, i.e., close to the junction of Torrington Place and Alexandra Place. From this point it is a short distance for the passengers to walk to the racecourse, especially to the side of the open enclosure.

It would be a convenient stage now to discuss the reasons given by the majority of the Tribunal for reversing the Commissioner's order.

In the second and third paragraphs it is stated that when Ordinance No. 47 of 1942 was brought into operation High Level and Gamini were " relegated " to the less profitable inland routes. With great respect I do not think this was a proper approach to the problem. When licences were first issued under the Ordinance it was done in accordance with its provisions. There was no arbitrary assignment of a lucrative route to one operator or a " relegation " of another to a less profitable route. One cannot but assume that each applicant's case was dealt with on its merits. The third paragraph further states, " In our opinion it would be as unfair for the South Western Bus Company Limited to come inland and skim the cream of the passenger traffic of these two latter companies from the Bullers Road roundabout to the Pettah as it would be for the inland route companies to make a proposal to tap the passenger traffic along the coast road of which the South Western Bus Company Limited has now a monopoly ". Whether the grant of route No. 3 to South Western would " skim the cream " of the passenger traffic of High Level and Gamini would be a question of fact depending on the evidence which I shall later consider. I must say that I did not gather from anything said by Gamini

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before me that they anticipated such a disastrous result. They are reconciled to South Western getting the licence for route No. 3. If, as I said before, a grant has the effect of a crippling financial blow to the old operator, that would be a ground for withholding the grant or for giving the licence to the old operator, but no company should be shut out by a label being attached to it. No operator has any particular claim except what the statute recognizes.

In paragraph 4 the right of South Western to provide a service from Slave Island to Pettah or Fort is described as a " lodgment " in an inland route brought about by wartime restrictions. The paragraph proceeds that although the war is over South Western, in addition to the use of the old coastal route through Galle Face, " clung " to its right to operate on the Slave Island route. It seems to me that the majority of the Tribunal felt that what would otherwise be a circumstance in favour of South Western was nullified by their perversity in not quitting an inland route to take their proper place along the coast. I must express my surprise at this argument. Whatever be the reason South Western was lawfully in possession of a licence covering a part of route No. 3 and they were entitled to a just appraisement of this fact. Counsel for South Western said that far from being a " lodgment " the Slave Island route was held by its predecessor in title and moved to read some official documents in support. Counsel for High Level objected and I upheld the objection, although my impression was that it was agreed by all parties that official documents the authenticity of which was not challenged could be produced before me. I have adverted to this only for the reason that Counsel for South Western asked me to record his application.

Paragraphs 5 and 6 appear to suggest that in the opinion of the majority High Level had acquired a strong claim to route No. 3 and that the only obstacle or " snag " in the way of a licence being granted to them earlier was the attitude of South Western in clinging to the Slave Island-Pettah section. The document which throws light on this subject is 3 S W B 3 dated the 6th September, 1945, which is a letter addressed to the Commissioner by High Level. At this date McCallum Road was not open to traffic and the High Level buses on the run from Nugegoda (a suburb of Colombo) to Pettah proceeded via Maradana. High Level without permission from any authority carried out an experimental express service through Flower Road, General's Lake Road and Slave Island via Fort to Pettah. High Level informed the Commissioner that after watching the experiment for a week or two they would apply for a special licence to run an express service in the mornings, *until such time as McCallum Road was opened.* A copy of this letter was sent to South Western for their observation and they objected to the proposal by their letter 3 SWB 1. They honestly feared that in spite of the service being said to be express High Level's employees might set down and pick up passengers on the Slave Island section.

In paragraph 5 the majority describe the Slave Island section held by South Western as " the snag " which obstructed the High Level Bus Company Limited from obtaining the licence contemplated in 3 SWB 3. They add, " It is noteworthy that the South Western Bus Company

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Limited strongly objected to the route claimed by the High Level Road Bus Company Limited at that time " and continued in paragraph 6 :

> " But it is this very route that the Commissioner has, forgetful of the past, granted to the South Western Bus Company Limited . . . . "

It seems to me that if the Commissioner had forgot the past it enured more to the advantage of High Level, for the running of omnibus services, be they express or not, experimental or otherwise, without a licence must always be regarded as a serious lapse.

Paragraph 7 deals with an argument by South Western based on their holding licences to carry school children. I agree that the Tribunal was free to attach little or no importance to these occasional licences.

Would the grant of route No. 3 to South Western " skim the cream " of the passenger traffic of High Level and Gamini, especially on race days ? The majority have answered the question in the affirmative. The Commissioner evidently did not think that the normal traffic to Pettah by High Level and Gamini buses would be affected to any marked degree. It is a matter of common knowledge that the South Western coastal route from Bambalapitiya to Galle Face Hotel runs through thickly populated areas on *both* sides and it would be rash for anyone to say that the Commissioner was wrong in stating, " At present people living in the Thurstan Road–Flower Road area who wish to proceed to Pettah would naturally go to Galle Road and take the South Western Company's buses ". High Level submits that the South Western buses from Bambalapitiya could take passengers only as far as Fort and not Pettah and, therefore, the Commissioner is in error in stating that passengers who wish to proceed to *Pettah* would take the South Western buses. Probably the Commissioner had in mind what everybody knows to his cost today that it is easier to walk from Fort to Pettah than waste time looking for a public conveyance. Even those who own cars find it easier to park them in Fort and walk considerable distances to attend to their business.

The Chairman of the Tribunal in his dissenting note said,

> " Secondly, there is much weight in the point put by Mr. Colvin R. de Silva. Admittedly, for many months there has been heavy congestion on the coast road buses : there have been long queues waiting. What is the reason for that ? The most probable explanation is that most of the inhabitants of South Colombo on both sides of the coast road are wont to make their daily journey to the Fort or Pettah by South Western Company's buses. Therefore, to give another company the short new route through General's Lake Road will damage the South Western Company as much as the opposite will damage the High Level Company or more. "

Counsel for High Level has argued that I must accept the finding of the majority that the grant of the licence to South Western would result in grave loss of custom to High Level and that my function is limited to answering whether the majority were wrong for that reason in revoking

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the licence granted to South Western. I regret I am unable to agree. There is no evidence that High Level's takings on their " parallel " route to Pettah from Nugegoda would be affected to such an extent that the running of that service would be unremunerative. On the order made by the Commissioner South Western did operate on route No. 3 roughly from July, 1948, to March, 1949. Did High Level feel the impact of the new competitor ? Did the number of passengers carried on their Pettah service go down ? What was the loss on the racecourse traffic ? Records of sales of tickets ought to have been readily available to throw light on these questions. It seems to me that High Level did feel the need of supporting their allegations as to loss of traffic before the Tribunal with documentary evidence. They produced a statement of income and expenditure (3 H L R 13) for the period 1st April, 1948, to 28th February, 1949, certified by an accountant shewing a loss of Rs. 25,820. As evidence of High Level's loss during the time that South Western operated on route No. 3 the document is entirely unconvincing. In producing 3 HLR 13 before the Tribunal Counsel for High Level is recorded to have said :

> " I produce the accounts of Nugegoda to Dehiwala, Maharagama to Kirillapone via Embuldeniya and Maharagama to Town Hall via Embuldeniya. Those are grouped for the purpose of accounts. Every year we had profits but this time we have run that section at a total loss of Rs. 25,820. This is from April 1948 to February 1949 . . . . So this loss must have been due to the competition of last 7 or 8 months. "

The majority say they are convinced that if South Western is allowed the route the cream of the High Level passenger traffic would be skimmed. They could not have based that finding on 3 HLR 13. I fail to see on what other material they could have come to that finding.

That both High Level and Gamini will lose a part of the racecourse custom is evident but not to the extent of being described as " skimming the cream ". If South Western bring race traffic from Pettah the point nearest to the racecourse appears to be the junction of Flower Road and Racecourse Avenue. A passenger going to the open enclosure, not to the covered stands, would have to walk along Racecourse Avenue, a part of Reid Avenue and then turn right at Maitland Crescent-Torrington Place junction. For this reason it seems to me that High Level and Gamini on their Pettah routes have an advantage in relation to race traffic over South Western operating on route No. 3, for the two former companies can put down their race passengers at a more convenient spot. I have referred to what is comparatively a minor circumstance to show that the description " skimming the cream " of race traffic is exaggerated.

Another reason for setting aside the Commissioner's order is contained in the latter part of paragraph 11. It is said that some day South Western may apply for a licence to ply on a part of route No. 3, as a shuttle service, from Bullers Road roundabout to Pettah and that if it were given a serious impasse would be created. I am clear in my mind that a contingency suc h as this ought not have influenced the Tribunal.

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On an examination of the reasons given by the majority I am satisfied that they have erred in setting aside the order of the Commissioner. I do not think it is necessary to examine in detail the reasons given by the Chairman for affirming the Commissioner's order. He rightly places emphasis on the Commissioner's function to select a route in his discretion and to give the licence to an operator who will best serve the needs of the public. I cannot say that the Chairman was wrong in drawing the inference that, because South Western had as many as 138 new buses of the Nelson type and 48 old of the same type as against High Level's 45 Nelson of the new type and 57 of the old type, the former could render a more efficient service than the latter. I note that in granting route No. 2 to High Level the Tribunal were unanimous in asserting that one of the reasons for preferring High Level to Gamini was that the former had a larger number of buses of the Nelson type. I agreed with that view in my judgment on route No. 2.

The Chairman thinks that High Level's employees may be guilty of evasion of the law in picking up passengers on the Slave Island section and that would be a reason for preferring South Western. Taken by itself I do not think it is a good reason, but the fact that South Western is already providing a service on the Slave Island section of route No. 3 is a point in their favour and to that extent I agree with the Chairman.

In the result I find that the Tribunal was not justified in reversing the order of the Commissioner granting the licence to the South Western Bus Company Limited.

There is no Tribunal of Appeal constituted under the Motor Car Ordinance, No. 45 of 1938, to whom I can remit these cases stated. I do not think I have the power to do so under section 246 (4) (*a*) of the Motor Traffic Act, No. 14 of 1951, as it deals only with " appeals " and that can mean only appeals to the Tribunal and not cases stated under section 4 (6) (*a*) of the Motor Car Ordinance, No. 45 of 1938. My determination on these cases stated is that the application of South Western for a road service licence under Ordinance No. 47 of 1942 in respect of the third route determined by the Commissioner, but subject to the modification of the southern sector indicated by the unanimous opinion of the Tribunal, should be granted with the result that I direct the Commissioner of Motor Traffic to grant to the South Western a stage carriage permit under section 246 (5) of the Motor Traffic Act, No. 14 of 1951. I am aware that there is no express provision authorising me to direct the Commissioner to grant a stage carriage permit ; but as the duty to grant the permit is laid down in mandatory terms in sub-section 5 I do not see any legal objection to issuing the direction. It has at least the advantage of avoiding new and fruitless litigation in Ceylon over this route.

As arranged by Counsel the question of costs is left over for further argument.

Order of Tribunal of Appeal set aside.

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1954 *Present :* **Gratiaen J., Sansoni J. and Fernando A.J.**

R. SINGARAYER, Appellant, *and* THE ATTORNEY-GENERAL, Respondent

S. C. 457 of 1951—D. C. Point Pedro, 3,905M

Customs Ordinance (Cap. 185)—Section 146—Security for costs of action—Form in which it may be given—Meaning of word " security ".

Security for costs of action required under section 146 of the Customs Ordinance may be furnished in some other form than cash. In the context, the word *security* includes " every document or transaction by which the payment of money is assured, or its recovery facilitated ". Security may therefore be given in the form of the personal guarantee of a surety coupled with a mortgage in favour of the Crown of the surety's interest in a specified allotment of land.

APPEAL from a judgment of the District Court, Point Pedro. Owing to a difference of opinion between the two Judges before whom it was first argued, it came up for hearing before a Bench of three Judges, in terms of section 38 of the Courts Ordinance.

E. R. S. R. Coomaraswamy, with *E. B. Vannitamby* and *D. R. Perera*, for the plaintiff appellant.

M. Tiruchelvam, Crown Counsel, with *V. S. A. Pullenayagam*, Crown Counsel, for the defendant respondent.

Cur. adv. vult.

July 26, 1954. GRATIAEN J.—

On 29th October, 1950, certain Customs officers seized a motor launch, of which the appellant claims to be the owner, off the coast of Thaiaidy for an alleged contravention of regulations framed under section 68 of the Customs Ordinance. On 10th November, 1950, the Collector of Customs of the Northern Province wrote to the appellant confirming the seizure of the launch " as forfeited under the Ordinance ". The letter added that " for purposes of action under section 146 of the Ordinance security for the launch had been fixed in a sum of Rs. 35,000 plus a further sum of Rs. 3,000 for costs of action ".

That section 146 applies to a situation of this kind is now conceded by Mr. Coomaraswamy. The section provides *inter alia* that all ships, boats, goods and other things " seized as forfeited under the Ordinance " shall be " deemed and taken to be condemned " unless the person from whom they are seized or their owner shall within one month give notice in writing to the Chief Officer of Customs at the nearest port that he intends to enter a claim for them, " and shall further give *security to*

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prosecute such claim before the Court having jurisdiction to entertain the same, *and to restore the things seized or their value, and otherwise to satisfy the judgment of the Court and to pay costs* ".

Section 147 provides that no claim to anything seized under the Ordinance shall be admitted by the Court " *unless the claimant shall at the time of filing his libel or plaint to establish his claim satisfy the Court that he has given notice and security as in the preceding section enacted* ".

On 28th November, 1950, the appellant gave notice in writing to the Collector of Customs of his intention to institute the present action, and at the same time tendered a bond in a sum of Rs. 3,000 (i.e., the amount fixed by the Collector as security for costs under section 146) conditioned for the due prosecution of the action and the payment of any costs that might be awarded against him. This bond was executed by the appellant and by his surety V. Velupillai who, in addition to his personal guarantee, hypothecated in favour of the Crown his interests in certain immovable property " for further and better securing the payment of all moneys due under the bond ".

The appellant had explained in his letter that he was unable to tender security in a sum of Rs. 35,000 fixed by the Collector as security for the launch ; he therefore consented to the vessel continuing to remain in the possession of the Customs authorities pending the final decision of the action which he proposed to institute. The Collector replied (1) that security " for costs of action alone " could not be accepted, and (2) that " the required securities should be furnished *in cash*". On the next day, he returned the notice and bond to the appellant on the ground that the security was " insufficient ".

On 3rd January, 1951, the appellant filed a plaint in the District Court of Point Pedro together with (1) the notice and bond tendered on 28th November, 1950, to the Collector, and (2) his affidavit in which he incorporated the correspondence to which I have already referred. He asked that the plaint, in which he claimed the recovery of his launch from the Crown, be accepted by the Court. The learned District Judge made order accepting the plaint and ordering summons to issue for 2nd February, 1951. This order must necessarily be construed as having been passed on an *ex parte* judicial decision under section 147 of the Ordinance that, upon the materials before him, the learned judge was satisfied that the appellant had " given notice and security as in the preceding section enacted ".

Several issues were framed at the trial, but, by agreement, the learned judge gave his ruling on certain preliminary issues arising from the Crown's objections to the nature and sufficiency of the security furnished by the appellant. He held in favour of the Crown (1) that the appellant was obliged to give security to restore the launch or its value even though he did not require it to be delivered up to him pending the action, and (2) that the security for costs that was tendered was insufficient. For these reasons, the appellant's action was dismissed without an adjudication on the merits. The present appeal is from that decision, and,

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owing to a difference of opinion between the judges before whom it was first argued, the matter came up for hearing before a Bench of three judges in terms of section 38 of the Courts Ordinance.

Since the judgment under appeal was pronounced, this Court has decided in *Seyaratnam v. Hudson* [1] that no security need be given under section 146 for the restoration of the seized property in cases where the claimant does not ask that it should be handed over to him pending the litigation. Mr. Tiruchelvam therefore agrees that the only question before us is whether the nature of the security tendered by the appellant as security for costs was objectionable, and, alternatively, whether it ought to have been rejected on the ground of insufficiency. The first of the issues introduces a question of law, the second a question of fact.

As to the form and nature of the security given by the bond, there was no substance in the Collector's original objection that it ought necessarily to have been furnished *in cash*. He was entitled under section 146 to determine the amount of the security, but not (as for example, in cases arising under section 70) to decide what particular kind of security would alone be approved by him. Compliance with the requirements of section 146 is in truth a prerequisite to the institution of a claim to the property " seized as forfeited " ; and it was ultimately for the Court, not the Collector, to rule whether or not those requirements had been complied with by the claimant.

The purpose of section 146 in requiring security to be furnished either for costs or (where applicable) for the restoration of the property is clear enough: it is to prevent the authorities being harassed with litigation without some adequate assurance that, if the claim is rejected, their costs will be met and that the property (if released pending the action) or its value will be restored to them.

In this context, the word *security* includes " every document or transaction by which the payment of money is assured, or its recovery facilitated ". *Encyclopaedia of the Laws of England* 13,204. " The security would generally consist of a right to resort to some fund or property for payment ; but I am not prepared to say that some other forms of security (*such as a personal guarantee*) are excluded. In each case however, where the word is used in the normal sense, some form of secured liability is postulated "—*per* Viscount Cave in *Singer v. Williams* [2]. There are many precedents in the English Courts for accepting *solvent persons* or even solvent foreign corporations " as security ".

In my opinion, the nature of the securities given by the appellant in the present case—namely, the personal guarantee of a surety coupled with a mortgage in favour of the Crown of the surety's interest in a specified allotment of land, was unobjectionable in form. There remains the question whether these securities were in fact inadequate. On this issue, the burden was clearly on the Crown to establish inadequacy, because a judicial order had previously been made (under section 147) accepting the plaint and therefore inferentially (even though not expressly) deciding that the requirements of section 146 had been complied with.

[1] (*1951*) *53 N. L. R. 145.* [2] (*1921*) *1 A. C. 41 at 49.*

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As such an order is necessarily made *ex parte*, the other party would of course be entitled to have it vacated by placing before the Court material which establishes that the acceptance of the plaint had in the first instance been improperly obtained by the claimant. In that event, the action as such is not dismissed ; it is the permission to institute the action which is withdrawn *nunc pro tunc*.

The value of the surety's interest in the property hypothecated under the bond was admittedly only Rs. 1,000. But the Crown could not succeed in its objections by proof of this circumstance alone. Even if we assume that section 46 of the Mortgage Act, No. 6 of 1949, does apply to a mortgage unilaterally executed by one party in favour of the other as security for costs in a litigation, the Crown is not bound by its provisions and could therefore enforce the personal bond against the surety in order to recover any balance amount due to it by way of costs. No evidence was led at the trial to prove that the monetary value of the surety's personal guarantee was insufficient. For these reasons, the preliminary objections raised at the trial should have been over-ruled.

I would allow the appeal and remit the case to the lower Court for the trial of the issues that remain to be tried. The appellant is entitled to his costs of this appeal and the costs of the abortive proceedings.

SANSONI J.—I agree.

FERNANDO A.J.—I agree.

Appeal allowed.

1954 *Present :* **de Silva J.**

K. SIMON PERERA, Appellant, *and* M. RASANAYAKAM (Public Health Inspector), Respondent

S. C. 1,188—M. C. Colombo, 41,314

Housing and Town Improvement Ordinance (Cap. 199)—Section 13 (1) (b)—Offence thereunder—Continuing fine—Circumstances when it may be imposed.

Under Section 13 (1) of the Housing and Town Improvement Ordinance a person who commits any offence set out in clauses (*a*), (*b*), (*c*), (*d*), (*e*) or (*f*) " shall be liable on summary conviction to a fine not exceeding Rs. 300, and to a daily fine of Rs. 25 for every day on which the offence is continued after conviction ".

Held, that a continuing fine cannot be imposed for an offence under the Section unless there is some indication in the charge itself or evidence is led in the case that the offence is being continued.

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APPEAL from a judgment of the Magistrate's Court, Colombo.

H. W. Jayewardene, for the accused appellant.

M. M. Kumarakulasingham, for the complainant respondent.

Cur. adv. vult.

July 30, 1954. DE SILVA J.—

The charge against the accused appellant reads as follows:— " . . . . that you did on the 28th day of November, 1952, at . . . . within the division aforesaid being the owner of the said premises 90 Sedawatte within the limits of Kolonnawa Town deviate from the approved plan No. 125B/48 without having first obtained the approval of the Special Commissioner, Kolonnawa Town, in breach of section 13 (1) (*b*) of Housing and Town Improvement Ordinance of Chap. 199 of the L. E., and thereby committed an offence punishable under section 13 of the said Ordinance." The accused who originally pleaded not guilty to this charge later withdrew that plea and tendered a plea of guilty. The Magistrate convicted the accused and on a subsequent day made the following order: " I fine the accused Rs. 50 and continuing fine of Rs. 10 p.d.". The accused has appealed from this order on the ground that the offence that he was charged with is not a continuing one and that the Magistrate therefore had no power to impose a daily fine of Rs. 10.

According to section 13 (1) of the Housing and Town Improvement Ordinance a person who commits any offence set out in clauses (*a*), (*b*), (*c*), (*d*), (*e*) or (*f*) " shall be liable on summary conviction to a fine not exceeding Rs. 300, and to a daily fine of Rs. 25 for every day on which the offence is continuing after conviction ". The offence under clause (*b*) is deviation from any plan or specification approved by the Chairman without his written permission. The accused was charged with having committed the offence under clause (*b*) on 28th November, 1953. There is no indication in the charge that he was continuing the offence thereafter. Nor was any evidence led to show that he was continuing to deviate from the approved plan. It may also be possible that although a person deviated from an approved plan on a particular date yet later on he brought the building into conformity with that plan. Therefore unless there is some indication in the charge itself or evidence is led in the case that the offence is being continued the Magistrate is not justified in imposing a continuing fine. In the case of *Punchihewa v. Nicholas Appuhamy* [1] Schneider J., while setting aside the imposition of a continuing fine for an offence under section 13 (1) (*b*), observed, " The fine for the offence of not bringing the building into conformity with the approved plan after the conviction in this case cannot be imposed until it has been proved to the satisfaction of the Court that the accused failed after the conviction to bring the building into conformity with the approved plan." In regard to the above observation of Schneider J.,

[1] (*1920*) *8 C. W. R. 247.*

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there is nothing objectionable, if I may say so with respect, in fixing a continuing fine at the time of the conviction itself, provided, there are reasonable grounds to believe that the offence is being continued. Such a procedure is not repugnant to the provisions of section 13 (1). But the continuing fine cannot be recovered unless the Court is satisfied at the time the application is made to recover it that the offence had in fact been continued after the conviction. Although the continuing fine is to be recovered later yet the imposition of it at the time of the conviction might adversely affect the accused even though the offence is not continued. It would be to his advantage if the opportunity is afforded to him at the trial itself to establish that he has already ceased to commit the offence. This opportunity would in effect be denied to him if a continuing fine is imposed without any intimation to him that he is continuing the offence.

Accordingly I set aside the order imposing a continuing fine but the rest of the sentence will stand.

Sentence reduced.

1954 *Present :* **Gratiaen J. and Fernando A.J.**

K. KUMARASWAMY *et al.*, Appellants, *and* K. SUBRAMANIAM *et al.*, Respondents

S. C. 180—D. C. (Inty.) Point Pedro, 4,329P

Thesavalamai—Tediatetam—*Devolution on death of non-acquiring spouse—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), ss. 19, 20, 21—Amending Ordinance No. 58 of 1947, ss. 5, 6—Retroactive effect.*

The rights of a wife, to whom the *Thesavalamai* appears, in respect of *tediatetam* property acquired by her husband before the Jaffna Matrimonial Rights and Inheritance Amendment Ordinance of 1947 came into operation are governed by section 20 of the principal Ordinance of 1911 and are not affected by sections 5 and 6 of the amending Ordinance. If she predeceases her husband subsequent to the date when the amending Ordinance became operative, the devolution of her share of that property is regulated solely by section 21 of the principal Ordinance because the new section 20 has no application to the case ; accordingly, the entirety of her vested interest in the property passes to the children of the marriage as her heirs, to the exclusion of the husband.

APPEAL from a judgment of the District Court, Point Pedro.

H. V. Perera, Q.C., with *T. Arulananthan*, for the 8th to 11th defendants appellants.

Sir Lalita Rajapakse, Q.C., with *H. W. Tambiah* and *S. Sharvananda*, for the 1st defendant respondent.

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July 16, 1954. GRATIAEN J.—

This is an appeal in a partition action. The only dispute which calls for our adjudication arises upon the legal consequences of certain admitted facts.

Kanagaratnam (the 1st defendant) and his wife, Rasammah, were Tamils to whom the *Tesawalamai* applies. They were married in 1915, and their property rights as *Tesawalamai* spouses were until 4th July, 1947, regulated by the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48)—hereinafter called " the principal Ordinance ".

In 1933 Kanagaratnam purchased in his own name an undivided $\frac{1}{3}$ share in the property sought to be partitioned, and in 1943 he similarly purchased an additional 1/18 share, so that the total extent purchased by him under the relevant conveyances amounted to 7/18. These shares admittedly constituted the *tediatetam* " of the husband " within the meaning of section 19 of the principal Ordinance.

The appellants are the children of the marriage, and as such were the preferential heirs of either parent under section 21 of the principal Ordinance. Rasammah died in August, 1948, after the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947 (hereinafter called " the amending Ordinance "), had passed into law.

The appellants claimed that half the *tediatetam* property purchased by Kanagaratnam in 1933 and 1943 (that is to say, an undivided 7/36 share), vested in Rasammah by operation of law immediately upon its acquisition by Kanagaratnam (section 20 of the principal Ordinance); and that this undivided 7/36 share devolved on them upon her death under section 21, whose provisions have not been repealed by the amending Ordinance. Kanagaratnam maintained in the Court below that, on the contrary, the entire 7/18 now belonged to him by virtue of an allegedly sweeping alteration which had taken place in the relevant law. This latter contention was upheld by the learned District Judge whose decision, I regret to say, is based on a misunderstanding of two recent rulings of a Full Bench of this Court.

In my opinion, the problem under consideration admits of no doubt. Rasammah's rights in respect of *tediatetam* property acquired by her husband before 4th July, 1947, were governed by section 20 of the principal Ordinance, and the provisions of sections 5 and 6 of the amending Ordinance did not operate to divest Rasammah of rights already vested in her under the earlier law—*Akilandanayaki v. Sothinagaratnam* [1], *Kandavanam v. Nagammah* [2].

Earlier controversies as to the nature of the rights of the non-acquiring spouse in *tediatetam* acquired by the other spouse before 4th July, 1947, have long since been resolved by decisions of this Court. An undivided half share in the property sought to be partitioned had automatically vested in Rasammah, as the non-acquiring spouse, by operation of law—*Parasathy Ammal v. Setupulle* [3]. The dissenting judgment of Garvin J.

[1] (*1952*) *53 N. L. R. 385 F.B.*
[2] (*1952*) *46 C. L. W. 104.*
[3] (*1872*) *3 N. L. R. 271.*

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to the same effect in *Seelachchy v. Visvanathan*[1] has been consistently followed. See *Sampasivam v. Manikkar*[2], *Iya Mattayer v. Kanapathipillai*[3] and *Seenivasagam v. Vaitilingam*[4].

During the subsistence of her marriage, Rasammah's title in a half share of the *tediatetam* was of course subject to the marital power of her husband to alienate it or mortgage it for consideration. This marital power was referable to the husband's status as the manager and "sole or irremovable attorney of the wife"—*per* Macdonell C.J. in *Sangarapillai v. Devarajah Mudaliyar*[5]. It is quite wrong to suggest that the power proceeds from the enjoyment of any *dominium* over the wife's share.

The devolution of Rasammah's share upon her death in 1948 remains to be considered. *This question is governed by the relevant provisions of the principal Ordinance of 1911 as amended by the amending Ordinance of 1947.*

Dr. Rajapakse very properly informed us that he could not support the wholly untenable proposition that the entirety of Rasammah's 7/36 share of the property devolved on Kanagaratnam as the surviving spouse. He argued, however, that the case was governed by section 6 of the amending Ordinance which repealed section 20 of the principal Ordinance and substituted in its place a new section in the following terms :

> "20. On the death of either spouse one half of the *tediatetam* which belonged to the deceased spouse shall devolve on the surviving spouse and the other half shall devolve on the heirs of the deceased spouse."

He suggested that a 7/72 share in the properties passed under this section to Kanagaratnam on Rasammah's death and only the remaining 7/72 share to the appellants jointly. For the reasons which follow, I am unable to accept this argument.

In *Kannamah v. Sanmugalingam*[6], Pulle J. has effectively disposed of the theory that a single sentence (isolated from its context) of my judgment in *Kandavanam's case*[7] lends support to the proposition which Dr. Rajapakse has invited us to adopt. No necessity arose in *Kandavanam's case* to examine the precise meaning of section 6 of the amending Ordinance ; it sufficed for the purposes of that appeal to emphasise that the amending Ordinance did not retroactively divest people of any rights acquired before 4th July, 1947, under the principal Ordinance.

In order to extract the true meaning of section 6 of the amending Ordinance, we must first examine section 5 which repeals section 19 of the principal Ordinance and substitutes a new section 19 which reads as follows :—

> "19. No property other than the following shall be deemed to be *tediatetam* of a spouse :—
>
> (*a*) property acquired *by that spouse* during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of that spouse ;

[1] (*1922*) *23 N. L. R. 97.*
[2] (*1921*) *23 N. L. R. 257.*
[3] (*1928*) *29 N. L. R. 391.*
[4] (*1944*) *45 N. L. R. 409 ; 28 C. L. W. 63.*
[5] (*1936*) *38 N. L. R. 1 F.B.*
[6] (*1954*) *55 N. L. R. 260.*
[7] (*1952*) *46 C. L. W. 104 at 105.*

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(*b*) profits arising during the subsistence of the marriage of that spouse ".

I shall hereafter refer to sections 5 and 6 of the amending Ordinance as " the new section 19 " and " the new section 20 " respectively.

The new section 19 gives a definition of *tediatetam* " which restores *for the future* the more traditional conception of *tediatetam* which had been unmistakably, even though carelessly, altered by legislative intervention in 1911 "—*Akilandanayake's case* [1]. Accordingly, property which would previously have constituted *tediatetam* within the meaning of the principal Ordinance in accordance with the ruling in *Avitchi Chettiar's case* [2], must, *if acquired on or after 4th July, 1947*, be regarded as " separate property ".

The repeal of the old section 20 and the substitution of the new section 20 have the following effect :—

(*a*) if either spouse acquires *tediatetam* property *on or after 4th July, 1947*, no share in it vests by operation of law in the non-acquiring spouse during the subsistence of the marriage ;

(*b*) if the acquiring spouse predeceases the non-acquiring spouse without having previously disposed of such property, the new section 20 applies ; accordingly, half the property devolves on the survivor and the other half on the deceased's heirs ;

(*c*) if the non-acquiring spouse predeceases the acquiring spouse, the *tediatetam* property of the acquiring spouse continues to vest exclusively in the acquiring spouse ; the new section 20 has no application because the *tediatetam* of the acquiring spouse never " belonged " to the non-acquiring spouse.

These three propositions pre-suppose that the *tediatetam* property had been acquired after the amending Ordinance passed into law.

It thus becomes clear that the new sections 19 and 20 have no bearing on the present problem. A half share of the *tediatetam* property acquired by Kanagaratnam in 1933 and 1943 had automatically vested in Rasammah (as the non-acquiring spouse) under the old section 20, and the subsequent repeal of the old section 20 did not operate to divest her of that share. The devolution of Rasammah's share upon her death in 1948 was regulated solely by section 21 of the principal Ordinance because the new section 20 has no application to the case. Accordingly, the entirety of Rasammah's vested interest in the *tediatetam* property (*i.e.*, a 7/36 share) passed to the appellants as her heirs. The balance 7/36 continued, of course, to be vested in the 1st defendant Kanagaratnam.

For these reasons, I would allow the appeal and amend the interlocutory decree passed in the lower Court (*a*) by allotting a 7/36 share to the appellants jointly and (*b*) by proportionately reducing the share allotted to the 1st defendant—*i.e.*, by allotting only a 7/36 share to him.

[1] (*1952*) *53 N. L. R. 385 at 397.*

[2] (*1933*) *35 N. L. R. 313.*

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The appellants are also entitled to the costs of this appeal and of the contest in the Court below. In all other respects the interlocutory decree must be affirmed.

It is unnecessary for the purposes of this appeal to give a definite ruling as to the devolution of *tediatetam* property acquired *before 4th July, 1947*, if the acquiring spouse predeceases the non-acquiring spouse *after 4th July, 1947*. In such a case, it is already settled law that the new section 20 could not operate to divest the non-acquiring spouse of the half share which had previously vested in him (or her) under the old section 20. Dr. Rajapakse suggested, however, that the devolution of the half share belonging to the deceased acquiring spouse would be regulated by the new section 20—with the result that the non-acquiring spouse would then become vested with an additional $\frac{1}{4}$ share. Although I appreciate the undesirability of giving expression to any *obiter dictum* concerning the interpretation of the amending Ordinance, I desire to place on record that, as at present advised, I am quite unable to accept this theory which (so Dr. Rajapakse informs us) is at present entertained in certain quarters.

The amending Ordinance appears to me to deal only with the incidence and devolution of *tediatetam* property acquired by one or other of the spouses *on or after 4th July, 1947*. In the hypothetical case referred to, the correct view, in my opinion, is that the new section 20 would not apply, and that the half share belonging to the acquiring spouse would, upon his death, devolve on his heirs under section 21 of the principal Ordinance—whereas the other half share would continue, as before, to vest in the non-acquiring spouse. I find no indication in the language of the amending Ordinance of any intention to enlarge the rights or expectations of a non-acquiring spouse in respect of *tediatetam* property which came into existence before 4th July, 1947.

FERNANDO A.J.—I agree.

Appeal allowed.

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1953 *Present :* **Rose C.J., Swan J. and de Silva J.**

In re W. A. P. JAYETILLEKE

S. C. 297—Application by W. A. P. Jayetilleke to be re-enrolled as a Proctor of the Supreme Court

Proctor—Application for re-enrolment—Palpable and definite repentance—Condition precedent.

The petitioner, whose name had been struck off the roll of Proctors in consequence of the commission by him of certain grave offences when he was 31 years of age and of 6 years standing in the legal profession, made application after 20 years to be re-enrolled as a Proctor. He suggested that the grave offences of which he had been convicted were the result of " youthful indiscretion ".

Held, that the petitioner failed to establish the existence on his part of that palpable and definite repentance which was a necessary pre-requisite of the consideration of the question whether the grave offences committed by him could even after 20 years be condoned.

APPLICATION for re-enrolment as a Proctor.

N. E. Weerasooria, Q.C., with *W. D. Gunasekere* and *O. S. M. Seneviratne*, for the petitioner.

H. A. Wijemanne, Crown Counsel, with *G. F. Sethukavaler*, Crown Counsel, as *amicus curiae*.

N. K. Choksy, Q.C., with *Cyril E. S. Perera, Q.C.*, and *C. G. Weeramantry*, for the Incorporated Law Society of Ceylon, on notice.

Cur. adv. vult.

July 9, 1953. ROSE C.J.—

This is an application by Mr. W. A. P. Jayatilleke to be re-enrolled as a Proctor of the Supreme Court.

The petitioner was enrolled as a Proctor of the Supreme Court on the 20th day of April, 1925, and practised his profession at Badulla from that date until the 21st of June, 1932, when he was convicted at the Midland Circuit with six other persons on five counts of an indictment laid against him, involving his being a member of an unlawful assembly, whose common object was to take possession of property by criminal force, and his having in prosecution of that common object committed house-trespass and caused hurt to two women and one man. For these offences he was sentenced to periods of six, nine and fifteen months imprisonment, the sentences to run concurrently.

At the hearing before us Mr. Wijemanne who appeared on behalf of the Attorney-General as *amicus curiae* drew our attention to certain facts, which if established, would have aggravated Mr. Jayatilleke's offence. Moreover, as was pointed out by Dalton A.C.J. when the matter was first considered by the Supreme Court (*35 N. L. R. 376*), there was medical evidence to support the complaint of one of the women

2——J. N. B 39236-1,592 (10/54)

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that a criminal assault was committed on her by one of the gang brought there by the respondent, although it was not alleged that the respondent could be held responsible for this. I do not consider, however, that it would be correct for this Court—nor is it in my opinion necessary for the decision of this matter to do so—to take into consideration any of those matters, as there may be some dispute as to them, and I propose to confine myself to the facts as accepted by this Court when Dalton A.C.J. delivered his judgment on the 3rd August, 1933.

With regard to the facts which were established in the criminal case Dalton A.C.J. says at page 378, that on arrival at the scene " The respondent with others entered the house, assaulted the inmates, the two women being seriously assaulted according to the medical evidence, and there is evidence to show that respondent personally took part in inflicting some of these injuries . . . . The occupants being then turned out of the house spent the rest of the night in fear, hiding from their assailants, and reported the occurrence to the Police at Lunugala next morning ".

The learned Judge adds at page 378, " This is not a simple case of criminal trespass where a party has taken a mistaken view as to his rights. The evidence shows that respondent was the moving spirit in the incidents of that night. He has in fact been dealt with as such, since no other of the accused (all but the 2nd, 8th and 9th being convicted) has received more than 5 months' rigorous imprisonment. His disputes with Ellen Perera explain his conduct, although of course they cannot justify it. He decided to take the law into his own hands to expel her from the property and recover possession of it, collected a gang of persons to help him in his project, coming with some from a considerable distance, and under cover of darkness entered the premises with them and attacked the three inmates, two of them being defenceless women, inflicting numerous injuries on them and afterwards driving them out in terror into the night. The conduct of the respondent—an educated man, and one who has on his own showing occupied public positions in the Uva Province—apart from the criminality of it, was most disgraceful and reprehensible even as an ordinary subject of the King, and still more so as a member of the legal profession. It makes him unfit to remain a member of an honourable profession ".

As is clear from the many authorities which learned Counsel cited to us, it has been the practice of this Court to decide each case upon its particular facts. It seems to me that the principle is well stated by Bertram C.J. in the Matter of Application for Re-admittance as a Proctor in *39 N. L. R. p. 517*, when he said, " There is no question that this Court has an inherent jurisdiction in the exercise of its discretion, where it is of opinion that an offender has sufficiently expiated his offence, to restore him to the roll of practising members of the profession. It is not necessary to say that we all feel that this jurisdiction must be exercised with the greatest caution. If a member of the profession is guilty of a lapse and after consideration of the facts is restored to the roll a very important step has been taken. In the case of *In re Pool*[1] it was said that with reference to such officers of the Court " that their presence

[1] *L. R. C. P, 350 (1869).*

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on the roll is an indication, *prima facie* at least, that they are worthy to stand in the ranks of an honourable profession to whose members ignorant people are frequently obliged to resort for assistance in the conduct and management of their affairs and in whom they are in the habit of reposing unbounded confidence; and in looking to the fact that in restoring this person to the roll we should be sanctioning the conclusion that he is in our judgment a fit and proper person to be so trusted. I think we ought not to do so, except upon some solid and substantial grounds ".

Bertram C.J. goes on to say " In the cases brought to our notice the grounds for such a proceeding have been recognized as being in the first place, a palpable and definite repentance and a manifestation of an honest career during a considerable period of time, and in the second place adequate reparation or at any rate an offer of all possible reparation in the man's power ".

As regards the present matter the question of reparation hardly arises. In the light of the facts there was perhaps no scope for any reparation. As regards the manifestation of an honest career during a considerable period of time, the documents which have been adduced by the petitioner would seem to indicate—and I have no reason to doubt—that for the last 20 years the petitioner has pursued a blameless and even a useful life.

As to the first ground however, the existence of a palpable and definite repentance, I am not satisfied. The facts of the case as established in the criminal Assizes, and set out by Dalton A.C.J. in the passages to which I have already referred, are in my opinion extremely serious and would, on their own account, make it difficult, in my view, for a Court to hold that the dignity of the profession and the safety of the public would be adequately safeguarded by the restoration of this Proctor to the Roll of Proctors of the Supreme Court. The petitioner, however, in paragraph 12 of his petition refers to the matter in the following terms: " The petitioner tenders to Your Lordships' Court his sincere apologies for the incident in respect of which he was convicted and sentenced and for the regrettable indiscretion which he committed ".

Moreover in some of the documents submitted by the petitioner in support of his petition the same position is adopted. Mr. M. I. Packir Saibo, a Justice of the Peace, writes, " . . . . Apart from his conviction there is nothing that can be said against him. He has paid dearly for this youthful indiscretion ". And Mr. Walter Pinto a Proctor of Badulla writes, " All those who know the facts of his case are aware that he has paid a very heavy penalty for a youthful indiscretion ". Further Mr. Henry Pinto, who is apparently a partner of Mr. Walter Pinto says, " His conduct has not been considered as anything more than his having indiscreetly taken the law into his own hands at the youthful age of 28 ".

It seems to me that the reference in the petitioner's own petition to which I have referred and the above passages from the documents in support show a complete lack of understanding of the extreme seriousness of the offences which the petitioner has committed. He was, according to his own Counsel, 31 years of age at the time of the offence and was

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already at that time a professional man of six years standing. To suggest that in those circumstances the grave offences of which he was convicted and sentenced to a substantial term of imprisonment can be dismissed as a youthful indiscretion seems to me to be quite unwarranted and leads me reluctantly to the conclusion that the petitioner has failed to establish the existence on his part of that palpable and definite repentance which is a necessary pre-requisite of our consideration of the question whether his grave offences can even after 20 years be condoned. For these reasons the application is refused. There will be no order as to costs.

SWAN J.—I agree.

DE SILVA J.—I agree.

Application refused.

1953 *Present :* **Gunasekara J. and Pulle J.**

P. SIVAKKOLUNTHU *et al.*, Appellants, *and* KAMALAMBAL *et al.*, Respondents

S. C. 98—D. C. Jaffna, 1,156

Evidence—Marriage contracted in a foreign country—Way of proving it—Decree for judicial separation—Scope of its relevancy as evidence—Estoppel—Res judicata —"*Privies in interest*"—*Evidence Ordinance, s. 41 (2) (c).*

In proceedings taken to administer the intestate estate of one R., each of two persons, K. and P., claiming to be the widow of the deceased, applied for letters of administration. K. alleged that she married the deceased in India on the 11th December, 1929, under the provisions of the Indian Christian Marriage Act. P. alleged that K. was not validly married and that she was the lawful widow by reason of her marriage to the deceased which was registered on the 3rd March, 1930, and solemnized according to Hindu rites in September of the same year. The principal contest was whether K. had contracted a valid marriage with the deceased. The trial Judge held that K., as widow, was entitled to letters of administration.

In a suit brought by P. in 1937 against the deceased for separation *a mensa et thoro* the deceased had admitted that he was lawfully married to P. and counterclaimed a dissolution of the marriage on the ground of malicious desertion. In his evidence the deceased had also admitted that he had been intimate with K. both before and after he was married to P. K. also gave evidence. She admitted sexual intimacy with the deceased but, in order to save the deceased from a prosecution for bigamy, falsely denied that she was married to him. A decree for separation was then entered as between P. and the deceased.

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Held, (i) that although the evidence given by the deceased and K. in the suit for judicial separation raised a strong presumption that they had not contracted a marriage in 1929, evidence could be given in the present administration proceedings so as to displace that presumption.

(ii) that it was not essential that K. should lead expert evidence to prove that all the provisions of the Indian Christian Marriage Act requisite for a valid marriage had been complied with. If the certificate of marriage in the form prescribed by the Indian Christian Marriage Act was properly produced, the Court was entitled to hold upon that certificate and the oral evidence that K. contracted a valid marriage with the deceased.

(iii) that the decree entered in the suit for judicial separation was not one which could come within the terms of section 41 (2) (c) of the Evidence Ordinance; it could not, therefore, operate in the present action as conclusive proof that P. was the lawful wife of the deceased.

(iv) that the conduct of K. in wilfully concealing her marriage in the suit for judicial separation could not operate as an estoppel against her in the present action.

(v) that the decree entered in the suit for judicial separation could not operate as *res judicata* against K.'s children.

APPEAL from a judgment of the District Court, Jaffna.

C. Thiagalingam, Q.C., with *G. T. Samarawickreme* and *T. Parathalingam*, for the 9th and 10th respondents, appellants.

H. V. Perera, Q.C., with *H. W. Tambiah, C. Shanmuganayagam* and *Felix Dias*, for the 1st to 6th respondents.

Cur. adv. vult.

October 30, 1953. PULLE J.—

This appeal relates to proceedings taken to administer the intestate estate of one V. S. Ramanathan who died on the 29th October, 1948. Two persons claiming to be the widows of the deceased applied for letters of administration. One of them Kamalambal alleged that she married the deceased in India on the 11th December, 1929. The other named Parupathy alleged that Kamalambal was not validly married and that she was the lawful widow by reason of her marriage to the deceased which was registered on the 3rd March, 1930, and solemnized according to Hindu rites in September of the same year. Kamalambal had four children by the deceased. Parupathy had none. The learned District Judge held Kamalambal as widow to be entitled to letters of administration. Parupathy has not appealed. The appellants before us are two interveniients who claimed shares in the estate as heirs on the basis that the deceased was lawfully married to Parupathy and died issueless.

The principal contest was whether Kamalambal had contracted a valid marriage with the deceased. If this question was answered in

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favour of Kamalambal it was argued both here and below that the decree entered in a suit brought by Parupathy in 1937 against the deceased for separation *a mensa et thoro* and the evidence given therein by Kamalambal precluded her and her children from maintaining that she was married to the deceased.

It may perhaps be convenient to deal first with the proceedings for judicial separation as they have a bearing both on the issue of fact as to whether Kamalambal was lawfully married to the deceased and on the issues of law as to the legal results flowing from the decree in that case.

In District Court Jaffna (Divorce) case No. 15 Parupathy alleged, among other things, that she was lawfully married to the deceased in 1930 and that thereafter he deserted her and, since May, 1931, lived in adultery with Kamalambal. She prayed for a decree for separation and alimony. The deceased admitted in his answer that he was lawfully married to Parupathy and counterclaimed a dissolution of the marriage on the ground of malicious desertion. In his evidence the deceased admitted that he was intimate with Kamalambal both before and after he was married to Parupathy. He denied having even gone through a ceremony of marriage with her. Kamalambal also gave evidence. She admitted sexual intimacy with the deceased but denied that she was married to him. On the 22nd December, 1939, a decree for separation was entered and it was affirmed in appeal in 1941.

The pleadings and the evidence given by the deceased and Kamalambal in the divorce proceedings raise, in my opinion, a strong presumption that they had not contracted a marriage in 1929. The question for determination is whether the evidence of their marriage given in the proceedings under appeal was such as to displace that presumption.

The evidence leaves no room for doubt that on the 11th December, 1929, Kamalambal and the deceased went through a ceremony of marriage in a place called the Heart of India Mission church at Bangalore. The evidence of Kamalambal on this point is corroborated by a retired minister of Church, one Rev. Paul Ratnasabapathy, who was one of the attesting witnesses. He has identified his own signature and that of the pastor who officiated which appear on the original of a certificate of marriage in the form prescribed by the Indian Christian Marriage Act, 1872. There was also produced an extract A2 from the register kept in the church purporting to be a certified copy of the registration of the marriage. Of the grounds taken in the petition of appeal one was that the evidence adduced to prove that the deceased became a Christian before his marriage was insufficient and the other that there was no proof that one Rev. K. Manickam who solemnized the marriage was authorized to do so under the Indian Christian Marriage Act. On both points there was oral evidence supporting Kamalambal which the learned Judge seems to have accepted. Assuming that the marriage certificate was properly admitted in evidence there was ample material on which the Judge could have come to a finding that the deceased was a Christian at the time of his marriage with Kamalambal and that Rev. K. Manickam

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was duly authorized to solemnize the marriage. The oral evidence of Rev. Ratnasabapathy is specific that he had himself seen the Rev. Manickam officiating as registrar of marriages for about two years and that the registrar who officiated at the marriage of Kamalambal was this same Rev. Manickam.

Another ground urged in appeal is that expert evidence had not been called to prove that all the provisions of the Indian Christian Marriage Act requisite for a valid marriage had been complied with. Speaking for myself I feel, in view of the conduct of Kamalambal and the deceased in deliberately concealing from the Judge who tried the suit for judicial separation the fact that they had gone through a ceremony of marriage in Bangalore, that it would have been more satisfactory had expert evidence been called. Their conduct is calculated to raise the suspicion that at the time the matrimonial suit was heard they did not believe they were validly married. No authority, however, was cited that in a case of this type the only way of proving that two persons had contracted a valid marriage in a foreign country is by calling an expert on the laws of that country. Our attention has been called among others to the following cases, namely, *Roe v. Roe* [1], *Browning v. Browning* [2] and *De Mowbray v. De Mowbray* [3] in which certificates of marriage were accepted in England as proof of marriages in St. Helena, Bulawayo and Ceylon respectively. In *Brown v. Brown* [4] the Judge thought it proper to call for evidence that a Gold Coast Ordinance was in force in order to apply the provisions of section 40 of that Ordinance. Assuming that the certificate of marriage A2 was rightly admitted it is impossible to say that the trial Judge was wrong in holding upon that certificate and the oral evidence that Kamalambal contracted a valid marriage with the deceased.

The final question in regard to the proof of marriage is whether the certificate of marriage A2 ought to have been admitted in evidence. The certificate is in the form prescribed by the Indian Christian Marriage Act and is an exact copy of what purports to be the original certificate itself marked A1. On the face of A2 is a certificate by one Rev. W. Borthwick, the Superintendent of the Heart of India Mission, that it is a true copy of the original marriage certificate. There is a further certificate under the seal of a notary public to the effect that A2 is a true extract and copy of the original certificate of marriage and that it has been duly certified by Rev. W. Borthwick, the officer having the legal custody of the original. The notary's certificate purports to be one under section 78 (6) of the Indian Evidence Act. Although it was argued in appeal that there was no formal proof that the Indian Christian Marriage Act was the one applicable, the argument in the lower court appears to have proceeded on the basis that that Act was applicable. No material was placed before us to show that if Kamalambal and the deceased were Christians in December, 1929, the celebration of their marriage was governed by any other Act. In my opinion the objection to the admission of the certificate A2 fails.

[1] *(1916) 115 L. T. 792.*
[2] *(1918) 35 T. L. R. 159.*
[3] *(1920) 37 T. L. R. 830.*
[4] *(1917) 116 L. T. 702.*

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There remain for consideration three other issues raised on behalf of the parties who contested the claim of Kamalambal and her children of whom the latter were named as 1st to 4th respondents to her application for letters of administration. These issues are—

" (i) Does the decree in case No. 15 (Divorce) of this Court operate as a bar to the petitioner's claim in view of section 41 of the Evidence Ordinance ?

" (ii) Are the respondents 1 to 4 the lawful heirs of the deceased Ramanathan ?

" (iii) If so, are they estopped by the decree in case No. 15 (Divorce) of this Court ? "

The argument on issue (i) was that in case No. 15 the court entered a decree for separation in the exercise of its matrimonial jurisdiction and that as that jurisdiction was exercised on the basis that Parupathy was the wife of the deceased the decree is conclusive proof that Parupathy was, to the exclusion of Kamalambal, the lawful wife. It is not necessary to discuss all the submissions on this for the reason that the point is directly covered by the authority of the Divisional Bench judgment of *Punchirala v. Kiri Banda et al.* [1]. It was held in this case that the provision in section 41 which applies to matrimonial suits is in sub-section 2 (*c*) and that it provides that a judgment or order or decree in the exercise of matrimonial jurisdiction is conclusive proof that any legal character which it takes away from any person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease. It is obvious that the decree for judicial separation is not one which would come within the terms of section 41 (2) (*c*) of the Evidence Ordinance. It also follows that if section 41 (2) (*c*) could not be invoked to defeat Kamalambal's claim to be the lawful wife of the deceased, issue (ii) was also rightly answered in favour of her children.

In appeal the argument on issue (iii) which raised an estoppel against the children of Kamalambal went beyond its terms. It was argued that the conduct of Kamalambal in wilfully concealing her marriage estopped her from denying that Parupathy was the lawful wife. In my opinion the appellants were not entitled to take this point as the facts which constitute an estoppel should be specially pleaded. *Odgers on Pleading and Practice 13th ed. p. 177.* No issue was raised at the inquiry as to whether the conduct of Kamalambal operated as an estoppel. Even assuming that such an issue was specifically raised, it could not be said that the conduct of Kamalambal amounted to a representation to Parupathy intended to be acted upon to her detriment. Kamalambal was called as a witness in case No. 15 and she committed perjury to save the deceased from a prosecution for bigamy. Her conduct really resulted in Parupathy obtaining an order for alimony.

Whether the decree in case No. 15 operates as *res judicata* against the children is a question which must be answered in their favour. The children were complete strangers to the suit instituted by Parupathy

[1] *(1921) 23 N. L. R. 228.*

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against the deceased on the basis that she was lawfully married to the deceased. To avoid confessing to a crime the deceased falsely admitted that she was his wife. The children are not, upon the death of the deceased, seeking to succeed to property or money which was the subject of adjudication in case No. 15. In other words it cannot be said that the children were identified in interest with the deceased in his litigation with Parupathy as to make them privies in interest of the deceased. (See *Taylor on Evidence, Vol. II, p. 1059.*)

In the result the appeal fails and should be dismissed. As the deceased and Kamalambal must be held responsible for this litigation it seems to me that the costs of the appellants here and below should be paid out of the estate. The order made by the District Judge as to costs will stand varied so as to give effect to this.

GUNASEKARA J.—I agree.

Appeal dismissed.

1954 *Present :* **Pulle J. and Swan J.**

D. J. H. VITHARNE, Appellant, *and* W. R. DE ZYLVA, Respondent

S. C. 411—D. C. Negombo, 15,657

Rent Restriction Act, No. 29 of 1948—Premium paid as condition of grant of tenancy—Right of tenant to recover it—Illegal contract—Sections 8, 15, 23.

No claim can be grounded on an illegal contract. A tenant, therefore, is precluded from recovering from the landlord any premium paid by him in contravention of section 8 of the Rent Restriction Act as a condition of the grant of the tenancy.

APPEAL from a judgment of the District Court, Negombo.

N. E. Weerasooria, Q.C., with *H. A. Koattegoda*, for the defendant appellant.

N. M. de Silva, with *E. A. G. de Silva*, for the plaintiff respondent.

Cur. adv. vult.

July 19, 1954. PULLE J.—

The defendant who is the appellant in this case was the owner of premises No. 316, Main Street, Negombo. On the 16th January, 1950, the defendant by an informal writing agreed to let these premises to the plaintiff at a rental of Rs. 69 a month. The third clause of the writing stated :

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" The said party of the second part has paid as an advance unto the said party of the first part a sum of Rs. 60 being rent due for one month this day and the party of the first part received the same. "

The plaintiff sued for the recovery of Rs. 1,934·10 on the basis that he paid to the defendant at the time the informal writing was executed not the sum of Rs. 60 but Rs. 1,500. He claimed the balance amount of Rs. 434·10 as damages for breach of agreement to hand over the premises. The defendant denied the receipt of any sum in excess of Rs. 60 but the learned District Judge preferred to accept the plaintiff's evidence and gave judgment in his favour for Rs. 1,500. The claim for damages was disallowed.

I am unable to extract from the evidence any reasons for disturbing the finding that the amount paid on the 16th January, 1950, was Rs. 1,500 and not Rs. 60. The only question that falls to be determined is whether the payment was obnoxious to the provisions contained in the Rent Restriction Act, No. 29 of 1948, and if so, whether the plaintiff is debarred from recovering the money.

The nature of the payment can be gathered from two documents. Paragraph 3 of the plaint stated :

" On the day on which the agreement referred to in paragraph 2 of the plaint was entered into the defendant *wrongfully* demanded and was paid by the plaintiff a sum of Rs. 1,500, being a sum which the defendant demanded before he would allow the plaintiff to occupy the premises to which the said agreement related. "

The letter of demand sent by plaintiff's Proctor described the amount as follows :

" This sum of Rs. 1,500, as you are aware, was paid to you by my client as consideration for your agreeing to give him on rent the premises owned by you. "

In my opinion the payment is one which is prohibited by section 8 (*b*) of the Rent Restriction Act. It is a premium paid by the plaintiff as a condition of the grant of the tenancy. Both parties were, therefore, guilty of a contravention of section 8 which amounted to a criminal offence punishable under section 23. *Prima facie* a court would not lend its aid to relieve a person from the consequences of criminal acts committed by him. In regard to illegal contracts Wessels in the Law of Contract in South Africa says at p. 217, " It is one which the law forbids. The law is not indifferent to it. Not only does the law refuse to enforce it, but it refuses to help a party who has been the victim of such a contract. No claim can be grounded on an illegal contract. The court will have nothing to do with rights based directly or indirectly upon an illegal contract. "

It has been argued that this general rule should be relaxed in this case having regard to the class of persons the Act was intended to protect. Vide *Jafferjee v. Subbiah Pillai* [1]. I am unable to accept this argument. The Rent Restriction Act is concerned primarily to protect a tenant who

[1] *(1953) 54 N. L. R. 505 at p. 511.*

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regularly pays the authorised rent from eviction. In regard to the payment of premium, penalties can be imposed equally on the giver and receiver and it is impossible to say that the law intended to protect the prospective tenant in a special manner. The identical penalties put them *in pari delicto*. Certainly it would not promote public policy to allow a man to plead his own criminal act as the very foundation of his claim in a court of civil jurisdiction. To debar him from maintaining such a claim would be to uphold the will of the legislature as reflected in the penal provisions. I do not see how the element of coercion enters into the transaction where the law has left the owner perfectly free to let his house or not.

Undoubtedly the position would be different if the Act enabled the recovery of a premium in spite of the payment thereof being a criminal offence. Unless the plaintiff can bring himself within section 15 of the Act, his action must fail. This section confers the right on the tenant to recover by process of law any sum paid " by way of rent " where the sum is in excess of the authorised rent, in spite of the prohibition imposed on the tenant against such payment by section 3 (2) and the payment being made punishable as an offence under section 23. Can it be said that the payment of a premium as consideration for granting a tenancy at a stipulated monthly rent is a payment " by way of rent " ? I do not think so. The word " rent " is used in relation to the authorised rent. If the Legislature intended that a premium, commission or gratuity could also be recovered it could easily have provided for it expressly in section 15. I find support for the view I have expressed in the judgment of Jenkins L.J. in *City Permanent Building Society v. Miller* [1]. In this case the statutory provision which had to be construed read as follows :

" Leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine. "

The word fine in the context included a premium. Jenkins L.J. said,

" Surely, the expression ' rent ' in the context ' granted at a rent ', must connote a periodical payment issuing out of the land during the period of the grant, and I should hardly have thought that a grant of term of three years in consideration of a lump sum, expressed to be the whole of the rent payable during that period would appropriately be described as a lease granted at a rent. "

Finally it was submitted that in spite of the illegality of the payment the plaintiff had the right to recover because the defendant did not implement the promise made by him to place the plaintiff in possession of the premises. An issue was raised as to whether the defendant failed to give possession to the plaintiff. Although the learned Judge has not answered this issue I will assume it should have been answered in plaintiff's favour. To give effect to the argument would mean that in every case where money has been paid in pursuance of a prohibited contract,

[1] *(1952) 2 All E. R. 621 at p. 628.*

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it ought to be recoverable upon proof of a total failure of consideration. I am unable to accede to this argument for if I do so I would deprive the maxim *in pari delicto potior est conditio defendentis* of its real content.

In my opinion the defendant succeeds. The decree under appeal should be set aside and plaintiff's action dismissed. The defendant will be entitled to draw the sum of Rs. 60 deposited in court. As the defendant has failed both here and below on the issues of facts there should be no costs in either court.

SWAN J.—I agree.

Decree set aside.

1954 *Present :* **Sansoni J. and Fernando A.J.**

W. HATURUSINGHE, Appellant, *and* G. W. KUDADURAYA, Respondent

S. C. 433—D. C. Kandy, M. R. 2,833

Malicious prosecution—Prosecution by Police—Acquittal—Liability in tort of person who gave first information of alleged offence—Criminal Procedure Code, ss. 121, 122—" Reasonable and probable cause ".

Where the Police institute a prosecution in consequence of information given to them by a person under section 121 of the Criminal Procedure Code and the accused is acquitted at the trial, the first information given to the Police (as distinct from a statement made under section 122 of the Criminal Procedure Code after the commencement of the Police inquiry) is sufficient to found an action for malicious prosecution if it actually contains a clear allegation that the plaintiff committed an offence, or, in other words, if it formulates a charge against the plaintiff. In such a case, the informant cannot be permitted to plead that the Police should not have acted upon his allegation.

In an action for malicious prosecution the plaintiff has the burden of proving a negative, i.e., that the defendant acted without reasonable and probable cause. In determining whether the burden has been discharged, regard should be had to all the circumstances in which the defendant acted.

APPEAL from a judgment of the District Court, Kandy.

Colvin R. de Silva, with *T. W. Rajaratnam*, for the defendant appellant.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for the plaintiff respondent.

Cur. adv. vult.

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September 21, 1954. FERNANDO A.J.—

This is the fifth case instituted in Court in consequence of a trivial incident which occurred in 1947, and one must hope, though vainly perhaps, that it is the last of the series.

The plaintiff in this action was in 1947 charged with robbery of a leather purse in proceedings instituted by one Sergeant Perera of the Galagedera Police under S. 148 (1) (*b*) of the Criminal Procedure Code and was acquitted. The prosecution was instituted in consequence of a statement or complaint made to the Police by the defendant in the following terms :— " This morning about 6.30 a.m. I was going to Kandy with some documents regarding two civil cases fixed for 22.8.49 and to pay some surveyors fees to Mr. Murray of Kandy. I carried Rs. 200 in my leather purse. All were in 13 ten rupee notes and four five rupee notes which bear no marks of identification and as I was going along the road, at Niyangoda, near the cemetery I met Kudaduraya who got on the road from the cemetery. When I saw him he had no club in his hand and then he pulled out a ' kitul ' club from his waist and hit me twice but I avoided the blows by getting onto a side. I caught hold of his club and we both struggled and at the struggle the right hand sleeve of my coat was torn, and we both fell into the culvert when he, Kudaduraya, pulled out my leather purse with cash from the right inner pocket. I raised cries, when Kotuwegedera Kirihamy and another man named Ranhamy came there on the road and caught Kudaduraya. One Ranasinghe and another man Naide also came there and separated us. My pencil also was fallen down and Ranasinghe picked it up but Kudaduraya took it away. I then went and informed the V. H. I sustained a bruise on the left knee as a result of falling down. My inner coat pocket was torn ".

The plaintiff now sues the defendant in an action for malicious prosecution and the learned District Judge has entered judgment in favour of the plaintiff for Rs. 750. Counsel for the defendant in appeal has raised several questions of law, including one of some general importance in regard to actions for malicious prosecution.

The essentials in an action for malicious prosecution under English law or Roman Dutch Law are substantially similar. Winfield (*Law of Tort, 4th Ed., p. 611*) states that the plaintiff must prove (1) that the defendant prosecuted him ; and (2) that the prosecution ended in the plaintiff's favour ; and (3) that the prosecution lacked reasonable and probable cause ; and (4) that the defendant acted maliciously. With regard to the first requisite it is clear law that a person can be sued in such an action even though he was not the actual prosecutor, that is to say the actual person who in Ceylon makes a complaint or report to the Court under S. 148 of the Criminal Procedure Code. A person can be made defendant in the action if he was " actively instrumental in putting the law in force ". Hence, a statement made to the Police may in certain circumstances found an action for malicious prosecution if the Police thereafter institute a prosecution in Court. The important contention of Counsel for the appellant was that in order to be held liable in such

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a case, it is not sufficient that the person merely made the allegation that the accused had committed an offence ; he must in addition have actively instigated or incited the institution of the prosecution. This contention was supported by reference to several decisions of this Court. In *Uduma Lebbe Marikar v. Adumay Sarango* [1] Clarence J. said, " All that the plaintiff has proved is that defendant gave certain information to the Police in consequence of which and of other information obtained by his own inquiries, the Inspector prosecuted the plaintiff. It does not appear that the defendant solicited the Inspector to prosecute ". In *Kotalawela v. Perera* [2] Fernando A.J. expressed himself as follows :—" If it be clearly shown that a private person procured a prosecution at the public instance, maliciously and without reasonable cause, an action may lie against him. It is in any case clear that where a private individual merely lays information concerning the commission of an alleged criminal offence, without requesting or directing the prosecution of any particular person, and the public prosecutor is left to exercise his own judgment as to whether a prosecution shall be instituted or not such prosecution is not traceable to the action of the person who gave the information and he cannot be held responsible for it. The defendant must have set the criminal law in motion, that is, he must have voluntarily instituted criminal proceedings. It is clear then that in South Africa an action of this kind will not lie in a case where the prosecution had been instituted by a public officer, unless it is shown that the defendant in addition to giving information either requested or directed the prosecution of any particular person ". In *Saravanamuttu v. Kanagasabai* [3] Howard C.J. said that " *there must be something more than a mere giving of information to the Police* or other authority who institutes a prosecution. *There must be the formulation of a charge or something in the way of solicitation, request or incitement of proceedings* ".

Considered by themselves these dicta would seem to indicate that a person who makes a complaint to the Police which clearly implicates another as the offender would not be liable in an action for malicious prosecution if he takes no further steps to induce the prosecution. But when the facts of the two more recent cases are examined, it becomes clear that in each of them the defendant was not the person who gave " information " to the Police within the meaning of S. 121 of the Criminal Procedure Code, but rather a person who made statements under S. 122 after the commencement of the Police inquiry. The only recent case where the defendant had given the first information was that of *Hendrick Appuhamy v. Matto Singho* [4] where however the contents of the first information were not available to the Court. Keuneman J. there said (at p. 460) " No evidence in fact has been given as to the actual information given to the Police by the defendant, nor as to the circumstances under which that information was given. No Police officer has been called, and we do not know whether this was the first information given to the Police, and whether, in giving the information, the defendant in fact formulated a charge against the plaintiff, based upon his

[1] *(1883) 5 S. C. C. 230.*
[2] *(1936) 39 N. L. R. 10 at p. 13.*
[3] *(1942) 43 N. L. R. 357 at p. 359.*
[4] *(1943) 44 N. L. R. 459.*

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knowledge ". This passage does not to my mind indicate that the learned Judge took the view that the first information by itself would not have sufficed to found the action for malicious prosecution ; it appears on the contrary to be open to the construction that if in giving first information the defendant in fact formulated a charge against the plaintiff based upon his own knowledge he might well have been held to be the real prosecutor. Counsel for the appellant relied strongly on the following statement in a judgment of the Privy Council in *Tewari v. Bhagat Singh* [1] which was also cited by Keuneman J., " If a complainant did not go beyond giving what he believed to be correct information to the Police and the Police, without further interference on his part (except giving such honest assistance as they might require) thought fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But, if the charge was false to the knowledge of the complainant, if he misled the Police by bringing suborned witnesses to support it, if he influenced the Police to assist him in sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution had not technically been conducted by him. The question in all cases of this kind must be—Who was the prosecutor ? And the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion was not the criterion ; the conduct of the complainant, before and after making the charge, must also be taken into consideration ". What is clear from this passage is that a complainant will not be liable if he merely gives *what he believed to be correct information* to the Police. But the judgment of the Privy Council does not clearly set out the law applicable in a case where the charge made to the Police by the complainant was false to his knowledge. The passage appears to be open to either construction, namely that such a charge by itself is sufficient to found the action for malicious prosecution or alternatively that there must be some further improper conduct on the part of the complainant.

Counsel for the respondent has invited us to hold that the former is the correct view. He contends that there is a distinction between what is popularly called a first information and a statement recorded under S. 122 of the Code during the course of the Police inquiry. He referred to the case of *Wijegunatilleke v. Joni Appu* [2] where it was held that false statement in the course of an inquiry by the Police under Chapter XII of the Code is a statement made on a privileged occasion and cannot found an action for damages. (In fact S. 122 clearly provides that such a statement cannot be used otherwise than (*a*) to prove that the witness made a different statement at a different time or to refresh the memory of the person recording it or (*b*) as evidence in a charge of perjury.) Counsel accordingly contends that the necessity for some further misconduct on the part of the person making such a statement to the Police arises because the statement itself is shut out by the law from constituting evidence of " setting the law in motion against the plaintiff ", but that there is no such necessity in the case of a first information if in fact the information consists of the formulation of a charge against the plaintiff.

[1] (*1907–8*) *24 T. L. R. 884.* [2] (*1920*) *22 N. L. R. 231.*

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The passage cited above from the judgment of Howard C.J. appears to bear out this view; the mere giving of information to the Police is not sufficient without " something more ", that is, either (*a*) the formulation of a charge or (*b*) a solicitation request or incitement. Although there is no recent case directly in point, I find that in *Podisingho v. Appuhamy* [1], it was held sufficient that the defendant set the authorities in motion to the detriment of the plaintiff.

I am of opinion that a first information given to the Police is sufficient to found an action for malicious prosecution if it actually contains a clear allegation that the plaintiff committed an offence, or, in other words, if it formulates a charge against the plaintiff. While it is correct that the Police have a discretion whether or not to prosecute, it is nevertheless their duty to prosecute if they form the opinion that the allegation may be true. If they do form such an opinion, particularly in a case where there appears to be corroboration from a source named by the informant, he can surely not be permitted to plead that the Police should not have acted upon his allegation.

In the case before us the defendant made a clear accusation of theft against the plaintiff, and there is in addition evidence that he insisted that the Sergeant should institute proceedings, a course which the Sergeant took when he found that the defendant's story appeared to be corroborated. I think therefore that the complaint was sufficient to found the action.

Counsel for the appellant has also argued that the defendant only made an allegation of theft and assault and that since the allegation did not amount to a statement of facts sufficient to constitute robbery within the meaning of S. 379 of the Penal Code, he cannot be held responsible for the action of the Police who instituted a charge of robbery and not the charge of theft. I do not propose to deal with this point at any length because I have formed the view that the appeal must succeed on other grounds. It is sufficient to say that since there was an allegation both of assault and of theft, the defendant cannot be allowed to seek shelter beneath the misconstruction of his allegation by the Police. Furthermore, the charge of robbery was sufficient to enable the Magistrate to convict of theft, and it must be assumed in the absence of such a conviction that theft was not established. The example (suggested by myself) of a prosecution for rape based upon a complaint of mere assault is not I think relevant because a person who complains of simple assault cannot properly be said to have set the law in motion on a charge of rape.

In order to succeed in an action for malicious prosecution, the plaintiff must prove that the defendant acted without reasonable and probable cause. The burden is clearly on the plaintiff, *Corea v. Pieris* [2]. Indeed *Winfield* at p. 617 points out that in this respect " the plaintiff is compelled

[1] *(1904) 3 Bal. 145.*

[2] *(1908) 10 N. L. R. 321; (1910) 12 N. L. R. 147 (P. C.).*

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to undertake a task commonly supposed to be impossible—to prove a negative ". It is necessary therefore to examine the manner in which the learned District Judge has approached the question of lack of reasonable and probable cause. He examines the evidence both of the plaintiff and the defendant and concludes that the charge was a false one, and therefore that it was made without reasonable and probable cause. I do not think however that this conclusion was justified having regard to the circumstances in which the complaint was made—circumstances which the Judge should have considered in determining whether or not the plaintiff had discharged the somewhat unusual burden cast on him in an action of this description. The plaintiff had himself admitted an exchange of blows between himself and the defendant on the morning in question, but he nevertheless made no complaint of the assault to the authorities. On the other hand the defendant made a very prompt complaint to the Headman and then to the Police. This indicates the probability that the incident of the morning had caused more resentment in the mind of the defendant than in that of the plaintiff. If the defendant did so resent the blows which the plaintiff admits were exchanged it might well be that in that state of mind his allegation of theft was an embellishment made merely in anger. " It may, I think be assumed ", says Cave J. in *Brown v. Hawkes* [1], " that the defendant was angry ; but so far from this being a wrong or indirect motive, it is one of the motives on which the law relies to secure the prosecution of offenders against the criminal law ". Then there was evidence that the defendant did at the time of the incident and in the presence of the plaintiff refer to the loss of his purse. The learned Judge has failed to consider the question whether the purse was actually lost, and if so whether the allegation of theft may have been made mistakenly. The fact that the defendant attempted subsequently to substantiate this allegation in his evidence to the Magistrate does not lead to the necessary inference that the original complaint was made without reasonable and probable cause. I think that the learned Judge should also have taken into consideration the fact that although the defendant made an allegation that the plaintiff took his purse, it was in the main a complaint of assault, which latter complaint could not possibly have been held to have been made without reasonable and probable cause. I think therefore that the plaintiff has failed to discharge the burden of proving that the complaint was made without reasonable and probable cause.

For these reasons the judgment and decree are set aside and the plaintiff's action dismissed with costs in both Courts.

SANSONI J.—I agree.

Appeal allowed.

[1] *(1891) 2 Q. B. D. at p. 722.*

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1953 *Present :* **Gratiaen J.**

N. SEEVARATNAM, Appellant, *and* K. M. P. GOPALASAMY, Respondent

S. C. 677—M. C. Jaffna, 22,647

Absence of complainant—Acquittal of accused—Power of Magistrate to cancel order—Right of appeal if cancellation is refused—Criminal Procedure Code, ss. 194, 336.

An order of acquittal entered under section 194 of the Criminal Procedure Code may be cancelled if the complainant subsequently satisfies the Magistrate that his absence was due to a genuine misunderstanding as to the date fixed for his appearance.

An appeal can be preferred as of right against an order refusing to vacate an order of acquittal passed under section 194 of the Criminal Procedure Code.

APPEAL from an order of the Magistrate's Court, Jaffna.

M. M. Kumarakulasingham, with *J. C. Thurairatnam*, for the complainant appellant.

S. Sharvananda, for the accused respondent.

Cur. adv. vult.

May 15, 1953. GRATIAEN J.—

The complainant-appellant in this case instituted criminal proceedings in the Magistrate's Court of Jaffna charging the accused-respondent with criminal breach of trust or in the alternative criminal misappropriation of various sums of money, and also with falsification of accounts. The learned Magistrate, after recording some evidence, decided to try the case summarily in the exercise of the discretion vested in him under sec. 152 (3) of the Criminal Procedure Code.

On 19th March, 1952, the trial was, by consent of parties, postponed—so the record reads—for 23rd April, 1952. On that date, however, the complainant, the accused, and their legal representatives were all absent, and the Magistrate accordingly made an order " discharging the accused ". This order must in the context be construed as an order of acquittal made in terms of sec. 194 of the Criminal Procedure Code.

On 28th April, 1952, the complainant attended the Magistrate's Court and learnt what had taken place on the earlier date. He promptly filed a motion and affidavit applying that the Magistrate should, in terms of the proviso to sec. 194, cancel the order of acquittal made on 23rd April, 1952. The complainant's affidavit purports to excuse his absence in

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Court on 23rd April, 1952, by explaining that there had been a genuine misunderstanding on his part and on the part of his lawyers as to which date had been precisely fixed by the Magistrate for the continuation of the trial. Indeed, the failure of the accused himself to attend the Court on the 23rd April seems *prima facie* to lend colour to the assertion that there had been some such misunderstanding.

The learned Magistrate made an order in chambers refusing that application to restore the case to the trial-roll—because, in his opinion, the explanation given in the complainant's affidavit was " not sufficient ". With respect, I disagree. If the explanation offered for the complainant's absence be true, there were clearly good grounds for applying the proviso to sec. 194. In my opinion the learned Magistrate should have issued notice on the accused to show cause why the application of the complainant should not be allowed on the grounds set out in his affidavit dated 28th April, 1952, and an *inter partes* inquiry should have been held in order to decide whether the explanation offered was in fact true. The learned Magistrate's order refusing to vacate the previous order of acquittal was in my opinion premature, and I allow the appeal. The record must now be returned to the Magistrate's Court with a direction that he should deal with the complainant's application on the lines previously indicated by me. If the learned Magistrate, after due inquiry is satisfied that the complainant's excuse for his failure to attend the Court on 23rd April, 1952, is true, the previous order of acquittal must be vacated, and the trial of the accused must proceed according to law. If, on the other hand, the complainant's explanation is rejected, the order of acquittal will stand.

I must refer in conclusion to a preliminary objection which was raised on behalf of the accused regarding the constitution of this appeal. Mr. Sharvananda argued that the appeal against the learned Magistrate's refusal to vacate his previous order of acquittal under sec. 194 of the Code is in effect an appeal against the acquittal itself, and therefore requires the prior sanction of the Attorney-General in terms of sec. 336. I do not agree. Sec. 194 provides for an acquittal without trial under very special circumstances, and the proviso vests jurisdiction in the Magistrate himself to cancel the order at the instance of the defaulting complainant in appropriate circumstances. A refusal to apply the proviso is a final order against which an appeal lies to the Supreme Court. Sec. 336 applies in my opinion only to orders of acquittal made by a Magistrate after trial under the provisions of sec. 190 of the Code, or by a District Judge after trial under sec. 210 or 214.

This question was considered by Soertsz J. in *Junaid v. Jayawardena* [1] and his judgment indicates that he was inclined to the same view that I have taken. He found himself embarrassed, however, by an earlier judgment of Shaw J. in *Somasunderam v. Kadiravelu Chetty* [2]. He therefore suggested, " without deciding the point ", that the more prudent course for an appellant in the position of a complainant who was dissatisfied with a Magistrate's refusal to vacate an order passed under sec. 194 was to obtain the sanction of the Attorney-General.

[1] *(1935) 15 Law Rec. 114.* [2] *(1916) 3 C. W. R. 315.*

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As Soertsz J. points out, Shaw J.'s judgment in *Somasunderam's case* (supra) was clearly made *per incuriam* in that he had failed to observe that the proviso to sec. 194 substantially enlarged the rights of defaulting complainants under the earlier Criminal Procedure Code of 1883. The judgment of Shaw J. in *Mourant v. Seera* [1] shows that the effect of the proviso to sec. 194 had subsequently been brought to his notice.

If a complainant seeks to obtain the unnecessary sanction of the Attorney-General to an appeal in a case such as the present, he might well be faced with the substantial objection that his appeal has been preferred out of time. The correct view, I think, is that an appeal can be preferred as of right against an order refusing to vacate an order of acquittal passed under sec. 194.

Appeal allowed.

1954 *Present :* **Gunasekara J.**

JAMALDEEN, Appellant, *and* P. J. DE SILVA (S. I. Police), Respondent

S. C. 1590—M. C. Colombo, 35,755/A

Criminal Procedure Code—Proviso to section 297—Scope of its applicability—Sections 151 (1), proviso 2, 151B, 407.

By Section 297 of the Criminal Procedure Code,

" Except as otherwise expressly provided all evidence taken at inquiries or trials under this Ordinance shall be taken in the presence of the accused or when his personal attendance is dispensed with in the presence of his pleader :

Provided that if the evidence of any witness shall have been taken in the absence of the accused whose attendance has not been dispensed with, such evidence shall be read over to the accused in the presence of such witness and the accused shall have a full opportunity allowed him of cross-examining such witness thereon. "

Held, that the proviso does not enable the prosecution to utilize as part of its case at a trial evidence taken in the accused's absence before he was charged.

APPEAL from a judgment of the Magistrate's Court, Colombo.

No appearance for the accused appellant.

V. S. A. Pullenayagam, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

[1] *(1917) 4 C. W. R. 172.*

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August 16, 1954. GUNASEKARA J.—

The appellant was convicted, after a summary trial under section 152 (3) of the Criminal Procedure Code, on a charge of having dishonestly retained a stolen radio receiving set valued at Rs. 250, knowing or having reason to believe it to be stolen property, and was sentenced to 12 months rigorous imprisonment. The evidence that was taken at the trial in the presence of the appellant is clearly insufficient to support the conviction. The learned crown counsel agrees that by itself it is insufficient, but he has sought to eke it out with some evidence that was taken in the appellant's absence, under section 407 of the Criminal Procedure Code. The evidence of each witness who was examined on that occasion was read over to the appellant at the trial in the presence of the witness and the appellant was given an opportunity of cross-examining the witness on that evidence. The learned crown counsel contends that by reason of the provisions of section 297 of the Code the evidence so read to the appellant was thereby made a part of the case against him.

The proceedings in the magistrate's court were instituted on the 28th January, 1953, upon a police report under section 148 (1) (*b*) of the Criminal Procedure Code. The evidence taken in the appellant's absence was taken on the 25th March. He appeared before the court for the first time on the 23rd November, and on that day the learned magistrate decided to try the case summarily and framed a charge against him in terms of the allegation in the police report. He pleaded not guilty, and the trial was postponed to the 7th December. The trial was held on that day and the appellant was convicted.

Section 297 of the Criminal Procedure Code is in these terms :

> " Except as otherwise expressly provided all evidence taken at inquiries or trials under this Ordinance shall be taken in the presence of the accused or when his personal attendance is dispensed with in the presence of his pleader :
>
> Provided that if the evidence of any witness shall have been taken in the absence of the accused whose attendance has not been dispensed with, such evidence shall be read over to the accused in the presence of such witness and the accused shall have a full opportunity allowed him of cross-examining such witness thereon. "

The main part of the section lays down the rule that evidence must be taken in the presence of the accused or his pleader except in those cases in which the law has expressly provided for evidence to be taken in their absence. The proviso relates to one class of these exceptions, namely, where an inquiry or trial, as the case may be, has been proceeded with in the absence of an accused whose attendance has not been dispensed with, and who is therefore absent in breach of an obligation to be present. What is enacted in the proviso is a procedure for giving the accused an opportunity of dealing with evidence that has been made a part of the case against him in his absence. I do not agree with the view contended for by the learned crown counsel that it is a procedure which enables the prosecution to put in at an inquiry or trial evidence that was taken in the accused's absence before the commencement of that inquiry or trial.

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As I read the proviso it does not enable the prosecution to utilize in one proceeding, whether an inquiry or trial, evidence that was taken in another, by merely having it read to the accused so that he may cross-examine the witness.

Support for a contrary view was sought in the judgment of Soertsz J. in *Musafer v. Wijesinghe* [1], where he decided that certain depositions that were taken before the trial in the absence of the accused must be held to have been taken under the second proviso to section 151 (1) of the Criminal Procedure Code upon an oral complaint made under section 148 (1) (*a*), and that therefore the reading over of those depositions to the accused at the trial was justified by the proviso to section 297. The question that was discussed appears to be whether in the circumstances of that case the taking of the depositions in the absence of the accused was justified by any provision of law ; and it appears to have been assumed that if the case fell within any exception to the general rule, that evidence must be taken in the presence of the accused (or his pleader), the proviso to section 297 would justify the reading of the depositions at the trial. Possibly the reason for this assumption is to be found in the procedure that was prescribed by the Code before it was amended by Ordinance No. 13 of 1938 ; for before the amendment the magistrate was required to read over to the accused at the commencement of a non-summary inquiry or a summary trial any depositions taken before the issue of process and recorded under section 150 (1). But this procedure was expressly laid down by sections 156 (1) and 189 (1) in regard to non-summary inquiries and summary trials respectively, and is not referable to section 297. Depositions now taken under the second proviso to section 151 (1) of the Code as amended, and recorded as required by section 151B, would, before the amendment, have been taken under section 149 (1) and recorded as required by section 150 (1). The provisions for the reading over of these depositions to the accused, that were contained in sections 156 (1) and 189 (1) before the amendment, find no place in the Code as amended. With all respect to the view expressed by Soertsz J., it seems to me that there is no justification for reading these provisions now into section 297, which has not been amended. Moreover, it is not to every exception to the general rule laid down in section 297 that the proviso applies, but only to those cases where evidence is taken in the absence of an accused whose attendance has not been dispensed with. There can be no question of the attendance of an accused person being or not being dispensed with until the proceedings have reached a stage at which the accused is under an obligation to attend unless his attendance is dispensed with. Clearly that stage has not been reached when the question for decision is whether process should issue, that is to say, whether the accused should be required to attend.

The learned crown counsel has also cited two other cases as throwing light on the present question. In the first of these, *James Singho v. Ratnapura Police* [2], Basnayake J. held that a deposition taken under section 407 could not be put in evidence by its being read at the trial in the presence of the accused and the witness being cross-examined. But,

[1] *(1941) 43 N. L. R. 61.* [2] *(1949) 39 C. L. W. 79.*

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as was pointed out by Nagalingam J. in *Fernando v. S. I. Police, Welikada* [1], which is the other case cited by crown counsel, it does not appear that the provisions of section 297 were considered by Basnayake J. It was held by Nagalingam J. in the latter case that the proviso to section 297 was applicable to certain evidence that had been recorded under section 407 in the absence of the accused, and that the procedure adopted at the trial, of reading that evidence to the accused in the presence of the witness and giving the accused an opportunity of cross-examining the witness, was unexceptionable. It is not clear, however, whether the evidence in question had been taken after the accused had pleaded to the charge (as in *James Singho v. Ratnapura Police* [2]) or before. In any event, the question that arises in the present case, whether the proviso to section 297 can apply to evidence taken in the accused's absence before he was charged, was not considered. In the view that I take of the proviso the evidence that was taken on the 25th March, 1953, before the commencement of the trial, was not made a part of the case against the appellant at the trial by its being read to him in the presence of the witnesses and by his being given an opportunity of cross-examining them on that evidence. With all respect to my brother Nagalingam, I am unable to agree with the view expressed in *Fernando v. S. I. Police, Welikada* [1], that the proviso " embodies a rule laying down a general principle of legal admissibility of evidence recorded in the absence of an accused person ". In my opinion what it lays down is an imperative rule of procedure for informing the accused of the evidence taken in his absence and giving him an opportunity of cross-examination, and not a rule governing admissibility of evidence. It can only apply to evidence that has already been admitted at an earlier stage of the same inquiry or trial.

I allow the appeal and acquit the appellant.

Appeal allowed.

1954 *Present :* **Swan J.**

P. KANAGARATNAM, Appellant, *and* W. A. BARTHOLOMEUSZ (Inspector of Police), Respondent

S. C. 438—J. M. C. Colombo, 44,201

Penal Code—Cheating—Section 403—Meaning of term " property ".

In a prosecution under section 403 of the Penal Code for cheating and dishonestly inducing a delivery of property, it was proved that the accused had deceived the Assistant Controller of Exchange into believing that he, the accused, had not purchased foreign exchange for travel for the year 1950 and thereby had induced the Assistant Controller to deliver to the accused a permit for foreign exchange for travel to the value of Rs. 750.

Held, that a permit for foreign exchange for travel could be regarded as " property " within the meaning of section 403 of the Penal Code.

[1] *(1953) 55 N. L. R. 322 ; 50 C. L. W. 10.* [2] *(1949) 39 C. L. W. 79.*

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APPEAL from a judgment of the Joint Magistrate's Court, Colombo.

S. Nadesan, with *T. K. Curtis*, for the accused appellant.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 5, 1954. SWAN J.—

The appellant was charged on two counts :—(1) that between 21st July 1950 and 27th July 1950, he deceived the Assistant Controller of Exchange into believing that he, the appellant, had not purchased foreign exchange for travel for the year 1950 and thereby induced him to deliver to the appellant a permit for foreign exchange for travel to the value of Rs. 750 and thereby committed an offence punishable under section 403 of the Penal Code.

(2) that he had at the same time and in the course of the same transaction made a declaration which he knew to be false touching a material point in his application and thereby committed an offence punishable under section 196 of the Penal Code.

The learned Magistrate acquitted him on the second count but found him guilty on the first and sentenced him to six weeks' rigorous imprisonment. It is contended on behalf of the appellant that the offence, if any, of which he could have been convicted was of cheating under section 400 inasmuch as the permit which he induced the Assistant Controller of Exchange to deliver to him could not be regarded as *property* within the meaning of section 403. In my opinion it would come within the ambit of the term property. Dealing with the corresponding section of the Indian Penal Code, to wit section 419, Rattanlal and Thackore in their treatise on The Law of Crimes (18th Ed.) at page 1058 make this comment :—

> " Whether an article is or is not property does not depend on its possessing a money or market value. If it has some special value for the person or persons concerned it is property, even though its value cannot be measured in money. "

Among the cases referred to by the learned authors are (1) *In re Packianathan* [1] where a person who had fraudulently induced a health officer to give him a health certificate was convicted under section 419 and (2) *Local Government v. Gangaram* [2] where a certificate of having passed a certain examination was held to be property within the meaning of the section.

I see no reason to interfere with the conviction or sentence. The appeal is dismissed.

Appeal dismissed.

[1] *21 Cr. L. J. 478.* [2] *23 Cr. L. J. 443.*

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1954 *Present :* **Gratiaen A.C.J. and Gunasekara J.**

S. A. A. P. JAYATILLEKE *et al.*, Appellants, *and* H. C. T. P. SIRIWARDENA *et al.*, Respondents

S. C. 314—D. C. Gampaha, 604/5608

Co-owners—Mortgage of his undivided share by one co-owner—Amicable partition among the co-owners thereafter—Effect of it on the earlier mortgage—Equitable considerations involved—Rule against "unjust enrichment".

In Ceylon, the rights of a mortgagee, to whom a co-owner has hypothecated his undivided share of the common property, continue to attach exclusively to that share notwithstanding a subsequent "amicable partition" of the property into divided allotments. The mortgage does not automatically attach to any share of the divided allotment conveyed to the mortgagor which had not been previously covered by the bond.

A, B and C who were co-owners effected an "amicable partition" of the common property, implemented by cross-conveyances. The basis of the arrangement was that each should become the sole owner of an unencumbered divided allotment in exchange for his original undivided share in the larger land which each (apart from the implied warranty against eviction) expressly warranted to be unencumbered. In fact A had previously mortgaged his undivided $\frac{1}{3}$ share in the common property to D, but fraudulently suppressed this from B and C.

Held, that, in an action by D to enforce his mortgage bond, D was entitled to a hypothecary decree in respect of the whole land to the extent of A's original interest therein which had been mortgaged. In the result, B and C received less than they had bargained to receive from A in the "amicable partition".

By the acquiescence of all parties, however, the execution-purchaser (who became the owner of an undivided $\frac{1}{3}$ share of the larger land) adopted the earlier "amicable partition" and went into occupation of A's divided allotment, leaving B and C in continued occupation of the other allotments; and this mode of possession continued for approximately nine years.

Held, that the *status quo* could not be disturbed at the instance of A's heirs. The rule against "unjust enrichment" prevented them from now asserting title to the unencumbered $\frac{2}{3}$ share of the divided allotment possessed by the execution-purchaser, because this relief could not be granted without causing prejudice to B and C whose interests in the other allotments A and A's heirs were under a contractual obligation to protect. The form of decree asked for by A's heirs would be "unjust" because it would indirectly have the effect of diverting the execution purchaser into occupation as a co-owner of the allotments conveyed to B and C which A had warranted to be free from encumbrances.

APPEAL from a judgment of the District Court, Gampaha.

H. V. Perera, Q.C., with *G. T. Samarawickreme*, for the 2nd and 3rd defendants appellants.

N. E. Weerasooria, Q.C., with *D. S. L. P. Abeysekera*, for the 1st defendant respondent.

S. Nadesan, with *J. Senathirajah*, for the plaintiffs respondents.

Cur. adv. vult.

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February 17, 1954. GRATIAEN A.C.J.—

Thomas, Edwin and Alexander (the 2nd defendant) were until 12th February, 1928, co-owners in equal shares of Pinkumbura Estate 113 acres 0 roods and 4 perches in extent. They then agreed to partition the property into three allotments of equal value, and to enter into deeds of exchange whereby each of them should become the exclusive owner of one such allotment. Accordingly, Thomas obtained a conveyance P4 from Edwin and the 2nd defendant of their undivided shares in lot A (37 acres 2 roods and 28 perches in extent) in exchange for conveyances of his undivided interests in Lot B (39 acres 3 roods and 14 perches in extent) in favour of Edwin, and in Lot C (35 acres 2 roods and 11 perches in extent) in favour of the 2nd defendant. The scheme of partition is shown in the plan P1 filed of record.

The terms of the cross-conveyances have not been briefed to us in their entirety, but learned counsel have agreed that they include covenants which, translated into English by an Interpreter of this Court, are to the following effect :

> " Further, the said premises are *free from any disputes that would arise as a result of leases, mortgages, &c.*, and no act has been done that will cause dispute for the said premises or any part thereof, and the 2nd and 3rd parties to this document (i.e., the transferors) have not previously done any act that would render this document void. Further, the 2nd and 3rd parties above referred to and their heirs, executors and administrators and assigns *further bind themselves to warrant and defend title* to the party of the 1st part above referred to (i.e., the transferee) and their aforewritten in the event of such a request being made by them at the expense of the party of the 1st part in order more fully to secure their title to the said premises."

In addition, the implied warranties against eviction must be read into the documents.

The amicable division was implemented as agreed upon, and the basis of the arrangement was that each co-owner should receive unencumbered shares in one divided allotment in exchange for his (professedly) unencumbered shares in the others.

The effect, both actual and intended, of the conveyance in favour of Thomas was that the legal title to an additional 2/3 share of Lot A passed exclusively to him, free of encumbrances. The corresponding conveyances relating to Lot B and Lot C were intended to produce a similar result for the benefit of Edwin and the 2nd defendant respectively ; but it later transpired that Thomas (contrary to his specific assurances) had previously executed in favour of Mrs. C. H. Obeysekera a duly registered mortgage bond P2 dated 19th June, 1914, hypothecating his (then) undivided share in the whole of Pinkumbura Estate. The bond had not been discharged, so that Edwin and the 2nd defendant in fact received in respect of Lots B and C respectively a title less secure than that which Thomas had bargained to convey to them.

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Mrs. C. H. Obeysekera had assigned her hypothecary rights under P2 to the 1st defendant by P3 of 6th October, 1914. Thomas died intestate in 1933 leaving as heirs the 1st plaintiff (his widow who was also the administratrix of his estate) and 6 children (including the 2nd plaintiff). In 1939 the 1st defendant instituted an action to enforce the bond, joining Thomas' former co-owners as parties in view of the registration of the cross-conveyances which had been executed in 1928. A decree was entered on 22nd January, 1940, and in execution thereof the shares hypothecated by Thomas, *i.e., an undivided 1/3 share of the entirety of Pinkumbura Estate*, were purchased by the 1st defendant under a Fiscal's conveyance dated 10th June, 1940. Thomas' debt under the mortgage was thus discharged, and satisfaction of the decree against his estate was duly entered of record.

The 1st defendant as execution-purchaser now became vested with legal title to an undivided 1/3 share of Lots A, B and C. She went into possession, however, of only Lot A in its entirety, which, after the amicable partition of 1928, had been enjoyed by Thomas and (upon his death) by his intestate heirs including the plaintiffs. Edwin (whose interests have since passed to the 3rd defendant) and the 2nd defendant continued to possess Lots B and C respectively. By this means, the 1st defendant virtually adopted the arrangement arrived at between Thomas, Edwin and the 2nd defendant. The plaintiffs and Thomas' other heirs acquiesced in this procedure without protest of any kind.

It is convenient to analyse the legal estate which (apart from the impact of equitable considerations) was held by each of the persons concerned in respect of Pinkumbura Estate on 10th June, 1940 :

(1) The 1st defendant had legal title to $\frac{1}{3}$ only of Lot A, and also $\frac{1}{3}$ of Lots B and C ; nevertheless she possessed the entirety of Lot A and no part of Lots B or C ;

(2) Edwin was divested of his title to $\frac{1}{3}$ of Lot B which Thomas had conveyed to him under the amicable partition ; nevertheless, he continued to possess the entirety of Lot B as if his legal rights had not been affected by subsequent events ;

(3) similarly, the 2nd defendant had lost his title to $\frac{1}{3}$ of Lot C which Thomas had conveyed to him, but continued to possess the entirety of Lot C ;

(4) the heirs of Thomas retained at least the bare legal title to the unencumbered $\frac{2}{3}$ shares of Lot A which he had obtained in 1928 from Edwin and the 2nd defendant ; nevertheless, they claimed no interests in those shares until the present action was instituted by the plaintiffs on 10th February, 1949—i.e., more than 9 years after the date of the Fiscal's conveyance in favour of the 1st defendant.

There can be no doubt that the 1st defendant, after the purchase in 1940 of the undivided shares actually mortgaged to her, could immediately have insisted, if she so desired, on being admitted by the 2nd and 3rd defendants to co-ownership of Lots B and C respectively. Had she done

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so, the 2nd and 3rd defendants could in their turn have enforced against the heirs of Thomas the appropriate remedies arising from Thomas' breach (*a*) of his implied warranty against eviction and (*b*) of his express warranty as to freedom from encumbrances which had been the foundation of the amicable partition of Pinkumbura Estate ; for, by his suppression of the mortgage then subsisting over his undivided interests in the entire property, he had induced each of them to part with an unencumbered share of Lot A in exchange for a share over which the 1st defendant in fact enjoyed hypothecary rights. For over 9 years, however, the practical necessity for such retaliatory action did not arise, because the heirs of Thomas acquiesced in the 1st defendant's adoption of the earlier scheme of divided possession. During this long interval, Edwin and the 2nd defendant were lulled into a sense of security, and effected valuable improvements on Lots B and C respectively.

So matters stood until this action commenced on 10th February, 1949—i.e., very shortly before the rights of the heirs of Thomas to $\frac{2}{3}$ of Lot A would (in any view of the matter) have effectively been extinguished by prescription.

The plaintiffs had in the first instance sued the 1st defendant alone for a declaration of title to their proportionate shares in that part of Lot A which was not covered by her Fiscal's conveyance P4. The 1st defendant, however, moved the Court to have the 2nd and 3rd defendants joined in the action so as to ensure an effectual and complete adjudication upon all matters arising in the dispute. The application was allowed, and I entirely agree with the learned Judge that this was an appropriate case for invoking the statutory provisions of section 18 of the Civil Procedure Code. A decree in favour of the plaintiffs in respect of Lot A would inevitably have prejudiced the 2nd and 3rd defendants' rights in respect of Lots B and C respectively, and they were therefore directly concerned in the success or failure of the plaintiffs' claim in these proceedings.

The case for the plaintiffs, upon the admitted facts which I have set out, has been presented to us by Mr. Nadesan with almost disarming simplicity. The undivided $\frac{2}{3}$ share of Lot A which passed to Thomas in terms of the amicable partition, it is argued, had not yet passed to the 1st defendant by adverse prescriptive user, nor do her rights under the Fiscal's conveyance cover these particular interests ; on the other hand, her claim to an undivided $\frac{1}{3}$ share of Lots B and C as against the 2nd and 3rd defendants (who are bound by the mortgage decree of 1948) is unanswerable, so that the 2nd and 3rd defendants cannnot dispute her co-ownership in respect of Lots B and C. In other words they must (so far as issues relating to title in the present action are concerned) be content with less than they had bargained for under the agreement to partition Pinkumbura into 3 separate allotments ; and. if they complain of any breach by Thomas of his express or implied warranties, their remedy lies in independent proceedings.

Each defendant filed an answer which bears evidence of much research in au endeavour to discover some equitable doctrine which would prevent the heirs of Thomas from taking advantage of the " fraud " which he

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had perpetrated on his former co-owners. But, as the facts are not in dispute, it matters little whether the available defences are precisely covered by the pleadings or by the issues framed at the trial—*vide* the observations of the Privy Council in *Jayawickrema v. Amarasuriya* [1].

The learned trial judge approached the case by a process of reasoning which is different from that which Mr. Nadesan submitted for our consideration. He took the view that, under the Roman Dutch law, the amicable partition which took place on 12th February, 1928, had the automatic effect of converting the 1st defendant's hypothecary rights over a $\frac{1}{3}$ share of the entirety of Pinkumbura Estate into hypothecary rights restricted to the whole of Lot A; that is to say, the existing mortgage over Thomas' earlier interests in Lots B and C was extinguished, and in its place a fresh mortgage was created by operation of law over the $\frac{2}{3}$ shares of Lot A which he has received from Edwin and the 2nd defendant. Proceeding from this hypothesis, the learned judge decided that the 1st defendant had misconceived her remedy by not claiming in the hypothecary action instituted by her in 1939 a decree affecting the entirety of Lot A; similarly, the 2nd and 3rd defendants, being parties to the action, should have objected to a decree being passed in respect of any part of Lots B and C which had in truth been freed from mortgage by reason of the earlier partition; not having done so, they too were bound by the decree; in the result, none of the defendants could resist the claims of Thomas' heirs to be placed in possession of the outstanding shares in Lot A which the decree and the Fiscal's conveyance had left untouched.

With regard to the 1st plaintiff's claim, it was disclosed at the trial that she had sold her interests in Lot A to outsiders in 1937. Her claim was accordingly dismissed. The 2nd plaintiff was however declared entitled to 26/504 shares in Lot A and to consequential relief upon that basis.

It will be observed that the entire judgment under appeal presupposes the correctness of the proposition as to the legal effect of an amicable partition among co-owners on an earlier mortgage created by one of them over his undivided interests in the common property. I am satisfied, however, that this does not correctly represent the law applicable in Ceylon.

Under the Roman Dutch law, "where things are the property of several co-owners, each of them can only sell or transfer by delivery to the purchaser to the extent of his own share", subject to certain exceptions (irrelevant in the present context) in favour of the Fisc. *Voet 18.1.14.* Similarly, "if one has mortgaged to his creditor a thing which he has in common with another, only the debtor's share is bound, whether the thing which was in common to the debtor and another has been mortgaged to a private person or even to the Fisc.". *Voet 20.3.3.* Voet explains that "among the Romans" (by way of contrast) the position of a mortgagee was more favourable.

[1] *(1918) 20 N. L. R. 289 at 297.*

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There is however, a passage in *Wille : Mortgage and Pledge in S Africa (2nd Ed.) p. 39* to the following effect :

> " Under the Roman Dutch law, one of several joint owners could mortgage the joint property even against the will of the others, but when a division or partition of the property took place, only the lot or the share of the mortgagor was bound ",

and *Voet 20.3.3* is quoted (besides other authorities) in support of this view. It is probable, however, that the author, who has previously pointed out that " a co-owner could not mortgage the common property without express or implied authority from the others ", merely intended, in the passage which I have quoted, to explain the effect of a subsequent " partition " on a subsisting mortgage which a single co-owner had purported to create *over the entirety of the common property, and not* (as occurred in the present case) *over only his undivided share in the entirety.* In the former case, the professedly unrestricted mortgage might well be regarded, upon a partition, as attaching to the whole of the divided portion which has been allotted as the mortgagor's share—for in that event, the terms of the bond would have purported from the outset to cover the entirety of that allotment (and something else as well).

In Ceylon, at any rate, a mortgage over a co-owner's interests would be entirely unaffected by a subsequent *amicable partition* to which the mortgagee himself was not a consenting party ; and even if he did consent, the provisions of the Prevention of Frauds Ordinance must be satisfied before the subsisting hypothecary rights could be enlarged in some respects or reduced in others. A so-called " amicable " partition, if it is to have immediate legal effect, must be implemented by notarial cross-conveyances. In the case of a *judicial partition*, on the other hand, different considerations arise, and special statutory provisions operate to determine the rights of mortgagees. (To what extent the common law of partition and mortgage is regulated by statute in S. Africa, I do not profess to know).

Applying the true principles which govern this case, I am satisfied that the 1st defendant did not misconceive her remedy in the action instituted by her in 1939 to enforce the mortgage bond P2 ; nor did the 2nd and 3rd defendants misconceive the defences available to them in those proceedings. The hypothecary decree binding an undivided one-third share of all three allotments to secure the repayment of the debt incurred by Thomas under the bond was the only decree which could properly have been entered in those proceedings, and the Fiscal's conveyance dated 10th January, 1940, passed to the 1st defendant legal title to all those interests. It follows that, although the learned Judge's reasons for entering judgment in favour of the 2nd plaintiff cannot be supported, the judgment itself is *prima facie* correct unless it ought to be set aside, on the facts of this particular case, on independent considerations founded on equity.

It is this part of the case which has caused us the greatest difficulty. One's instinct prompts one to believe that the law is not powerless to prevent the heirs of Thomas from directly or indirectly obtaining, to the

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detriment of the 2nd and 3rd defendants, an unfair advantage from the "fraud" which Thomas originally perpetrated on them when he obtained an amicable partition of the common property. Let me summarise the relevant facts :

1. Thomas obtained from Edwin and the 2nd defendant an enlarged and unencumbered interest in Lot A in exchange for his existing interests in the other allotments which he had falsely represented to be also unencumbered ;
2. the heirs of Thomas now seek to assert their ownership of property which (but for his fraud) Thomas would never have received, and indirectly (but inevitably) to divert the 1st defendant into possession, at the expense of the 2nd and 3rd defendants, of property *in respect of which Thomas was under a special duty to protect them from eviction ;*
3. by acquiescing for 9 years in the arrangement by which the 1st defendant had adopted the earlier scheme of partition, the heirs of Thomas had stood by while the 2nd and 3rd defendants improved Lots B and C under the belief that their position was secure.

The civilised rules of modern jurisprudence are not devoid of an adequate reply to unconscionable claims of this kind. The 1st defendant is content to preserve the *status quo*, but, as far as she alone is concerned, the inconvenience of now taking over proportionate shares of Lots B and C (at the expense of the 2nd and 3rd defendants) in exchange for a $\frac{2}{3}$ share of Lot A would possibly not cause her appreciable detriment. On the other hand, the 2nd and 3rd defendants would be gravely prejudiced if the judgment under appeal were to be affirmed.

As for the equitable principles which govern the case, some might say that the solution lies particularly in the doctrine against "unjust enrichment", because Thomas, through his heirs, cannot ask the aid of a Court "to stultify his own act"—*Voet 21.2.2.* Others would point out, by reference to the express and implied warranties which formed the basis of the amicable partition implemented by cross-conveyances, that a man shall not "derogate from his own grant" or act "in fraud of his covenant". The rule of estoppel by acquiescence could also be called in aid. Indeed, all these are allied rules, and the underlying reason behind each of them protests strongly against the injustice of granting the 2nd plaintiff the relief which he has claimed in these proceedings.

Shortly stated, the prayer of the 2nd plaintiff is that the Court should permit him to oust the 1st defendant from some part of Lot A, thereby sanctioning indirectly the consequential eviction of the 2nd and 3rd defendants from a corresponding interest in Lots B and C. In other words, he seeks to enrich himself at their expense by depriving them of those very rights which his predecessor Thomas was under a contractual and common-law duty to respect.

It is impossible to grant the plaintiff relief in respect of Lot A without at the same time indirectly giving judicial sanction to some consequential injury to the 2nd and 3rd defendants. Having regard, therefore, to the

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contractual relationship in which the 2nd plaintiff (by succession) stands to those defendants, the " enrichment " which he seeks in the form of a declaration of title in respect of Lot A would be manifestly " unjust ". " It is equitable and in accordance with the law of nature that no person should be enriched at the expense of, and by the infliction of an injury on another "—*Dig. 50.17.206.* As Lord Kenyon observed in *Doe v. Carter* [1], in a similar context, " that which cannot be done *per directum* shall not be done *per obliquum* ". In England, the rule against unjust enrichment has been adopted by gradual stages, with the assistance of legal fictions such as the " quasi-contract " and, in more recent times, the " quasi-estoppel ". But in countries which are governed by the Roman Dutch law, this broad and fundamental doctrine is unfettered by technicalities, and there is no need to insist on proof that the general rule has been previously applied in a precisely similar situation. The comprehensiveness of the Roman Dutch law principle must be enforced whenever the " enrichment " asked for would, in the facts of a particular case, be demonstrably " unjust ".

For these reasons, I am of the opinion that the appeal should be allowed. The action of both plaintiffs must be dismissed with costs as against the 1st, 2nd and 3rd defendants. The 2nd plaintiff must also pay to the appellants their costs in appeal.

GUNASEKARA J.—I agree.

Appeal allowed.

1954 *Present :* **Gunasekara J.**

C. V. S. CORERA, Appellant, *and* S. MUTTUCUMARU *et al.*, Respondents

S. C. 7—C. R. Colombo, 46,054

Rent Restriction Act, No. 29 of 1948—Joint landlords—" Reasonable requirement " of premises for some only of them—Tenant's liability then to be ejected—Sections 13 (1) (c), 27—Interpretation Ordinance (Cap. 2), s. 2.

Where there are two joint landlords, they cannot obtain possession of premises under proviso (*c*) of Section 13 (1) of the Rent Restriction Act unless they prove that the premises are reasonably required for occupation as a residence for both of them. The tenant cannot be ejected if there is proof of reasonable requirement of the premises for only one of them.

[1] *(1799) 8 T.R. 300.*

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APPEAL from a judgment of the Court of Requests, Colombo.

H. V. Perera, Q.C., with *M. L. de Silva*, for the defendant-appellant.

C. Thiagalingam, Q.C., with *H. W. Tambiah, S. Sharvananda* and *T. Parathalingam*, for the plaintiffs-respondent.

Cur. adv. vult.

October 11, 1954. GUNASEKARA J.—

This is an appeal from an order of the Commissioner of Requests, Colombo, for the ejectment of a tenant from premises to which the Rent Restriction Act, No. 29 of 1948, applies. They had been let to the appellant by the two respondents, who are co-owners, and the tenancy had been duly terminated. The learned commissioner has held that the premises are reasonably required for occupation as a residence for one of the landlords. The question for decision is whether this finding is sufficient to bring the case within paragraph (*c*) of the proviso to section 13 (1) or whether the landlords have to prove that the premises are reasonably required for occupation as a residence for both of them.

The subsection provides that no action for the ejectment of the tenant of any premises to which the Act applies shall be instituted in any court unless the Rent Control Board has authorized its institution. It is enacted by the proviso that the authorization of the Board shall not be necessary in any case where " (*c*) the premises are, in the opinion of the Court, reasonably required for occupation as a residence for the landlord or any member of the family of the landlord, or for the purposes of the trade, business, profession, vocation or employment of the landlord ". It is contended for the appellant that by reason of the provisions of section 2 of the Interpretation Ordinance (Cap. 2) the word " landlord " must be read as " landlords ", where there are more landlords than one, and therefore the respondents must prove that the premises are reasonably required for occupation as a residence for both of them.

In the English case of *McIntyre v. Hardcastle* [1], where two landlords claimed possession of a house on the ground that one of them required it for occupation as a residence for herself, the Court of Appeal considered the effect of a provision which is somewhat similar to paragraph (*c*) of the proviso to section 13 (1) of our Act. That provision, which is in schedule 1 paragraph (*h*) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, empowers the court to make an order for the ejectment of a tenant from a dwelling house if " the dwelling house is reasonably required by the landlord . . . . for occupation as a residence for (i) himself; or (ii) any son or daughter of his over 18 years of age ; or (iii) his father or mother ". In the case of *Baker v. Lewis* [2] it

[1] [*1948*] *1 All E. R. 696.* [2] [*1946*] *2 All E. R. 592 ;* [*1947*] *1 K. B. 186.*

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had been held that by reason of the provisions of the Interpretation Act, 1889, section 1, the word " landlord " in this passage includes the plural where there is more than one landlord, and Asquith, L.J., had said :

> Where there are two or more joint beneficial owners, (i), (ii) and (iii) of (*h*) should, I think, be read as follows : in (i) for " himself " read " themselves ", in (ii) for " any son or daughter of his " read " any son or daughter of theirs " and in (iii) read " their father or mother ". Where, read in this way, neither (i), (ii) nor (iii) has any application such beneficial owners would fail, for instance, if they proceed under (ii) and are not a married couple with a child, or if they proceed under (iii) and have not got a parent in common ; but they would fail in that case not because there are several of them or because they are not a " landlord " within the opening words of the section, but because they could not bring themselves within the language of (i), (ii) or (iii), construed in the way I suggest.

In *McIntyre v. Hardcastle* [1] Tucker, L.J., who delivered the judgment of the court, quoted these words and said :

> All kinds of difficulties have been suggested as likely to follow whichever interpretation is accepted by us. I do not think that the legislature contemplated this situation at all when this paragraph was framed, and, therefore, I feel driven to interpret it merely in the light of the actual language used. Looking at it in that way, I feel convinced that the interpretation put on it by Asquith, L.J., was the correct one and I do not desire to attempt to put into better language that which he so clearly expressed in the judgment which I have just read.

For these reasons it was held that where there were two landlords they could obtain possession of the house under this provision only if it was required for occupation as a residence for both of them.

I do not think that a situation such as the one which has arisen in the present case was contemplated by our legislature any more than by the British Parliament. The observation that the enactment must be interpreted merely in the light of the actual language used appears to be just as applicable in the present case as in *McIntyre v. Hardcastle* [1]. Though the language that is construed in that case is not quite the same as the language of our enactment, there is sufficient similarity to yield the same result. It seems to me, moreover, that the same result is also reached upon a consideration of the definition of " landlord " in section 27 of the Act, which provides that " ' landlord ', in relation to any premises, means the person for the time being entitled to receive the rent of such premises ". It follows that, by reason of the provision in the Interpretation Ordinance that unless there be something repugnant in the subject or context words in the singular number shall include the plural, the word " person " in the definition of " landlord " must be read

[1] [*1948*] *1 All E. R. 696.*

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as " persons " ; and it must therefore be proved that the premises are required for occupation as a residence for the persons for the time being entitled to receive the rent.

For these reasons I set aside the order made by the learned commissioner and I dismiss the action with costs in this court and the court below.

Appeal allowed.

1953 *Present :* **Rose C.J. and Pulle J.**

H. SEDARAHAMY *et al.*, Appellants, *and* K. ABUBUCKER *et al.*, Respondents

S. C. 151–152—D. C. Colombo, 3,223/LA

Res judicata—*Partition action—Sole defendant—Agreement by plaintiff to pre-pay costs before a given date—Dismissal of action for default—Legal effect of the dismissal.*

In a partition action instituted by A. as sole plaintiff against B. as sole defendant, B. claimed the entirety of the corpus without conceding any share to A. The action was, however, dismissed because the plaintiff had committed a breach of an agreement to pre-pay certain costs before a given date. Thereupon A. filed another partition action in respect of the identical land.

Held, that the dismissal of the first action determined once for all B.'s title to the entirety of the land as against A. A. was not entitled, in the second action, to agitate the same question of title as was in issue in the previous action.

Held further, that the transfer by B. of the entire land to C. during the pendency of the second action was valid.

APPEALS from a judgment of the District Court, Colombo.

E. B. Wikramanayake, Q.C., with *W. Wimalachandra*, for the 5th defendant appellant.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the 3rd and 4th defendants appellants.

M. H. A. Aziz, with *M. H. M. Naina Marikar*, for the 1st and 2nd defendants respondents.

Cur. adv. vult.

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December 13, 1953. PULLE J.—

There are two appeals in this case. The appellant in the first appeal is the 5th defendant and the appellants in the second are the 3rd and 4th defendants. The contest giving rise to these appeals relates to the apportionment of a sum of Rs. 9,625 awarded as compensation in respect of the acquisition by the Crown of a land called Koraborakele described as Lot 1 in Preliminary Plan No. A. 2,543. The 1st and 2nd defendants claimed the entirety of the compensation on the footing of a conveyance of that lot to them by the 5th defendant dated the 27th February, 1947, and marked 1D 1. They alleged that the 5th defendant was the owner of the entirety of the land. It was common ground that before her conveyance 1D 1 the 5th defendant was entitled under a chain of deeds to 7/8ths of the land. The case for the 1st and 2nd defendants was that the 5th defendant had acquired title by prescriptive possession to the balance 1/8th also.

The 5th defendant took up the entirely unconscionable position that 1D 1 amounted to only a conveyance of her undivided 7/8ths share, even though it purported to convey the whole, and that it was void because at the date of its execution there was pending a partition suit No. 4,561 of the District Court of Colombo in respect of the identical land. The 3rd defendant claimed the balance 1/8th on certain deeds. If in fact the 5th defendant was, at the time 1D 1 was executed, entitled to no more than 7/8ths it was conceded that the title to the remaining 1/8th was in the 3rd defendant.

The principal issues tried in the case under appeal were whether the 5th defendant had at the date of 1D 1 acquired a title by prescriptive possession to the 1/8th in dispute and whether the decree in a previous partition suit between the 3rd and 5th defendants enured to the benefit of the 1st and 2nd defendants. The learned Judge answered the former issue against the appellants and the latter in their favour.

The facts material to the question of prescriptive possession are as follows. One Giran Appu was the original owner of the land which on his death passed to his widow and eight children. In 1922 the 5th defendant acquired the interests of the widow and four children amounting to 12/16ths and in 1929 she acquired the interests of two other children amounting to 2/16ths thus making a total of 7/8ths. In 1931 she leased a 3/4ths share for four years to the 1st defendant according to whom the balance 1/4th was possessed by the 5th defendant.

On 31st December, 1943, the 3rd defendant instituted D. C. Colombo Case No. 3,175/P to partition the land in question. The sole defendant was the present 5th defendant. The latter claimed in her answer the entirety of the land and asked that the action be dismissed. She specifically pleaded that the 3rd defendant at no time held the land in common with her and that she had acquired a prescriptive title by possession for over twenty years. The decree is 1D 5 according to which the action was dismissed with costs on the 7th June, 1946, because the plaintiff had committed a breach of an agreement to pre-pay certain costs. The 3rd defendant promptly filed another partition action No. 4,561. The plaint bears the date 21st June, 1946. As stated earlier the 5th defendant by

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1D 1 dated the 27th February, 1947, transferred all her right, title and interest in the property to the 1st and 2nd defendants. She filed her answer 1D 6 in case No. 4,561 on the 30th March, 1949, stating in effect that she was the sole owner and that she had conveyed all her interests to the 1st and 2nd defendants.

Did the 1st and 2nd defendants obtain on 1D 1 a transfer of title from the 5th defendant to the entirety of the land ? The answer depends on whether between 1929 when the 5th defendant bought the shares of two of the children of Giran Appu and 1947 the date of 1D 1 she had acquired title by prescriptive possession to the 2/16ths shares belonging to Charles and John, the sons of Giran Appu and on the legal effect of the decree in case No. 3,175.

Assuming that the 5th defendant was in exclusive occupation and enjoyment of the whole land since 1929 it is not possible from this bare fact to infer that she had acquired title to the additional 2/16ths. There was nothing in the character of the occupation and enjoyment which would lead one to presume that there was an ouster of the co-owners at a point of time from which adverse possession could be reckoned. The well known cases on the acquisition by prescriptive possession of the title of a co-owner are reviewed by Howard C.J. in *Sideris et al. v. Simon* [1] who says at p. 276,

" It may be conceded that the possession from 1904 to 1942 was long continued, undisturbed and uninterrupted. But this is not enough. What other circumstances existed leading to the presumption that there was an ouster ? ". The learned Chief Justice then proceeded to deal with three deeds executed by one set of co-owners and held that they were not sufficient " to initiate a prescriptive title and put an end to the co-owners' possession ".

In my opinion in so far as the learned Judge found in favour of the 1st and 2nd defendants on the ground that the 5th defendant had by her acts of possession acquired a prescriptive title it cannot be supported. We then have to consider the question whether the dismissal of action No. 3,175 so operated as to give the 5th defendant title to the share which she disputed with the 3rd defendant in that case. Of the cases cited at the resumed hearing on the 9th October, 1953, *Saramappuhamy v. Martinahami et al.* [2] is of considerable assistance. It was there decided that where a partition suit was dismissed on the ground that the defendant had acquired title by prescription, then in a subsequent action brought by the defendant to vindicate title to the land the judgment in the partition suit operated as *res judicata* and prevented the parties from again raising the question of title. In the partition suit which was under consideration in *Saramappuhamy v. Martinahami et. al.* [2] the defendant set up a claim that he was entitled to the entirety of the land sought to be partitioned and after an investigation of title the defendant succeeded and the action was dismissed. In case No. 3,175/P the 5th defendant in the present case was the sole defendant and the 3rd defendant was the sole plaintiff. The issue between them was plain and straightforward, whether the 3rd defendant was entitled to any share at all having regard

[1] *(1946) 46 N. L. R. 273.* [2] *(1910) 12 N. L. R. 102.*

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to the claim set up by the 5th defendant that she was entitled to the whole land. Does it make any difference that the 3rd defendant agreed to have the action dismissed in the event of costs being not paid before a given date ? In my opinion the answer must be in the negative. The dismissal of that action determined once for all the 5th defendant's title to the entirety of the land as against the 3rd defendant and thereafter, unfettered by any legal proceedings by the 3rd defendant to agitate the same question of title *inter partes* as was in issue in case No. 3,175/P, the 5th defendant was in a position to convey a good title to the entirety of the land to the 1st and 2nd defendants. I have considered the decisions in *Sanchi Appu v. Jeeris Appu* [1] and *Abeysundera v. Babuna et al.* [2] which were cited to support the argument for the appellants that the dismissal of case No. 3,175/P was not a bar to the institution of case No. 4,561/P. In the former case a decree dismissing a partition action was pleaded as *res judicata* in a subsequent action *rei vindicatio*. Ennis J. was of the opinion that the plea failed because there was no adjudication of title on the merits in the dispute between the plaintiff and the 37th defendant in the partition case. He said,

" The plaintiff, who sought to partition, failed because he could not establish his own title and the Judge further remarked that his proper action would have been a *rei vindicatio* action, in view of the fact that he was aware that the thirty-seventh and fortieth defendants were contesting his title. So far as we are aware in this case, there is nothing to show that the thirty-seventh defendant in the partition action adduced any evidence at all in support of his title. It is impossible, therefore, to say that the decision in that partition action was relative between the plaintiff and the thirty-seventh defendant. "

In the present case after the two parties had filed their pleadings and after the trial had been fixed the 3rd defendant expressly invited the Court upon a named contingency to adjudicate on his claim without evidence. I do not think he can now be heard to say that there was no investigation of the dispute between him and the 5th defendant.

The case of *Abeysundera v. Babuna et al.* [2] does not help the appellants. In that case the earlier partition action had been dismissed before the day fixed for trial and even before some of the defendants had been served with notice of the action. The resulting position was that one could not say what the points of contest were between the parties.

As stated earlier, in the present case one knows exactly the nature of the dispute between the 3rd and 5th defendants in case No. 3,175. The pleadings do not speak with an uncertain voice as to the legal consequences flowing from an adjudication dismissing that action, namely, that as against the 3rd defendant the 5th defendant had vindicated title to the entirety of the land.

I would dismiss the two appeals with costs. The 1st and 2nd defendants will be entitled to only one set of costs of appeal.

ROSE C.J.—I agree.

Appeals dismissed.

[1] *(1920) 22 N. L. R. 176.* [2] *(1925) 26 N. L. R. 459.*

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1954 *Present:* **Swan J.**

B. N. COORAY, Petitioner, *and* C. T. GRERO, Respondent

S. C. 140—Application for a Writ of Mandamus

Municipal Council of Colombo—General meeting—Notice of motion by member—Chairman's refusal to include motion in agenda—Remedy of member—Municipal Councils Ordinance, No. 29 of 1947—Section 21—By-Law 10—Amending Act No. 39 of 1951, s. 15 (2)—Mandamus—*Effect of alternative remedy—Necessary parties.*

A writ of *mandamus* is not available where there is another remedy open to the party seeking it. The alternative remedy need not be an action at law; it may be by way of an appeal to a *forum domesticum.*

The petitioner, a member of the Colombo Municipal Council, gave notice of a motion for the removal of the respondent from the office of Mayor, and desired that the matter should be put up for discussion at a general meeting of the Council. The respondent, who was the Chairman of the Council, purporting to act under By-Law 10 (*c*), ruled that the motion was out of order, and the Secretary so informed the petitioner. The Secretary accordingly omitted to place the motion on the Agenda of the meeting. On an application by the petitioner for a writ of *mandamus* on the Mayor—

Held, that *mandamus* was not available for the reason that the petitioner had an alternative remedy, namely, an appeal to the Council itself under section 21 of the Municipal Councils Ordinance.

Held further, (i) that if *mandamus* was available the proper party respondent to the application was the Mayor and not the Secretary.

(ii) that the discretion of the Mayor under By-Law 10 to allow or disallow a motion must not be exercised arbitrarily.

(iii) that the proposed motion was a question affecting the Municipal Administration of Colombo within the meaning of By-Law 10 (*d*).

(iv) that a writ of *mandamus*, if available, could be issued although the date of the meeting had already passed.

APPLICATION for a writ of *mandamus* on the Mayor of the Colombo Municipal Council.

Izzadeen Mohamed, with *A. Kamalanathan* and *A. S. Vanigasooriar*, for the petitioner.

H. V. Perera, Q.C., with *N. M. de Silva* and *Eric LaBrooy*, for the respondent.

Cur. adv. vult.

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July 7, 1953. SWAN J.—

This is an application for a writ of mandamus on the respondent who is the Mayor of the Colombo Municipal Council. The petitioner is a duly elected member of the Council and he states that, in the exercise of his rights as such Councillor he, on the 12th March, 1953, gave notice of the following motion :—

> " This Council resolves that Mr. C. T. Grero be removed from the Office of Mayor."

He desired that the matter should be put up for discussion at the meeting to be held on 17th March, 1953. His complaint is that the respondent wrongfully ruled that the motion was out of order.

The conduct of the business of the Council is regulated by By-laws which were duly framed for this purpose under the old Municipal Councils Ordinance of 1910 and which have been kept alive under the various amending and replacing ordinances and finally made operative under the enactment now in force, namely, Ordinance 29 of 1947 by virtue of two Notifications published in *Government Gazettes* Nos. 9,773 of September 24, 1947 and 9,875 of June 8, 1948.

Under this Ordinance the Mayor was to hold office for one year, but by the Amending Act 39 of 1951 that period of the Mayor's office was extended to be co-terminous with the life of the Council. The Ordinance made provision for the removal of the Mayor or Deputy Mayor from office on a resolution for such removal by a certain majority of the total number of Councillors. This provision has been slightly altered, i.e., as regards the requisite majority, by the Amending Act referred to above which provides as follows :—

Section 15 (2)

> " A Mayor or Deputy Mayor may be removed from office on a resolution for such removal duly passed at any meeting of the Council by not less than one half of the total number of Councillors and confirmed by a resolution similarly passed at the next Meeting of the Council. Upon the date of the confirmation of any resolution for removal, the Mayor or Deputy Mayor affected by such resolution shall be deemed to vacate his office as such."

I shall at this stage quote the relevant portions of By-Law 10 :—

> " (*a*) Every notice of motion shall be in writing signed by the Councillor giving the notice. Unless such notice shall be in the hands of the Secretary three clear days, exclusive of Sundays and Government holidays, before the Meeting of the Council, the motion shall not be included in the Agenda.
>
> (*b*) All notices of motion shall be dated and numbered as received, and shall be entered by the Secretary upon the Agenda Paper in the order in which they are received.

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(*c*) Before any notice of motion is placed on the Agenda Paper it shall be submitted to the Chairman who, if he be of opinion that it is out of order, shall cause the giver of the Notice to be so informed.

(*d*) Every Notice of Motion shall be relevant to some question affecting the Municipal Administration of Colombo.

(*e*) No motion to rescind any resolution which has been passed within the preceding six months nor any motion to the same effect as any motion which has been negatived within the preceding six months shall be in order, unless notice thereof shall have been given and specified in the Agenda, and the notice shall bear, in addition to the signature of the Councillor who proposes the motion, the signatures of five other Councillors ; and when such motion has been disposed of it shall not be competent for any Councillor to propose a similar motion within a further period of six months.

(*f*) ————.

(*g*) ————.

(*h*) ————.

(*i*) Immediately after the motions of which due notice has been given have been disposed of a Councillor may propose a motion asking the permission of Council to bring forward a motion of which due notice has not been given, and in such case he will hand to the Secretary a copy of such motion."

The respondent, purporting to act in the exercise of the powers vested in him under By-Law 10 (*c*), ruled that the said motion was out of order and the Secretary by his letter dated 13th March, 1953, so informed the petitioner.

The petitioner states that the refusal of the Mayor to place the motion on the Agenda of the Meeting to be held on 17th March, 1953, was wrongful and unlawful, and he prays that this Court should command the Mayor to place it on the Agenda of the meeting next to be held after order is made on this application.

The respondent has filed an affidavit in which he states that he ruled out the motion in question in the bona-fide belief that the motion was out of order for the following reasons :—

" (*a*) That under the Local Authorities (Election of Officials) Act, No. 39 of 1951, the term of office of the Mayor had been extended until the expiration of the term of office of the Councillors then in office, and that the Mayor and Deputy Mayor were *not subject to removal until the end of that period.*"

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"(*b*) On or about the 1st day of February, 1952, the Council had discussed a motion referred tc in para. 11 of the petition which motion was defeated at the said meeting. I had done nothing nor had I omitted to do anything in the performance of my duties as Mayor to justify the petitioner giving notice of a motion in identical terms as that which was defeated, and as no reason had been given and no reference made to any act or omission of mine as Mayor subsequent to the defeat of the earlier motion, I was of opinion that the motion was frivolous and out of order."

Mr. H. V. Perera appearing for the respondent says that, inasmuch as a discretion is vested in the Mayor to allow or disallow a motion, this Court cannot review the propriety of that discretion. He also submits, in addition to the reasons set out by the respondent in his affidavit, that the motion was out of order under By-Law 10 (*d*) because there was nothing to show that it was relevant to some question affecting the Municipal Administration of Colombo. He argued further that, in any event, this Court would refuse the application for a writ of mandamus for the following reasons :—

(*a*) It would be futile to grant a writ of mandamus because the date of the meeting is long past ;

(*b*) The petitioner has an alternative remedy in that he could have obtained and even now can obtain under Sec. 21 of the Ordinance the permission of the Council to move this resolution even though it does not appear on the Agenda.

(*c*) Inasmuch as it is the duty of the Secretary to place motions on the Agenda, and as it was the Secretary who refused to place the petitioner's motion on the Agenda of the Meeting of the 17th March, 1953, the application should have been made against the Secretary and not against the Mayor."

I shall deal with the last objection first. Undoubtedly it is the Secretary who places motions on the Agenda, but he does so on the directions of the Mayor. The motion in question was ruled out by the Mayor, and the Secretary was merely carrying out the orders of the Mayor when he did not put it on the Agenda of the Meeting of 17th March, 1953. In my opinion if mandamus is available it should be against the Mayor and not the Secretary.

In a case reported in *5 S. C. C. 168* an application was made before three Judges of this Court for a mandamus on the Chief Clerk of the Court of Requests of Colombo to entertain a plaint. The Chief Clerk acting on the orders of the Commissioner had refused to accept it. This Court dismissed the application on the ground that under the Ordinance the Chief Clerk had no independent duty to the public, that he was merely doing something for which he was responsible to the Commissioner, and therefore no mandamus could issue on him.

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Before dealing with the other points taken by Mr. Perera I shall dispose of the reasons given by the respondent in his affidavit for ruling that the petitioner's motion was out of order. Mr. Perera did not seriously attempt to support those reasons. In my opinion they cannot be supported.

Although the term of office of the Mayor and Deputy Mayor was extended by Act 39 of 1951 the right of removing them from office by a resolution was not abolished. It was in fact made easier by reducing the requisite majority from two-thirds to half.

The reason given by the respondent in para. 3 (*b*) of his affidavit is amusing. He says that since the defeat of the earlier motion to have him removed from office he had done nothing nor omitted to do anything to justify the petitioner's motion. Surely it was not for him to be the judge of that—it was a question for the Council to decide.

I shall now deal with the other objections taken by Mr. Perera. As regards the Mayor's discretion to allow or disallow a motion undoubtedly By-Law 10 says that *if he be of opinion* that the motion is out of order he can reject it. But he has a duty to perform in the matter which is of a quasi-judicial nature, and he must perform that duty judiciously and not arbitrarily as he has done in this case. If I were satisfied that the petitioner had no other remedy I should not hesitate to command the respondent to place the petitioner's motion on the Agenda of the next meeting to be held.

In the case of *Goonesinghe v. Mayor of Colombo* [1] de Kretser J. dealing with Sections 82 and 85 of the old Ordinance (which correspond to Sections 20 and 21 of the present enactment) and the identical By-Laws referred to herein before, held that a member of the Council had the right to bring forward, at a general meeting, a resolution of which he had given three clear days' notice to the Secretary, despite the fact that the Chairman has, prior to the date of the meeting, expressed the opinion that the resolution was out of order and directed that it should not be placed on the Agenda.

If the view taken by de Kretser J. is correct then clearly the petitioner is not without a remedy. I shall deal with this matter more fully later.

Regarding Mr. Perera's contention that under By-Law 10 (*d*) the proposed motion was out of order because it did not show that it was relevant to some question affecting the Municipal Administration of Colombo I would say that *ex facie* a motion to remove the Mayor from office is a question that vitally affects the Municipal Administration of the City, because the Mayor is the Chief Executive Officer of the Council and has several administrative functions to perform. It is not necessary for the mover in giving notice of the motion to state his reasons for wanting the Mayor removed. Those reasons would be revealed at the meeting. The motion may fail if there is nobody to second it. It may fail after it has been put to the house. It is a motion which every Councillor has a statutory right to move. There is, in my opinion, an absolute duty cast on the Mayor to place such a motion on the Agenda unless it is out of order by reason of By-Law 10 (*e*) quoted above.

[1] (*1944*) *46 N. L. R. 85.*

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As regards the question of futility I do not think that merely because the date of the meeting at which the resolution was to have been moved is past an order of this Court would be ineffectual. The Mayor and Council are still in office, and there will be many more meetings held before they vacate office.

I shall now deal with the last question, namely, whether the petitioner had, and still has an alternative remedy. Mr. Mohamed argues that the alternative remedy must be a legal remedy. I do not agree. *Allen* on *Law and Orders* at page 62 puts the matter thus :—

> " When any public authority or official is under an absolute (not a discretionary) duty to perform a certain function and refuses to do so any person who has a demonstrable interest in its performance may move the High Court for a mandamus to compel the fulfilment of the duty, and the Court, if satisfied by the application, will make an order accordingly, *provided that there is no other remedy, equally convenient, beneficial and effectual* open to the applicant."

In a very recent case, namely, *Rex v. Dunsheath, Ex parte Meredith* [1] Lord Goddard C.J. said :—

> " It is important to remember that mandamus is neither a writ of course, nor a writ of right, but that it will be granted if the duty is in the nature of a public duty and specially affects the rights of an individual, provided *there is no more appropriate remedy.* This Court has always refused to issue a mandamus *where there is another remedy open to the party seeking it.*"

In this case the learned Chief Justice cited several instances where the alternative remedy was not an action at Law but an appeal to a *forum domesticum.* Here too the petitioner could have sought his remedy by an appeal to the Council itself under Sec. 21.

To have brought up the matter before the Council at the meeting held on 17th March, 1953, or at some subsequent meeting would have been as convenient as, if not more convenient than, as beneficial and effectual as, applying to this Court for a writ of mandamus. It certainly would have been speedier, and cost the petitioner nothing at all.

Mr. Mohamed also contends that it would have been useless for the petitioner to have moved this resolution under Sec. 21 because the Mayor would have ruled it out of order.

Sec. 21 provides as follows :—

> " Without the permission of a Municipal Council, no business shall be brought before or transacted at any general or special meeting, other than the business specified in the notice of the meeting."

Mr. Mohamed, pointing to By-Law 10 (*i*), says that any motion moved under Sec. 21 must be one of which no notice was given and not a motion of which notice has been given and which the Mayor has ruled to be out of order. I am unable to place such a restricted interpretation on Sec. 21.

[1] *(1950) 2 A. E. R. 741.*

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In fact de Kretser J. in the case cited above took the same view when construing Sec. 85 of the old Ordinance. I think that the petitioner's fear that the Mayor would have ruled the motion out of order under Sec. 21 is groundless. Under Sec. 21 the mover has to obtain not the Mayor's but the Council's permission to move a motion not on the Agenda.

In my opinion the act of the Mayor in ruling the petitioner's motion out of order was clearly wrong and improper, but I dismiss the application for a writ of mandamus because the petitioner had, and still has, an alternative remedy. In the circumstances I make no order as to costs.

Application dismissed.

1954 *Present:* **Nagalingam A.C.J.**

W. J. SILVA, Appellant, *and* L. KARUNAWATHIE, Respondent

S. C. 856—M. C. Galle, 6,580

Maintenance—Child—Order made in divorce proceedings—Jurisdiction of Magistrate's Court to award maintenance subsequently.

Where an order for the maintenance of a child entered in divorce proceedings has been carried out by the deposit of a certain sum of money in the District Court, the jurisdiction of a Magistrate to make a subsequent order for the maintenance of that child becomes ousted to that extent.

APPEAL from a judgment of the Magistrate's Court, Galle.

Christie Seneviratne, with *Felix Dias*, for the respondent-appellant.

A. L. Jayasuriya, with *J. C. Thurairatnam*, for the applicant-respondent.

Cur. adv. vult.

March 30, 1954. NAGALINGAM A.C.J.—

This is an appeal by the father of a child named Upali from an order of the learned Magistrate of Galle ordering him to pay a sum of Rs. 30 a month as maintenance.

The child is the legitimate child of the appellant. The appellant was sued in the District Court of Galle for divorce in proceeding No. X. 615 by the mother of the child, the respondent in these proceedings, and the

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learned District Judge on being satisfied upon the evidence decreed a divorce dissolving the marriage of the parents of the child. In the course of those proceedings the mother stated that she was able to maintain the child but that the defendant, the father, should pay a sum of Rs. 1,200 by way of alimony for the child and it was agreed that the sum of Rs. 1,200 so deposited should remain in Court and should be paid along with the accrued interest thereon to the child on his attaining majority.

It was contended on behalf of the appellant that the order in the divorce proceedings precluded the learned Magistrate from making an order in these proceedings. The point raised by the appellant before the learned Magistrate has been decided by a Divisional Bench in the case of *Fernando v. Amarasena* [1] where it was expressly laid down that the existence of a decree of a civil court for alimony does not oust jurisdiction of the Magistrate to make an order under the Maintenance Ordinance where the father fails to maintain the child.

The point however stressed on appeal is that though the law may have been laid down in that sense it must be qualified to the extent that if it is shown that the order made in civil proceedings is not merely a paper order but one which has been carried out, then the jurisdiction of the Magistrate becomes ousted. I think there is force in this contention. Admittedly the father deposited a sum of Rs. 1,200 in the divorce proceedings on the faith of the undertaking given by the mother that she would claim no maintenance for the child as she was in a position to maintain the child. It now transpires however that the source of maintenance which she relied upon has dried up and that she is no more in a position to maintain the child. The father is however willing that the amount deposited in the civil case should be appropriated for the maintenance of the child in monthly instalments, thus varying to that extent the agreement entered into by him in the divorce proceedings. The mother, I find, in fact applied to the learned District Judge for an order of payment of the entire sum but later did not press the application although the father was willing to have the amount transferred to these proceedings to enable the order of maintenance made against him to be executed on that fund.

In these circumstances it seems to me that the proper order to make is that the Magistrate's order should remain intact but that the sum of Rs. 1,200 should be withdrawn by the applicant-respondent, the mother, at the rate of Rs. 30 a month from 6th July, 1953, the date from which the order of the Magistrate operates, and that whether by actual withdrawal or by a notional appropriation at that rate, the fund in Court together with the interest gets exhausted, the father should thereafter make payments in terms of the order. On a rough calculation I find that the fund will get exhausted by January or February 1958 so that the order in this case can be executed against the defendant from February or March 1958. Till then no application for execution of the order can be allowed. The present order will not debar the applicant from making an application for enhanced maintenance if she can satisfy

[1] *(1943) 45 N. L. R. 25.*

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the Magistrate that circumstances have so altered that such an order should in the interests of justice be made. I also note that in the divorce proceedings the Decree Nisi has not yet been made absolute. The order therein as to alimony in favour of the child may be modified on the application of the parties so as to give effect to the order in these proceedings.

The appeal is dismissed and as each party has partially succeeded I make no order as to costs.

Appeal dismissed.

1954 *Present :* **Sansoni J.**

K. CHELLAN, Appellant, *and* PONNAN *et al.*, Respondents

S. C. 143—C. R. Point Pedro, 1,001

Co-owner—Owner also of adjoining land—His right to go over the common property to reach the adjoining land.

Where in the partition of a land owned in common a portion of it is reserved as common property for use as a lane, a co-owner is entitled to use the lane in order to reach an adjoining land which belongs solely to him if by doing so he does not interfere with the substantial rights of the other co-owners.

APPEAL from a judgment of the Court of Requests, Point Pedro.

H. W. Tambiah, with *V. Ratnasabapathy*, for the plaintiff appellant.

S. J. V. Chelvanayakam, Q.C., with *S. Sharvananda*, for the defendants respondents.

Cur. adv. vult.

October 6, 1954. SANSONI J.—

The plaintiff-appellant and the four defendants owned a land in common until, by deed P1 of 1941, they partitioned the land into four separate lots, the 1st and 2nd defendants who are husband and wife getting one lot at the eastern end. A lane was left along the southern boundary of the 4 lots "for our common use . . . . the whole of this (lane) belongs to us in equal shares", to quote the words of the deed. This lane leads up to a separate land on the east which belonged and still belongs solely to the plaintiff. Admittedly the 1st defendant blocked the lane at two points, one point being where the lane begins to skirt his lot on the south and the other point being at its eastern extremity where it touches the western boundary of the land belonging to the plaintiff alone on the east.

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The plaintiff has brought this action as a co-owner of the land over which the lane runs claiming damages against the 1st and 2nd defendants because they obstructed him in the use of the lane ; he also asked for the removal of the obstruction. He claimed that he was entitled as a co-owner to use the land in order to reach his land on the east. The 1st and 2nd defendants filed a joint answer in which they denied that the lane was intended for use by the plaintiff to have access to his land on the east, or that he ever used it for that purpose. Their position was that the lane was intended only to serve the 4 lots.

I do not think the validity of the plaintiff's claim can be doubted. He is a co-owner of the lane and as such co-owner he is entitled to use it as a lane for the purpose of getting to his land on the east if by doing so he does not interfere with the substantial rights of the other co-owners. This is the reason underlying the decision of de Sampayo J. in *Marsal Appu v. Angohamy* [1] where he followed the decision of Schneider J. in *Singho Appu v. Hendrick Appu* [2]. The plaintiff's use of the lane to get to his land on the east is an incident of his co-ownership of the lane and it is no less justified than the use of the lane by the owners of the 4 lots to reach their respective lots. It is not suggested that the use of the lane in the manner claimed by the plaintiff will interfere with the use of the lane by the other co-owners. The deed does not provide that the lane should be used only for the purpose of having access to the 4 lots lying to the north of it.

The learned Commissioner dismissed the plaintiff's action because the lane was not declared in the deed to be a public lane or one along which the plaintiff should have access to his land on the east. Both reasons are unsound. The plaintiff is not claiming to use the lane as a member of the public and he has no need to do so since he is a co-owner. Nor does the deed restrict the use of the lane by the co-owners in any way. It is a very unsafe method of construing this deed to search for the particular objects which the parties may have had in mind when they reserved a portion of land as common property for use as a lane. The deed itself contains no restriction as regards the lands which the lane was to serve and it would be adding to the terms of the deed if one were to impose such restrictions now. The learned Commissioner has also referred in his judgment to a servitude and a way of necessity but there is no claim by the plaintiff on these grounds.

I therefore allow this appeal. The plaintiff-appellant is entitled to have the obstructions on the lane removed by the four defendants and he is entitled to use the lane to have access to his land on the east. The 1st and 2nd defendants must pay the plaintiff-appellant damages as agreed at the trial until the obstructions are removed ; they must also pay him his costs both in this Court and in the lower Court.

Appeal allowed.

[1] *(1922) 4 C. L. Recorder 197.* [2] *(1922) 24 N. L. R. 157.*

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1954 *Present :* **Rose C.J. and Sansoni J.**

INCORPORATED LAW SOCIETY OF CEYLON, Appellant, *and* COMMISSIONER OF INCOME TAX, Respondent

S. C. 146—Income Tax Case Stated 92/366/BRA214

Income Tax—Law Society—Annual grant received from Government—Assessable to income tax—Meaning of terms " Business ", " Annuity ", " Income "— Ordinance No. 33 of 1947, ss. 3, 7—Income Tax Ordinance (Cap. 188), ss. 5, 6 (1) (a) (f) (h), 7 (1) (c).

The annual grant of Rs. 50,000 received by the Incorporated Law Society of Ceylon from the Government under section 7 of Ordinance No. 33 of 1947 is chargeable with tax under one or all of the following sub-heads of section 6 (1) of the Income Tax Ordinance :—

(a) the profits from any business ;

(f) annuity ;

(h) income from any other source whatsoever, not including profits of a casual and non-recurring nature.

CASE stated under the Income Tax Ordinance.

H. V. Perera, Q.C., with *C. Thiagalingam, Q.C.*, *P. Navaratnarajah* and *P. Somatilakam*, for the assessee appellant.

T. S. Fernando, Acting Attorney-General, with *M. Tiruchelvam* and *Mervyn Fernando*, Crown Counsel, for the Commissioner of Income Tax, respondent.

Cur. adv. vult.

September 7, 1954. ROSE C.J.—

The Incorporated Law Society of Ceylon was incorporated by Ordinance No. 33 of 1947.

Section 7 of the Ordinance provides :

" The Government shall make to the Society, out of the revenue of the Island, a grant of fifty thousand rupees per annum. The amount of the grant shall be paid to the Society on or before the thirtieth day of September in each year, commencing in the year 1947. "

The question that arises for consideration is whether this annual grant of Rs. 50,000 can properly be regarded as an item of income.

The first point taken on behalf of the Appellant Society was that the provisions of Section 7 (1) (c) of the Income Tax Ordinance, Chapter 188, is applicable. The sub-clause exempts from tax—

" The income of any institution or trust of a public character established solely for charitable purposes. "

2——J. N. R 40718-1,590 (11/54)

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The general objects for which the Society is constituted are set out in Section 3 of the Ordinance and read as follows :—

" (*a*) to maintain correct and uniform practice and discipline among the members of the profession of Proctors in their capacity as proctors, or as notaries, or as both ;

(*b*) to establish, regulate, and maintain Libraries, Pension and Benefit Schemes and other financial arrangements, for the benefit of its members and their dependants ;

(*c*) to consider, represent and express the opinion of its Council or members, and to collect and circulate information, relating to legislative or other measures affecting the Civil or Criminal Law of Ceylon ;

(*d*) generally to protect and promote the interests and welfare, rights and privileges of the profession of Proctors in Ceylon and of the public in relation to that profession ;

(*e*) to discharge and perform such functions and duties as may be conferred or imposed upon the Society or any Committee thereof by any other written law. "

In the course of the argument before us learned counsel for the Appellant Society conceded—in my opinion properly—that the general objects could not reasonably be contended to be solely charitable in their nature, and that therefore he did not propose to press the point that the Society was established solely for charitable purposes within the meaning of Section 7 (1) (*c*) of the Income Tax Ordinance.

That being so, the Attorney-General contends that the grant in question is caught up by Section 6 (1) of the Income Tax Ordinance under one or all of the following sub-heads :—

" (*a*) the profits from any trade, business, profession, or vocation for however short a period carried on or exercised ; . . . .

(*f*) any charge or annuity ; . . . .

(*h*) income from any other source whatsoever, not including profits of a casual and non-recurring nature. "

While normally it is not regarded as relevant to consider the terminology of the " Objects and Reasons " of an ordinance for the purpose of deriving information to assist in its interpretation, it appears that in the present matter in the proceedings before the Board of Review a copy of the " Objects and Reasons " was produced and marked (A3). It is of interest—and assistance in determining the applicability of Section 6 (1) (*a*) and (*h*) of the Income Tax Ordinance—that the " Objects and Reasons " which accompanied the draft ordinance at the date of its introduction in 1947 included the following :—

" In England and other Empire countries, the fees payable by members of the profession upon admission and for annual certificates authorising them to practise are paid to Societies enjoying the same status and discharging the same functions as the Law Society will, in Ceylon, under the new legislation. At present, under local Ordinances, these fees are payable to the local authority within whose area a proctor practises his profession. It is not proposed at present to make any alteration in this respect under the existing law, but since funds

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must be made available to the Society to enable it properly to discharge its important functions and duties, the Bill provides that the Government should make an annual grant of fifty thousand rupees to the Society. This amount represents the average sum which is recovered annually from members of the profession. "

In search of a test to determine whether the Law Society may be said to be carrying on a business within the meaning of sub-clause (*a*), the learned Attorney-General referred to *Commissioners of Inland Revenue v. Marine Steam Turbine Co*[1]., where at page 203, Rowlatt J. says, in considering the meaning to be attached to the word " business ",

" the word ' business ', however, is also used in another and a very different sense, as meaning an active occupation or profession continuously carried on, and it is in this sense that the word is used in the Act with which we are here concerned. I have therefore to ask myself whether the respondent company is carrying on a ' business ' in this latter sense. "

This judgment goes on to hold that on the facts of that particular case certain royalties received by the " old company " could not be regarded as part of the profits of any " trade or business " carried on by it within the meaning of the Finance Act. It is to be noted in that particular case that the learned Judge said,

" When it found that these royalties were likely to continue to be paid for some years, it thought that it would be best to stay the winding up and thus to continue the existence of the company, which was by no means a very active existence, until these royalties had ceased to be payable. It is contended on behalf of the Crown that the respondent company, merely because it continues to exist for the purpose of receiving these moneys, and is a registered company, is carrying on ' business ' within the meaning of the Act. I am unable to come to that conclusion. The respondent company have ceased to carry on the business which they originally carried on, and are now merely receiving royalties for a certain number of years in part payment for the business and the assets of the business with which they have parted. In these circumstances I am of opinion that they are not carrying on business within the meaning of the Act. "

The case of *Smart* (*H. M. Inspector of Taxes*) *v. Lincolnshire Sugar Co., Ltd.* [2] is also in point. The matter concerns the effect of the British Sugar (Subsidy) Act, 1925, which provided that a subsidy be paid for a number of years on sugar manufactured in Great Britain from beet grown therein. The British Sugar Industry (Assistance) Act, 1931, provided for further assistance to be given to companies engaged in such manufacture (of which the Respondent Company was one) by way of weekly advances for one year commencing on 1st October, 1931. In the event of a rise in sugar prices, the advances were, in certain circumstances, repayable, otherwise the advances were not to be repayable. On appeal from the original assessment under Schedule (D) of the relevant Finance Act, the Special Commissioners held that the advances were in their nature loans and not trading receipts, and that, in any event, they were not trading receipts until the period during which possible repayment might be

[1] (*1920*) *1 K. B. 193.* [2] (*1937*) *20 Tax Cases 643, 662.*

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claimed had expired ; and the Company could not be assessed to Income Tax in respect thereof in the year under appeal. On appeal the matter came before the Court of Appeal and subsequently the House of Lords, where in both cases it was held, in effect, that in view of the business nature of the sums in question they were trading receipts of the company and properly to be taken into account for Income Tax purposes in the year in which they were received.

It is, in my view, unnecessary to set out in detail the reasons which Finlay J. and subsequently Lord Wright gave in coming to their conclusion. But the facts of the case and the basis of the decision ultimately arrived at would seem to assist the learned Attorney-General's contention in the present matter.

As to the meaning of the term " business " the case of *Rolls v. Miller*[1] is also helpful. In that matter Lindley L.J. held that a charitable institution called a " Home for Working Girls ", where the inmates were provided with board and lodging, whether any payment was taken or not, was a " business ". At page 88 the learned Lord Justice said,

" It is very true it is a charitable lodging-house, but what is being done ? The defendants are associated together for the purpose of finding a home for these working girls, and they invite them to come and board and lodge there. They do not take any payment now—I do not think that is material—but they have a staff . . . . When we look into the dictionaries as to the meaning of the word ' business ', I do not think they throw much light upon it. The word means almost anything which is an occupation, as distinguished from a pleasure—anything which is an occupation or duty which requires attention is a business—I do not think we can get much aid from the dictionary."

Applying that test it would seem to be difficult to come to any other conclusion but that the Law Society in Ceylon are engaged in a " business " wherein they perform the various activities necessary to carry out the general objects of the Society.

Be that as it may, it seems to me that, with regard to sub-clause (*f*), there can be no doubt that the grant in question would fall within the meaning of the term " annuity ", nor, indeed was any substantial argument adduced to the contrary. It is true that learned counsel for the appellant suggested that an annual payment need not necessarily be regarded as an annuity, and he referred to *Perrin v. Dickson* (*Inspector of Taxes*)[2]. That case however referred to the details of a policy of insurance, and it was held on the facts of that case that the annual payments made by the Assurance Society did not constitute an annuity within the meaning of the Income Tax Act, but were intended to effect repayment of the principal sum with interest ; and therefore that Income Tax was only payable upon such part of them as consisted of interest.

It does not seem to me that the *ratio decidendi* in that case is of assistance to the appellant in the present matter.

With regard to sub-clause (*h*) one has to consider the meaning to be attached to the word " income ". We were referred in the course of the argument to the case of *Higgs v. Wrightson*[3] and *Charles Brown &*

[1] (*1894*) *27 Chancery Division 71.* [2] (*1929*) *1 K. B. D. 107.*

[3] (*1944*) *26 Tax Cases 73.*

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Company v. Commissioners of Inland Revenue [1]. It would seem to be clear from the judgments in these two cases and from a passage in Lord Wright's judgment in *Smart (H. M. Inspector of Taxes) v. Lincolnshire Sugar Co. Ltd.* (supra) that the test to be applied is whether the receipt in question is of a revenue nature or of a capital nature.

Learned counsel for the appellant contends that the functions of the Law Society are, in effect, "capital" functions, and therefore it would not be right to regard the grant in aid payable by Government as being of a revenue nature or as being paid on revenue account. It seems to me. however, that there is nothing in the general objects as such which would necessarily lead one to the conclusion that the grant in question was intended to be only for "capital" purposes. Indeed, the contrary would seem to be the case, particularly if one has regard to the objects and reasons of the ordinance to which I have already adverted.

For all these reasons I am of opinion that there can be no doubt that the annual grant in question is caught up by Section 6 (1) (*f*) and (*h*) of the Income Tax Ordinance. Whether it is also caught up by Section 6 (1) (*a*) is perhaps more open to question, as there is some attraction in the argument of learned counsel for the appellant that Section 6 (1) (*a*) requires the existence of a profit making motive on the part of the person or association carrying on the business in question. Having regard however to the views expressed by the learned Judges, on this aspect of the matter, in the cases to which I have referred, I consider that the better opinion is that the absence of a profit making motive does not necessarily take the business in question out of the scope of the sub-clause, if the other requirements of a "business" are present ; and that therefore this grant is also caught up by the sub-clause (*a*).

It is perhaps unnecessary to add that in the determination of this matter I have been guided entirely by legal considerations. The question as to whether or not it is desirable that the Law Society should pay Income Tax in respect of this Government grant is a matter affecting the taxation policy of government. If the decision in this case is considered, in fact, to constitute an injustice, the matter, of course, can be remedied by a simple legislative amendment.

The answers to the specific questions of law submitted to us under paragraph 10 of the case stated are therefore as follows :—

(i) Is the Society exempt from income tax under Section 7 (1) (*c*) ? . . . . No.

(ii) Is the grant of Rs. 50,000 received from Government an "income" under Section 5 . . . . Yes.

(iii) Is the Grant of Rs. 50,000 received from Government "profits" from any business under Section 6 (1) (*a*) . . . . Yes.

(iv) Is it a charge or annuity under Section 6 (1) (*f*) . . . . Yes, it is an annuity.

(v) Is it "income" from any other source whatsoever under Section 6 (1) (*h*) . . . . Yes.

There will be no order as to costs.

SANSONI J.—I agree.

Appeal dismissed.

[1] *(1930) 12 Tax Cases 1256.*

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1954 *Present :* **Gratiaen J. and Gunasekara J.**

K. VAIKUNTHAVASAN, Appellant, *and* THE QUEEN, Respondent

S. C. 63, with Application 422—D. C. (Criminal) Colombo N. 1698/28641

Defamation—Charge of criminal defamation—Burden of proof—Newspapers Ordinance, s. 7—Penal Code, s. 479.

In a prosecution for criminal defamation as defined by section 479 of the Penal Code, the burden is on the Crown to establish *inter alia :*

(1) that the accused made or published the particular imputation complained of ;

(2) that he did so with the requisite intention or knowledge.

APPEAL from a judgment of the District Court, Colombo.

S. Nadesan, with *Izzadeen Mohamed*, for the accused-appellant.

H. A. Wijemanne, Crown Counsel, with *J. G. T. Weeraratne*, Crown Counsel, for the Crown.

Cur. adv. vult.

February 2, 1954. GRATIAEN J.—

This is an appeal against a conviction for defamation. The appellant, who was the printer and publisher of a weekly newspaper entitled the "People's Voice", was indicted before the District Court of Colombo with having defamed Mr. Allen Smith, the Auditor-General of Ceylon, by publishing in Colombo in an issue of the "People's Voice" of 30th May, 1952, an article containing a serious imputation on the integrity of Mr. Smith. The words complained of are grossly defamatory, and, if the conviction was justified, the fine of Rs. 250 imposed on the appellant was quite inadequate.

It was proved against the appellant that he was registered at the relevant date under the Newspapers Ordinance as the printer and publisher in Colombo of the "People's Voice". He gave evidence, however, in his defence, and explained that he had in fact been absent in Jaffna almost continuously during the months of April and May, 1952, in promoting his own candidature and the candidature of other persons at the Parliamentary elections. He stated that he had made arrangements for the newspaper to be edited and published during his absence by someone else, and that he was quite unaware of the publication of the particular article referred to in the indictment until he returned to Colombo after the newspaper of 30th May, 1952, had gone out in circulation.

The learned District Judge accepted the evidence that the appellant had been absent from Colombo almost continuously during the months of April and May, 1952. Nevertheless, the learned Judge stated that he was "not at all satisfied with the evidence given by the accused that he

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was not privy to the publication of this particular newspaper ". On this basis, the learned Judge proceeded to hold " that the accused was the printer and publisher of the (defamatory) statement in question, and that he was guilty of the charge laid against him ".

It is unnecessary to analyse in detail the process of reasoning by which the learned Judge took the view that the commission of the offence had been brought home to the accused. Shortly stated, he assumed that, upon proof that a defamatory statement appeared in a newspaper of which an accused person was registered under the Newspapers Ordinance as its printer and publisher, the burden shifted to the defence to satisfy the Court that he was not criminally responsible for the publication of that statement. This assumption was based upon a suggested interpretation of section 7 of the Newspapers Ordinance which I am quite unable to accept.

In a prosecution for criminal defamation as defined by section 479 of the Penal Code, the burden is on the Crown to establish *inter alia :*

(1) that the accused made or published the particular imputation complained of ;

(2) that he did so with the requisite intention or knowledge.

If the defamatory imputation complained of appears in a newspaper of which the accused person was registered as its printer and publisher, section 7 of the Ordinance declares that the prosecution will have discharged the onus of establishing *the fact of publication* of the newspaper (and all its contents) by proving in evidence :

either (*a*) a copy of the particular newspaper in question duly signed by the accused person (as printer or publisher) and delivered to the Registrar-General (or Government Agent) as required by section 7

or (*b*) an unsigned copy corresponding to the authenticated copy " signed and delivered as aforesaid ".

In the former case, the proof of publication is irrebuttable, but in the latter case, the burden shifts to the accused to show that the unauthenticated copy " was not printed or published by him nor with his knowledge or privity ". In either case, however, the Ordinance raises no statutory presumptions as to the *intention* with which any particular statement contained in the newspaper had been published.

In the present case, the accused admittedly delivered to the Registrar-General, after he returned to Colombo from Jaffna, a signed copy of the newspaper containing the offending article. The *fact of publication* was therefore clearly established against him, but this by itself does not conclusively prove the other essential ingredients of the offence of defamation. It was necessary for the prosecution also to prove that the publication had been made with the requisite intention or knowledge specified in section 479. To this distinct and separate issue the judgment under appeal makes no reference, and is vitiated by the erroneous assumption that, as a matter of law, the burden had shifted to the appellant to satisfy the Court of his innocence.

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There is an important difference between the offence of criminal libel under the English common law and the offence of defamation defined by section 479 of the Penal Code of Ceylon. In England, the common law penalises not only a person who intentionally defames another but also a newspaper vendor who is an unconscious instrument in circulating libellous matter, or an innocent newspaper proprietor whose editor has (without the proprietor's privity or knowledge) defamed a third party.—*R. v. Holbrook* [1], *Emmens v. Pottle* [2]. In other words, criminal liability depends not on the intention of the defamer but on the fact of publication. In order to mitigate to some extent the rigours of this rule, a remedial Act was passed (*6 and 7 Vict. c. 96*) whereby an accused person who was *prima facie* vicariously liable for criminal libel could secure his acquittal by proving that the publication was not authorised by him and that he had not acted without due care and attention. The burden of bringing himself within this statutory exception is on the accused person.

In Ceylon, however, section 479 of the Penal Code makes the requisite criminal intention or knowledge an additional ingredient of the offence of defamation, and the burden of proving that ingredient remains throughout on the prosecution. No doubt the bare fact of publication, especially if it be unexplained, is an item of evidence to be taken into account on the issue of intention in the facts of a given case, and the presumption that a man intends the natural and probable consequences of his intentional acts may properly but cautiously be applied in a prosecution for defamation in particular instances. This presumption, however, is not a rule of law which a Court is bound to apply in every situation. Indeed, it does not arise at all unless the evidence justifies the inference that the prisoner had directly published the imputation complained of or knowingly authorised its publication.

There is no justification in Ceylon for casting upon a person charged with defamation the onus of negativing criminal intention, and the correct rule to be applied, *mutatis mutandis*, by a judge trying a case without a jury in such cases has been laid down in *R. v. Steane* [3]:

> " If the prosecution proves an act the natural consequences of which would be a certain result, and no evidence or explanation is given, then a jury may on a proper direction find that the prisoner is guilty of doing the act with the intent alleged, *but if, on the totality of the evidence there is room for more than one view as to the intent of the prisoner*, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist, *or they are left in doubt as to the intent*, the prisoner is entitled to be acquitted. "

The judgment under appeal is vitiated by misdirection because the issue of criminal intent has not been examined by the learned Judge with due regard to the burden of proof which remained throughout on the prosecution. Having regard particularly to the finding that the appellant was not in Colombo at the time of publication, it is not possible to say

[1] (*1877*) *3 Q. B. D. 60 and* (*1878*) *4 Q. B. D. 42.* [2] (*1885*) *16 Q. B. D. 354.*
[3] (*1947*) *K. B. 997.*

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that, if the learned Judge had properly directed himself on this issue, he could not reasonably have entertained a doubt as to whether this ingredient of the offence had been established by the prosecution. I would therefore quash the conviction and make order acquitting the appellant. In the result, the foundation of the application of the Crown to have the sentence enhanced has disappeared. The application in revision must accordingly be refused.

GUNASEKARA J.—I agree.

Appeal allowed.

1954 *Present :* **Gunasekara J. and Fernando A.J.**

S. D. S. GUNATILLEKE *et al.*, Appellants, *and* J. P. FERNANDO *et al.*, Respondents

S. C. 201–202—D. C. Colombo, 21,595

Rent Restriction Act, No. 29 of 1948—"Excepted premises"—Significance of date of assessment of annual value—Distinction between "residential premises" and "business premises"—Sections 2 (4) and (5), 13, 27—Regulations 1 and 2 of Schedule (prior to amendment).

(i) The annual value of certain residential premises situated within the Municipality of Colombo was assessed in November, 1941, at Rs. 2,750. The premises were, therefore, excepted premises within the meaning of Regulation 2 of the Schedule to the Rent Restriction Act. When the premises were let in May, 1949, and at the time of the institution of the present action to eject the overholding tenant, they were used as business premises.

Held, that the tenant was not entitled to claim the protection of the Rent Restriction Act on the plea that the annual value of the premises, regarded as business premises, did not exceed Rs. 6,000. The character of the premises that was material for the purpose of applying Regulation 2 was their character at the time of the assessment.

(ii) Premises were taken on rent by the proprietor of a school and used by him as a hostel for the students and a place of residence for the warden of the hostel and some of the teachers. The business of the school itself was carried on at another place.

Held, that the premises were "residential premises" within the meaning of section 27 of the Rent Restriction Act.

Hepponstall v. Corea (1952) 54 N. L. R. 214 and *Standard Vacuum Oil Co. v. Jayasuriya* (1951) 53 N. L. R. 22, considered.

APPEAL from a judgment of the District Court, Colombo.

H. W. Tambiah, with *O. S. M. Seneviratne* and *John de Saram*, for the 2nd defendant-appellant in 201 and the 2nd defendant-respondent in 202.

H. V. Perera, Q.C., with *N. M. de Silva*, *K. Herat*, *G. T. Samarawickreme*, *H. L. de Silva* and *K. Shinya*, for the plaintiff-respondent in 201 and the plaintiff-appellant in 202.

M. M. K. Subramaniam, for the 1st defendant-respondent in both appeals.

Cur. adv. vult.

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October 8, 1954. GUNASEKARA J.—

These appeals arise out of an action in the District Court of Colombo in which the plaintiff sued for the ejectment of the defendants from premises known as Knowsley, Bagatelle Road, Kollupitiya, upon the footing that the first defendant was an overholding tenant and the second and third were in occupation of the premises on behalf of the first, and for the recovery of damages from the first defendant at the rate of Rs. 750 a month, which was the agreed rent. The premises are situated within the Municipality of Colombo, where the Rent Restriction Act, No. 29 of 1948, is in operation. The defendants alleged that the premises had been let by the plaintiff to the second defendant and not to the first, that they were business premises to which the Act applied, and that the authorised rent was Rs. 287·25 a month. They also claimed in reconvention a sum of Rs. 8,668·10, made up of two sums alleged respectively to have been spent on necessary repairs to the premises and to have been paid on the plaintiff's behalf to his landlord's son so that the latter might be provided with a house without the plaintiff being ejected from the one of which he was the tenant. The learned district judge held that the premises had been let to the first defendant and not to the second, but that they were business premises to which the Rent Restriction Act applied and the plaintiff was not entitled to a decree for ejectment of the defendants and also that he was entitled to recover a monthly rent of only Rs. 302·50 as the authorised rent and not the agreed rent of Rs. 750. He rejected the claim in reconvention.

At the conclusion of Mr. Tambiah's argument in support of the second defendant's appeal, No. 201, we intimated to counsel that we saw no reason to interfere with the findings against which the 2nd defendant has appealed and we did not call upon counsel for the respondents in that appeal. Appeal No. 201 must be dismissed and the 2nd defendant must pay to the plaintiff respondent his costs of appeal.

No. 202 is an appeal by the plaintiff against the finding that the Rent Restriction Act applies to the premises and that the plaintiff is therefore entitled to recover only Rs. 302·50 a month as the authorised rent, and against the learned judge's refusal of the plaintiff's prayer for ejectment of the defendants.

The main contention advanced in support of this appeal is that upon the facts accepted by the learned judge the premises in question are excepted premises and the Act does not apply to them. It is provided by subsection (4) of section 2 that so long as the Act is in operation in any area its provisions shall apply to all premises in that area, not being excepted premises, and by subsection (5) that the regulations in the Schedule shall have effect for the purpose of determining the premises which shall be excepted premises. Regulation 2 of these regulations provides that any premises situated within the municipality of Colombo shall be excepted premises if the annual value of the premises, being residential premises, exceeds Rs. 2,000; or, being business premises, exceeds Rs. 6,000; and "annual value" is defined in regulation 1 as "the annual value of the premises as assessed for the purposes of any rates levied by any local authority under any written law during the

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month of November, 1941, or, in the case of premises first assessed or first separately assessed thereafter, such annual value as so first assessed or first separately assessed". In November, 1941, the annual value of the premises in question was Rs. 2,750, and the district judge has answered in the affirmative an issue as to whether at that time they were " residential premises within the meaning of the Rent Restriction Act, No. 29 of 1948 ". It is contended for the plaintiff appellant that the learned district judge having arrived at this finding should have held that the premises were excepted premises, for the reason that in November, 1941, they were residential premises the annual value of which exceeded Rs. 2,000.

The view taken by the district judge is that the character of the premises that is material is their character either at " the time of filing the action or it may be the time when the Court is required to make the ejectment order " ; and he holds that at the time of the institution of the action, and indeed even at the time of the letting (which was the 1st May, 1949), they were business premises, and consequently, as their annual value in November, 1941, did not exceed Rs. 6,000, that they are not excepted premises. He reaches this view upon a consideration of the provisions of sections 13 and 27 of the Act and the absence of any express provision for determining the character of any premises as " residential ", or " business " premises by reference to their character in November, 1941.

Section 27 provides that, unless the context otherwise requires, " ' residential premises ' means any premises for the time being occupied wholly or mainly for the purposes of residence ", and " ' business premises ' means any premises other than residential premises ". The learned judge, rightly if I may say so, holds that " the phrase ' for the time being ' . . . . is used to suggest the idea that the character of any particular premises must be considered with reference to different points of time depending on the circumstances of each particular case ", and that their character may change from time to time. A question that arises for decision then is at what time the premises must be residential premises so that they may be excepted premises as defined by regulation 2. The learned district judge takes the view that the answer is to be found in section 13 which, he points out, " provides that an action may be brought for the ejectment of a tenant of any premises to which the Act applies if the premises are in the opinion of the Court reasonably required for occupation as a residence for the landlord or for the purpose of his trade, business, etc. " ; and in which " there is nothing to prevent a landlord seeking to eject a tenant of business premises on the ground that he required such premises for occupation as his residence and *vice versa* ". He proceeds to hold " that one has to consider whether any particular premises are residential or business premises with reference to their use ' for the time being ', and so far as this action is concerned that section 13 provides that the material time is either the time of filing the action or it may be the time when the Court is required to make the ejectment order ".

The argument appears to be that the expression " for the time being " must, in the context of an action for the ejectment of the tenant, be taken to refer to the time at which it is sought to have him ejected, whether

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that time is the time of the bringing of the action or " the time when the court is required to make the ejectment order ". There would have been force in this argument if the question regarding the premises which the court had to decide in the present case had been merely whether they were residential premises. But the question was whether the annual value of the premies, being residential premises, exceeded Rs. 2,000 ; that is to say, whether the annual value of the premises as assessed during the month of November, 1941, being premises for the time being occupied wholly or mainly for the purposes of residence, exceeded Rs. 2,000. It seems to me that in the context of regulation 2 the expression " for the time being " in the definition of " residential premises " refers to the time of the assessment of the annual value. It appears also to be a reasonable view that the character of the premises that is contemplated in the regulation is its character at that time. In this view of the meaning of the regulation the same premises cannot be brought within or excepted from the operation of the Act from time to time by a mere change in the purpose for which they are occupied. It seems unlikely that the legislature intended the effect of enabling landlords or tenants of any class of premises to subject them to or exclude them from the operation of the Act at will ; but this effect has been achieved in respect of some premises if the learned district judge's construction of the enactment is its true construction. In my opinion the premises in question are excepted premises if they were residential premises in November, 1941.

It is contended for the 1st and 2nd defendants respondent that the evidence does not support the finding that the premises were residential premises in November, 1941. The evidence is that they had been let in 1940 to the proprietor of a school known as the Pembroke Academy, who used them from that time until the time of the air raid in April, 1942, as a hostel for the students and a place of residence for the warden of the hostel and some of the teachers. The business of the Academy itself was carried on at another place, known as Duff House, until those premises were requisitioned for military purposes at the end of 1941, and it was then moved to Knowsley in January, 1942. It is contended that according to this evidence the main use to which the premises were put in November, 1941, was the running of a hostel, and that therefore they were not occupied " wholly or mainly for the purposes of residence " and were not " residential premises ". The case of *Hepponstall v. Corea* [1], decided by Swan J. and L. M. D. de Silva J., was cited as supporting this contention. It was laid down in that case that in order to decide whether premises are residential premises " the character of the physical occupation of the premises judged by the use to which they are put by the tenant must be examined ", and that " if the character of the occupation so judged is ' wholly or mainly for residential purposes ' then the premises are ' residential premises ' ". It was held that judged by this test premises taken on rent for the purpose of running a boarding house and used by the tenant for that purpose and also to serve as a residence for herself were business premises. " There can be no doubt that the main use to which they were put was the running of a hostel. It is clear therefore that the premises were not occupied ' wholly or mainly

[1] *(1952) 54 N. L. R. 214.*

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for residential purposes ' and therefore they are not ' residential premises ' within the meaning of the ordinance. Consequently they are ' business premises '. "

In an earlier case, *Standard Vacuum Oil Co. v. Jayasuriya* [1], decided by Gratiaen J. and myself, we held that certain premises taken on rent by the Standard Vacuum Oil Company and used by it mainly as a residence for its manager, although some portion of its business was transacted there, were residential premises, notwithstanding that it was for the purposes of the company's business that it provided the manager with a residence. This case was distinguished in *Hepponstall v. Corea* [2] on the ground that in the latter case " business was conducted on the premises, and was the main purpose of its occupation by the respondent " (the tenant), while in the former " only a very small amount of business was conducted on the premises and the main purpose of occupation was residence". It seems to me that in the present case the whole purpose of the occupation of Knowsley in November, 1941, was residence, although it was for the purposes of the tenant's business at Duff House that he provided this place of residence for some of the students and the staff, and no part of the tenant's business was carried on at Knowsley. In my opinion, therefore, judged by the test laid down in *Hepponstall v. Corea* [2], the premises in question were residential premises in November, 1941.

For these reasons I hold that the premises are excepted premises. The appeal must be allowed and judgment entered for the plaintiff as prayed for in the plaint. The three defendants must pay the plaintiff's costs in the district court, and the 1st and 2nd defendants his costs of appeal. I would, direct, however, that writ of ejectment shall not be issued until the lapse of three months.

FERNANDO A.J.—

Having had the advantage of reading the judgment of my brother Gunasekara, I agree with the conclusions he has reached upon both appeals.

The Rent Restriction Act imposes various prohibitions and restrictions; for example, the amount of rent chargeable is regulated (Sections 3, 4, 5 & 6), the right of ejectment is controlled (Section 13), sub-letting without consent is prohibited (Section 9), advances and premia are forbidden (Section 8), the family of a deceased tenant is given the option to continue the tenancy (Section 18). But each of these different protective provisions only applies to " *premises to which the Act applies* ", an expression the meaning of which the Legislature has taken care to explain at the very commencement of the Act because the question whether any particular premises are governed by the Act is a fundamental one. The effect of sub-section (4) of Section 2 is that all premises in Colombo are premises to which the Act applies unless they are excepted premises, and sub-section (5) directs us to the Regulations in the Schedule, *which shall apply* for the purpose of determining whether any premises are excepted.

[1] *(1951) 53 N. L. R. 22.* [2] *(1952) 54 N. L. R. 214.*

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In the relevant regulation 2 in the Schedule, there occur two expressions, " annual value " and " residential premises ", which are assigned their meanings by regulation 1 and by Section 27 respectively, and when regulation 2 comes to be interpreted, those two expressions have to be given the meanings so assigned. Regulation 2 therefore (when considered in relation to premises in Colombo which existed in 1941) in effect provides that *any premises shall be excepted premises if the annual value thereof as assessed in November, 1941, in the case of premises for the time being occupied for the purposes of residence, exceeds Rs. 2,000.* In this context, there is no period of time mentioned, other than the period " November, 1941 ", to which the words " for the time being " can with reason be related ; and if any premises were at that time " residential " (as the learned Judge has found in this case), and if their annual value at that time exceeded Rs. 2,000, they are excepted premises and cannot be said to be premises to which the Act applies, whether for the purpose of Section 13 or of any other provision of the Act. This mode of construction is not merely the natural and logical one in a statute where the Legislature has assigned a meaning to an expression ; it has also the advantage that the important question whether the Act applies to any particular premises is determined with certainty by regulation 2, and does not receive different answers according as a Court or a landlord or a tenant is considering different sections of the Act. If the question is affirmatively answered by regulation 2, then the whole of the control is prima facie applicable ; if negatively, then the " control " is altogether inapplicable. As to this matter, I wish only to add that my opinion does not take account of the amendment of the Schedule to the Act which was passed at a time subsequent to the date of the institution of the present action.

The other question which we have to decide is whether premises which were occupied as a hostel or residence for persons in the employment of the tenant were premises for the time being " occupied wholly or mainly for the purposes of residence ". I agree with my brother that the test is the physical character of the occupation.

The Legislature has not in reality differentiated between *residential purposes* and *business purposes ;* the relevant definitions pose only the question whether the premises are occupied for the purposes of residence, and if not they are to be regarded as business premises whether or not they are actually business premises. Nor is the Legislature concerned with the character of the tenant's occupation. In my view therefore, the only issue to be determined is whether in fact persons actually " reside " (in the ordinary connotation of the word) in the premises or in the majority of the rooms which it comprises. If such is the case, the premises are residential within the meaning of the Act, and the circumstances in which the residents come to reside in the premises and their contractual relationships, if any, with the tenant, do not alter the character which the premises acquire by reason that persons reside there.

Appeal No. 201 dismissed.

Appeal No. 202 allowed.

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1954 *Present :* **Sansoni J.**

V. VISVALINGAM, Appellant, *and* D. DE S. GAJAWEERA, Respondent

S. C. 180—C. R. Colombo, 41,956

Landlord and tenant—Merger of titles—Effect—Right of tenant to dispute landlord's title—Meaning of "landlord" in rent restriction law—Rent Restriction Act, No. 29 of 1948, ss. 13 (1) (a), 26, 27.

Plaintiff-appellant had let certain premises to the defendant-respondent on a non-notarial document. Admittedly he was not the owner of the premises. He brought the present action to have the defendant ejected on the ground that rent was in arrears. Defendant pleaded that he had purchased from the owners a portion of the premises and taken on lease the remainder and that, consequently, the capacities of landlord and tenant had become merged in him.

Held, that even assuming that the defendant had become owner of the entire premises, it was not open to him to refuse to surrender possession to his landlord. He must first give up possession, and then it would be open to him to litigate about the ownership.

Meaning of expression "landlord" in sections 26 and 27 of the Rent Restriction Act considered.

APPEAL from a judgment of the Court of Requests, Colombo.

H. W. Tambiah, with *H. L. de Silva*, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for the defendant-respondent.

Cur. adv. vult.

October 13, 1954. SANSONI J.—

The plaintiff-appellant brought this action against the defendant-respondent claiming that rent was in arrears for four months. He claimed the amount due on this account and also asked for ejectment and damages. The defendant-respondent pleaded—

(1) that the plaintiff-appellant was not his landlord but only a rent collector for the owners ;

(2) that he had purchased from the owners through their attorney an undivided 1/3rd share of the rented premises prior to the filing of this action, and a further 5/18th share since the filing of the action ; and that he had taken on lease from the owners the remaining 7/18th share ;

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(3) that the effect of such purchase was to extinguish the contract of lease because the capacities of landlord and tenant merged in the defendant.

On the question whether the respondent was the tenant of the appellant the learned Commissioner held, in my opinion correctly, that he was. The tenancy agreement entered into between them concludes the matter. The appellant was not the owner of the premises ; he only claimed to have taken them on rent himself on an oral agreement entered into with the owner. Though section 26 of the Rent Restriction Act, No. 29 of 1948, on which the respondent's counsel relies seems to enable the owner in such a case to claim that he is the landlord of the sub-tenant, section 27 of the Act clothes the appellant also with the character of a landlord. The purpose of section 26 seems to be to create a class of statutory landlords consisting of persons who would not normally bear that character; they come into existence independently of any contracts made by them, and their tenants are also created for them by the same section.

I have heard interesting arguments urged on the second and third questions by counsel for the appellant and the respondent respectively, but I think this appeal should be decided on the law as laid down many years ago by Bonser C.J. and Withers J. in *Alvar Pillai v. Karuppen* [1]. In that case which is very similar to the present one the defendant was let into possession of the whole land in dispute by the plaintiff on a non-notarial document. When the terms of the letting expired the defendant refused to give up possession on the ground that he had acquired title to half the land from a third party. Bonser C.J. said, " Even though the ownership of one half of this land were in the defendant himself, it would seem that by our law, having been let into possession of the whole by the plaintiff, it is not open to him to refuse to give up possession to his lessor at the expiration of his lease. He must first give up possession, and then it will be open to him to litigate about the ownership (Voet 19.2.32.) ". The same rule based on the same passage in Voet is set out in Maasdorp, Institutes of Cape Law (4th Edition) Vol. 3, page 248—" A lessee, as already stated, is not entitled to dispute his landlord 's title, and consequently he cannot refuse to give up possession of the property at the termination of his lease on the ground that he is himself the rightful owner of the same. His duty in such a case is first to restore the property to the lessor and then to litigate with him as to the ownership ". I am not aware of any authority upsetting the rule enunciated in these passages. The earlier statement referred to in Maasdorp is at page 245 and reads :—" A lessee is not entitled, when sued, to dispute his landlord's title to the leased property, even though that title is invalid unless he has been evicted or been legally compelled to pay the rent to some one else ". This obviously relates to the defence of eviction by title paramount which is open to a tenant under our law too, for which " actual physical dispossession is not necessary, but the eviction may be constructive or symbolic ", as Jayawardene A.J. said in *Tillekeratne v. Coomarasingham* [2]. But there is no question of eviction by title paramount in this case, since the respondent's position is not that he has been

[1] *(1899) 4 N. L. R. 321.* [2] *(1926) 28 N. L. R. 186.*

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asked to pay rent to a third person under threat of eviction. The respondent is bluntly disputing hi landlord's title and he has refused to pay rent on the ground that he has acquired title to a share of the premises which he took on rent. He cannot be permitted to do this so long as he remains in possession, and if he ill-advisedly failed to pay the rent he is none the less in arrears of rent. This appeal therefore succeeds.

It would, on this finding, be illogical for me to examine the claim of the respondent to have acquired title to certain shares of the premises in question. That dispute—for the respondent 's claim to those shares is challenged by the appellant—can be gone into if and when an action is filed by the respondent to vindicate his title. I am, however, unable to uphold the defence of merger or *confusio* put forward by the respondent even assuming, without deciding, that he has purchased the shares he claims. It does seem correct to say that a contract of lease becomes extinguished " by merger of titles, as where the lessee becomes owner of the leased property " and Maasdorp (page 269) cites Voet 19.2.4 as authority for this statement. But I do not think that such a result follows when a lessee purchases only a share, and it may be only an infinitesimal share, of the leased property. He would still, I think, remain a lessee and there would still be a landlord, for in such a case there is not that " concurrence of two qualities or capacities in the same person, which mutually destroy one another ", which is the reason of the rule as given by Innes, C. J., in *Grootchwaing Salt Works v. Van Tonder* [1].

But even if there had been merger in this case, I do not think it will assist the respondent because he will still be bound to restore the rented premises to the appellant for whether the contract of tenancy is extinguished by expiration of the term or by notice to quit or by merger of titles makes no difference to the tenant's obligation to surrender possession before he litigates about the ownership. Voet's views on this obligation are unmistakable in the passage I have referred to. " Nor can the restitution of the thing hired be delayed by the conductor pleading the *exceptio dominii*, although he might be able easily to prove his own ownership, but he must by all means first surrender the possession and then litigate as to the proprietorship, especially when the lessor sues not by the ordinary *actio locati*, but under the interdict for recovery of possession, " (Berwick's translation, page 228). The learned translator's note draws attention to the English formula that a tenant cannot dispute his landlord's title.

For the reasons given by me earlier in this judgment I allow this appeal. The appellant is entitled to judgment against the respondent as prayed for in his plaint, with costs in this Court and the lower Court.

Appeal allowed.

[1] *(1930) A. D. 492.*

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1953 *Present :* **Nagalingam A.C.J.**

FONSEKA, Appellant, *and* CHANDRASEKERA (S. I., Police), Respondent

S. C. 893—M. C. Panadure, 29,338

Mischief—Bona fide *vindication of a right—Valid defence—Penal Code, s. 408.*

Accused was charged with committing mischief by breaking down a wall erected by the complainant two days earlier. The evidence showed that the accused demolished the wall in the *bona fide* belief that it obstructed a public cartway and that there was no spite or malice on the part of the accused.

Held, that the facts did not disclose the offence of mischief.

APPEAL from a judgment of the Magistrate's Court, Panadure.

Colvin R. de Silva, for the 2nd accused appellant.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

September 25, 1953. NAGALINGAM A.C.J.—

This is an appeal from a conviction entered on a charge of committing mischief by breaking down a wall. The facts, as found by the learned Magistrate, briefly are : One J. M. Perera, whom I shall hereinafter refer to as the complainant, for he is the aggrieved party, built what has been indifferently termed a parapet wall or retaining wall close to a house that he had constructed newly and across a path obstructing, not however the entirety of, it. The path was admitted by the complainant himself to be a public footpath, but he also admitted that the path had been used both by carts and cars, though he qualified that statement by saying that carts and cars had been taken along that path with his permission. The complainant had previously unsuccessfully attempted to obstruct the use of the path by carts and cars by putting up a coconut stump. The appellant on that occasion complained to the Headman of the obstruction and as the Headman himself took no steps he pulled out the stump and threw it out and made the path available for use by members of the public. The complainant limited the use of the path to members of four or five houses, which he said were all that were situate on this path, but his witness the Village Headman admitted there were at least twenty-five houses which were served by this path, and that evidence was supported by the incumbent of the Gangatilaka Arama who was called by the defence. There was also evidence led by the defence that cars and carts had been taken along the path without any permission having been obtained from the complainant.

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The learned Magistrate has expressed no view on the exercise of the right of user of this path by vehicles, for he took the view that whether the path had been used or not in that manner, that user did not affect the question he had to decide.

On the day in question, the appellant says, he was in a car, and from a distance he saw there was a crowd of about fifty or sixty people on the spot ; he came there and found that a short wall had been erected to a height of about a foot and a half across the path, leaving a gap of two feet and eight inches in the middle, so as to permit of pedestrian but not of vehicular traffic. The Headman was immediately contacted by the appellant and told that there was an obstruction along this road, but the Headman was apathetic. The appellant says that he thereupon informed the Headman that he proposed to remove the obstruction on the path and then proceeded to demolish it with the assistance of certain other persons, who had been charged along with him.

The question that arises is whether it can be said that in these circumstances the appellant committed the offence of mischief, having regard particularly to the question whether in causing the destruction of property he either intended to cause wrongful loss or damage or that he did so with knowledge that he was likely to do so.

That there can be neither such intention nor knowledge when the right in the exercise of which an act of alleged mischief is done is itself the subject of dispute and when the act that is done is itself in vindication of a right has been accepted by our courts—*Hendrick Sinno v. Engo Nona*[1]. Pereira J. also laid down in the case of *Porolis v. Romanis*[2] that " it is only where a person wantonly acts that he can be said to be guilty of mischief. In other words, as observed above, he should act spitefully, maliciously or wantonly."

If these principles are applied to the present case, it would be found that far from acting wantonly, spitefully or maliciously in order to cause wrongful loss or damage to the complainant, the act that the appellant did was for the purpose of restoring a right of path which had been in use for several years and which had been unlawfully obstructed by the complainant.

The learned Magistrate has asked the question whether it would be proper for a party to take the law into his own hands, and whether in circumstances such as these he should not resort to proper legal remedy. In regard to this the question may well be asked as to what the position would be if as a result of a civil action between the parties it be held that the path was a public cartway and that the complainant has no right to obstruct it. Would it then be proper to punish the appellant for what the law ultimately decides—that he as a member of the public could not have been prevented from using the cartway. While it is a sound principle that a man should not be allowed to take the law into his own hands, that principle must not be regarded as of universal application in every manner of circumstance. It has its own limitations.

[1] *(1914) 1 Cr. App. Reports 21.* [2] *(1913) 2 C. A. C. 163.*

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For instance, if a person found his gate opening on to the road barricaded, I think there cannot be the slightest doubt that he would be entitled to break down the barrier in order to get on to the road. It could not in those circumstances be said that he could not break down the barrier but that he must resort to other means to get out of his premises, even to make a complaint.

I find, however, one case which is very similar to the present, and that is the case of *Mohideen v. Suppramaniam Chettiar et al.*[1] decided by Fernando A.J. There a wall constructed by the complainant preventing access to a latrine was broken down by the accused. The conviction in that case was set aside on the ground that the facts did not disclose the offence of mischief.

In the present case, too, it cannot be said that the accused intended to do more than to assert a *bona fide* right of path which the members of the public had been in the habit of exercising for a number of years by removing an obstruction erected a couple of days anterior. There is nothing in the evidence to indicate that the demolition took place as a result of any spite or malice on the part of the appellant.

I therefore set aside the conviction and acquit the accused. Acting in revision I set aside the convictions of the other accused too in these proceedings and acquit them.

Appeal allowed.

1954 *Present :* **Sansoni J.**

NORTH-WESTERN BLUE LINE BUS CO., LTD., Appellant,
and GREEN LINE OMNIBUS CO., LTD., *et al.*,
Respondents

S. C. 1,245—Motor Traffic Appeal 138

Motor Traffic Act, No. 14 of 1951—Right of appeal to Supreme Court—Appealable period—Computation—Sections 210, 211, 212.

The appealable period of twenty-one days in section 212 (2) of the Motor Traffic Act runs from the date of the determination or order of the Transport Appeals Tribunal and not from the date on which notice of the determination or order is served on the appellant.

[1] *(1937) 8 C. L. W. 123.*

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APPEAL against a decision of the Transport Appeals Tribunal.

H. V. Perera, Q.C., with *H. W. Tambiah* and *S. Sharvananda*, for the appellant.

H. W. Jayewardene, Q.C., with *K. Shinya*, for the respondents.

Cur. adv. vult.

October 8, 1954. SANSONI J.—

This is an appeal filed under the provisions of section 212 of the Motor Traffic Act, No. 14 of 1951, against the decision of the Transport Appeals Tribunal dated 11th July, 1953. Mr. H. W. Jayawardene who appears for the 1st respondent has taken the preliminary objection that the appeal has been filed out of time and should be rejected on this account. The petition of appeal was filed on 11th August, 1953. I am dealing with the preliminary objection on the basis that the date of the decision under appeal is the date it bears on its face, and that the appellant company received on 25th July the notice in writing of the Tribunal's decision which was posted to it on 24th July.

Section 212 (2) provides that " the petition of appeal . . . . shall be presented to the Tribunal by the appellant within 21 days after the date of the Tribunal's decision against which the appeal is preferred ". Section 212 (4) requires the Tribunal to cause the petition to be transmitted to this Court, but only where the petition " is presented to the Tribunal in the manner and within the time specified in sub-section (2)". I have no doubt that if the petition was not filed within the prescribed time the appellant is not entitled to be heard.

Now section 211 (1) provides how the Tribunal should inquire into a matter coming up before it by way of appeal from any determination or order of the Commissioner of Motor Traffic. Then follow the provisions regulating the manner of giving the decision of the Tribunal, viz., section 211 (2)—" After the hearing of an appeal the Tribunal shall *give such decision* thereon as it may think fit ".

(3) " In every case where the decision of the Tribunal upon any appeal makes it necessary so to do, the Tribunal shall either make a fresh determination, or vary the determination of the Commissioner and issue all such directions as may be necessary to enable the Commissioner to give effect to the determination as so varied ".

(4) " In the event of any difference of opinion among the members of the Tribunal, the decision of the majority shall be the decision of the Tribunal ".

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(5) " The Secretary shall give notice in writing of the decision of the Tribunal upon any appeal to the appellant, to the Commissioner and to every other respondent to the appeal ".

(6) " Subject to the provisions of section 212, the decision of the Tribunal shall be final and conclusive ".

It was submitted for the appellant that the decision of the Tribunal does not become effective until it is formally given in the sense of being pronounced in the presence of, or otherwise communicated to, the parties, and the period of 21 days will commence to run only from the day it was so pronounced or communicated. Section 212 (2) is not, in my opinion, open to such a construction ; the words " the date of the Tribunal's decision " are clear and unambiguous. The phraseology is markedly different from that adopted in sections 184 and 754 of the Civil Procedure Code. Section 184 requires a Court to " pronounce judgment in open Court either at once or on some future day of which notice shall be given . . . . ". Section 754 requires a petition of appeal to be presented within a specified number of days " from the date when the decree or order appealed against was pronounced ". It will be seen on the other hand that the sub-sections of section 211 of the Motor Traffic Act contemplate a giving of the decision of the Tribunal to be followed by the Secretary giving notice of such decision to the parties to the appeal. It is not contemplated that the parties should have prior notice of the date on which the decision will be given. Nor again is it provided in section 212 (2) that the period of 21 days should run from the date on which the parties receive notice of the decision of the Tribunal. It seems quite clear from an examination of sections 211 and 212 that the calculation of the appealable time has nothing to do with " the date on which the parties receive notice of the decision ". To read the words " the date of the Tribunal 's decision " appearing in section 212 (2) as though they were " the date of service of notice of the Tribunal 's decision " would be to do far more than interpret the words. What is more, there are clear indications that the words were not intended to have that meaning if one considers section 210 which provides for the manner of preferring appeals to the Tribunal against any determination or order of the Commissioner. Section 210 (3) reads—

" Every statement of appeal shall be transmitted to the Secretary to the Tribunal within fourteen days of the service on the appellant—

(*a*) of notice of the determination or order against which the appeal is preferred, in a case where the notice sets out the reasons therefor ; or

(*b*) in any other case of the statement of reasons referred to in section 63 or section 97, as the case may be ".

Here then is a definite provision that the appealable period runs not from the date of the determination or order but from the service of notice of the determination or order. It is not for me to say why a distinction

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was drawn in the two cases, but a distinction plainly exists. I would point out, however, that if it takes the Secretary to the Tribunal from the 11th July to the 24th July to send out the written notice of the Tribunal's decision to the parties, a day may come when an aggrieved party who wishes to appeal against the Tribunal's decision will barely have time to peruse the decision if he wants to be sure of lodging his appeal within the prescribed time. Mr. H. V. Perera asked what the position of a party adversely affected would be if he received notice of the decision only after 21 days had passed. I am relieved that such a question does not call for an answer in this appeal. I would only add that delay in giving the notice is bound to cause hardship, and such delays should be scrupulously avoided.

I uphold the preliminary objection and reject this appeal. The appellant must pay the 1st respondent its costs.

Appeal rejected.

1954 *Present :* **Sansoni J.**

J. SAPI NONA, Appellant, *and* INSPECTOR OF POLICE, HORANA, Respondent

S. C. 287—M. C. Horana, 16,016

Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172)—Section 32—"Raw or prepared opium".

In a prosecution for possessing raw or prepared opium in breach of section 32 of the Poisons, Opium and Dangerous Drugs Ordinance it is sufficient for the complainant to establish that the accused had opium in his possession ; he need not give further particulars as to the species of opium.

APPEAL from a judgment of the Magistrate's Court, Horana.

R. A. Kannangara, with *Eardley Perera*, for the accused appellant.

E. H. C. Jayetileke, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 5, 1954. SANSONI J.—

The accused appellant was convicted upon a charge of possessing raw or prepared opium in breach of section 32, (Cap. 172). The point argued by her Counsel in appeal is that the only evidence regarding the substance found in her possession is to the effect that it was opium, without any further particulars as to what form the opium took and without any mention as to whether it was raw or prepared. This question has been raised

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before in two cases, viz. *De Neise v. Sambunathan* [1] and *Excise Inspector of Nattandiya v. Somasunderam* [2], decided in 1937. In both those cases the substance in question was merely described by the Government Analyst and the Excise Inspector as "opium" without any further details as to what particular species of opium it was. Both Abrahams C. J. and Soertsz J. examined the provisions of the Poisons, Opium and Dangerous Drugs Ordinance; they considered that the intention of the legislature was to prohibit the possession of opium of any kind and for this reason they held in those cases that it was sufficient for the prosecution to establish that the accused had opium in his possession.

I have been asked to reconsider the question in view of the wording of section 32 which mentions only raw or prepared opium. I have considered the matter carefully and I would follow the opinions of those two learned judges.

The appeal is dismissed.

Appeal dismissed.

[1] *(1937) 9 C. L. W. 116.*

[2] *(1937) 9 C. L. W. 130.*

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1954 *Present:* **Gratiaen J. and Fernando A.J.**

DR. P. J. CHISSEL, Appellant, *and* R. C. CHAPMAN, Respondent

S. C. 484—D. C. Colombo, 21,987M

Delict—Action for "injurious falsehood"—Dolus *or* animus injuriandi *is necessary ingredient—Negligence—Incidence of liability—Duty of care.*

If A, in discharge of a contractual obligation which he owes to B, makes to B a negligent but honest and non-defamatory statement in relation to a third party C, A is not liable to C for pecuniary loss sustained by him in consequence of the statement.

Cable and Wireless Ltd. employed the defendant, who was a medical practitioner, to examine the plaintiff and report whether the plaintiff, who had been accepted for service as a telegraphist-apprentice, was physically fit for permanent employment as a telegraphist. Defendant examined the plaintiff, but reported that he was unable to recommend him for service with the Company. As a direct consequence of this report, the plaintiff's engagement as an apprentice was abruptly but lawfully terminated by the Company. Plaintiff then instituted the present action claiming damages from the defendant. He alleged that he was perfectly fit for employment as telegraphist in Cable and Wireless Ltd., and that the defendant's unfavourable report was "due to gross negligence and/or incompetence". He made no allegation that the defendant had acted maliciously or dishonestly in the matter.

Held, that the action was not maintainable, even if the defendant's medical opinion concerning the plaintiff's suitability to undertake the duties of a telegraphist had been negligently arrived at.

Held further, that in regard to the question of negligence the law did not impose any duty of care on the defendant towards the plaintiff, other than the duty not to cause him physical injury.

Conflicting medical evidence discussed.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *S. J. Kadirgamar* and *B. S. C. Ratwatte*, for the defendant appellant.

E. G. Wikramanayake, Q.C., with *H. W. Jayewardene* and *P. Ranasinghe*, for the plaintiff respondent.

Cur. adv. vult.

June 25, 1954. GRATIAEN J.—

The defendant is a qualified doctor, possessing the degrees of F.R.C.S. (Edinburgh), M.R.C.S. (England) and L.R.C.P. (England). He has practised his profession continuously in Ceylon since 1910 except during a period when he served overseas in World War I.

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2——J. N. B 40779-1,952 (11/54)

On 22nd April, 1949, the plaintiff, then 18 years of age, was accepted for service as a telegraphist apprentice in the Colombo branch of Cable & Wireless, Ltd., subject to the terms of a written agreement which provided *inter alia* that his physical fitness must be certified by the Company's own medical officer, whose decision was to be accepted as final. Two senior executive officers gave evidence at the trial for the plaintiff. One of them explained that this certificate was an essential condition of membership of the Company's Pension Fund ; the other pointed out that, in addition, the exacting nature of a telegraphist's duties called for a high degree of physical and mental efficiency. The defendant had been the Company's medical officer for over 30 years, and was specially conversant with the standard of physical fitness required.

On 14th July, 1949, the plaintiff presented himself at the defendant's consulting room for his medical examination, which the defendant duly carried out in fulfilment of his own contractual obligation to the Company. It will be necessary to discuss at a later stage the precise nature of the legal duties which the situation imposed on him towards the examinee himself.

After a detailed clinical examination, the defendant sent a confidential report P5 to the Company to the effect that, although the plaintiff satisfied the requisite standard of health in other respects, his employment was not recommended because :

> " There is a very forcible impulse over the cardiac area. The heart is enlarged, the apex being outside the nipple area. There are no murmurs. Pulse rate was 108 per minute and the blood pressure was S 154 and D 70 ; at the second reading the S was 144. Applicant is an athlete which I think accounts for his hypertrophied heart. *I am unable to recommend him for service with Cable & Wireless, Ltd.*"

As a direct consequence of this report, the plaintiff's engagement as an apprentice was abruptly but lawfully terminated by the Company on 18th July, 1949, and he was unable to secure other employment for approximately six months. He has continuously thereafter been engaged in the service of the Bank of Ceylon, but there is no precise evidence upon which (on the issue as to damages) the Court could accurately compare his financial prospects in his new employment with those of a telegraphist in the firm of Cable & Wireless, Ltd.

The plaintiff's mother, Mrs. Chapman, was naturally distressed by the events which had taken place, and she arranged for the lad to be examined clinically at her own expense on 18th July, 1949, by Dr. F. J. T. Foenander (another well known practitioner in Colombo). Dr. Foenander certified that in his opinion " there was no evidence of functional or organic disorder of the heart nor was there any enlargement ". On 22nd July, Dr. H. O. Gunawardene (a distinguished cardiologist) also issued a report to the effect that " electrocardiagram and X-ray film of his heart revealed no abnormality ".

These fresh opinions were brought to the notice of the Company's branch manager by Mrs. Chapman, and he in turn communicated them to the defendant who volunteered to examine the plaintiff once again

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on 27th July, 1949. On this occasion, the lad's blood pressure was recorded at 150/70, and the defendant informed the manager orally that he saw no reason to revise his earlier opinion as to the lad's unfitness for service as a telegraphist. The Company therefore confirmed its original order of discontinuance.

These were the circumstances in which the plaintiff instituted the present action claiming damages from the defendant in a sum of Rs. 5,000. He alleged that he was perfectly fit for employment in Cable & Wireless, Ltd., and that the defendant's unfavourable report P5 (received by the Company on 15th July, 1949), was "due to gross negligence and/or incompetence". The plaint makes no allegation that the defendant had acted maliciously or dishonestly in the matter.

After the trial had very nearly been concluded, the (then) District Judge of Colombo was appointed to other duties at very short notice. Fresh proceedings thereupon commenced *de novo* (at additional expense to both parties) before the learned judge whose decision is now under appeal. He held that the report P5 was "substantially incorrect", and that the defendant had been guilty of gross negligence. The defendant was ordered to pay to the plaintiff a sum of Rs. 5,000. Incidentally, the award includes an unspecified sum by way of "sentimental damages" which are not recoverable in actions based on negligence.

The judgment has been criticised by Mr. Perera on a number of grounds. In particular, he submitted that the evidence was quite insufficient to justify the conclusion that the defendant had acted negligently; and that in any event no liability attaches under the Roman-Dutch law for pecuniary loss sustained by a person in consequence of incorrect statements (concerning him) made *negligently but honestly* by the defendant to someone else. The first of these submissions is, for obvious reasons, of special concern to the defendant who is jealous of his professional reputation. But the issue of law raised by Mr. Perera is of wider importance, and calls for a definite answer by this Court as to whether or not the learned judge has extended beyond legitimate limits the incidence of liability for negligence under the general law of Ceylon.

I shall first consider the question of law raised by Mr. Perera. What is the extent of a doctor's duty towards a person whom he is required (under a contract with that person's proposed employer) to examine for the purpose of expressing a confidential medical opinion as to the examinee's fitness to undertake employment of a particular kind? The contract certainly imposes on the doctor an obligation *towards the proposed employer* to exercise reasonable care and skill, but in my opinion his only obligation *towards the examinee* (apart from the obvious duty not to cause him physical injury during the examination) is to express an opinion which is honest. In such a situation, there is no contractual, fiduciary or analogous relationship between the doctor and the examinee which makes the doctor liable to the examinee for pecuniary loss arising from the communication of a negligent, non-defamatory but honest opinion to the proposed employer.

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Had the defendant made a defamatory statement to Cable & Wireless Ltd. concerning the plaintiff, he would of course have been liable in damages (not restricted only to pecuniary loss) in an *actio injuriarum* for defamation, provided that the plaintiff could have established express malice so as to defeat the plea of qualified privilege.

The *lex Aquilia* proper is concerned only with liability for acts which cause *physical injury* to person or property through fraud or negligence ; but, in order to meet the more complex situations which arise under modern conditions, the incidence of liability has also been extended to cases where *dolus*, as opposed to mere *culpa* (negligence), causes *pecuniary loss* to the aggrieved party. So, in the present case, if the defendant had, through some improper motive, expressed to Cable & Wireless, Ltd., even a non-defamatory opinion (which he knew to be wrong) that the plaintiff was physically unfit for service with the Company, he would without doubt have been liable to compensate the plaintiff for consequential pecuniary loss (though not, as the learned judge appears to have assumed, for sentimental loss as well)—*Van Zyl v. African Theatres*[1]. The elements of this actionable wrong are precisely similar to the prerequisites to an action " on the case " for injurious falsehood under the English common law.

It thus appears that a person in the position of the plaintiff would not have been denied a legal remedy if the doctor's incorrect opinion concerning him had been dishonestly expressed. The question is whether the law also protects him against the consequences of negligence unaccompanied by an improper motive.

In taking the view that the situation imposed on the defendant not merely an obligation towards the plaintiff to act honestly but also a duty to act without negligence, the learned judge purported to follow the ruling of Watermeyer J. in *Perlman v. Zoutendyk*[2]. That decision, however, was not concerned with a negligent false statement made by A to B concerning C, but with a valuation report negligently issued by A (a professional valuator) to B *knowing that it was intended to be used by B for the purpose of inducing C to act upon it.* Watermeyer J. held that the absence of contractual privity between A and C did not preclude C (*i.e.*, the person deceived) from suing A for pecuniary loss sustained in direct consequence of C (as intended and foreseen) having acted on the faith of the negligent valuation.

The judgment in *Perlman's case* (*supra*) proceeds on lines which bear a very close resemblance to the views expressed by Denning L.J. (concerning the English common law in a similar situation) in his notable dissent in *Candler v. Crane Christmas & Co.*[3].

If and when a case arises in our Courts where damages for pecuniary loss are claimed by a person who was actually deceived by another's negligent misrepresentation, it will be necessary to decide whethe

[1] (*1931*) *C. P. D. 61.* [2] (*1934*) *C. P. D. 151.*

[3] (*1951*) *2 K. B. 164.*

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Perlman's case should be followed in Ceylon. I observe that it has been criticised on more than one occasion by judges and distinguished academic lawyers in S. Africa. In *Alliance Building Society v. Deretich*[1], for instance, Berry J. adopted the more conservative view expressed 10 years later in England by the majority of the judges who decided *Candler's case* (*supra*). In *Western Alarm System v. Coini*[2], Jones J. and de Villiers J. found it unnecessary to resolve the conflict of authority, but were content to rule that, in either view, a negligent false statement was actionable *if made directly to the plaintiff* (*i.e., the person actually deceived*) *to whom the speaker or writer was bound by contractual relationship, with knowledge or notice that it would be acted upon.* In a more recent judgment, Malan J. decided that before liability can attach in an action founded on a negligent misrepresentation which takes the form of deceit, "*some special relationship* (between representor and representee) *must exist—contractual or fiduciary—or some special circumstances must exist which create a similar relationship* "—*Mrupi v. Hershall*[3]. This, in his opinion, is the only exception to the general rule that "independently of contract, a false representation causing damage is not actionable *unless fraudulent* "—*Dickson & Co. v. Levy.*[4]

The present state of these S. African authorities indicates that, even in an action under the Roman-Dutch law for damages instituted by someone who was actually misled by another's negligent misrepresentation, it is at least doubtful whether (and if so, to what extent) negligence by itself suffices to establish a cause of action. But there is certainly no precedent for applying the ruling in *Perlman's case* (*supra*) to the elements of an entirely different delict, conveniently described as "injurious falsehood".

The learned District Judge has also claimed support for his proposition in the judgments of the majority of the English Court of Appeal (Scrutton L.J. dissenting) in *Everett v. Griffiths*[5], followed by McCardie J. in *de Freville v. Dill*[6]. The principle laid down in those cases is that, notwithstanding the absence of contractual relationship between doctor and patient, the former is liable for damages caused by the latter's *physical detention* (under the Lunacy Acts) which was the inevitable consequence of a negligent report as to the patient's mental condition. I conceive that this would certainly be so under the Roman-Dutch law, because the *lex Aquilia* proper itself provides a remedy for causing physical injury either maliciously or negligently; compulsory detention in a mental institute obviously constitutes physical interference with the patient's right to his personal freedom.

The analogy of the "lunacy cases" does not lie where a plaintiff complains only of *pecuniary loss* resulting from a negligent statement concerning himself made by the defendant to a third party and acted upon by the third party to the plaintiff's detriment. In such a situation, the *ratio decidendi* of *Alliance Building Society v. Deretich* (*supra*) is precisely in point, and we have not been referred to any authority of the English or S. African Courts which takes a contrary view. Indeed,

[1] (*1941*) *T. P. D. 263.*
[2] (*1944*) *C. P. D. 271.*
[3] (*1953*) *3 S. A. L. R. 553.*
[4] *11 S. C. 36.*
[5] (*1920*) *3 K. B. 163.*
[6] (*1927*) *96 L. J. K. B. 1056.*

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Watermeyer J., who wrote the controversial judgment in *Perlman's case* (*supra*), has himself explained in *Van Zyl v. African Theatres Ltd.* (*supra*) that *dolus* or *animus injuriandi* is the true foundation of the action for " injurious falsehood ".

It is interesting to note that Atkin L.J. in *Everett v. Griffiths* (*supra*) at p. 213 discusses the kind of problem which has arisen in the present case. Dr. Chissel's duty to the plaintiff could clearly not be placed higher than that of a doctor who, in discharge of his contractual obligations towards an insurance company, examines a person proposing to take out a policy of life insurance with the Company. Lord Atkin contrasted that relationship with the situation of a doctor who is under a statutory duty virtually to decide whether a suspected lunatic should be detained in an asylum. Having first analysed the general duty of a doctor towards his patients, he explains :

> " In all the above cases *the duty to the patient may be negatived by contract express or implied, or by some circumstances that are inconsistent with the existence of such a duty.* A patient may be examined, for instance, by the medical officer of the insurance company ; it would, I think, be reasonably plain that *the patient submitted himself to examination upon the footing that the doctor owed the duty to take care, not to him, but to the insurance company.* "

The learned District Judge does not explain why he found it " difficult to follow the logic " of what Atkin L.J. had regarded as " reasonably plain ".

Denning L.J., whose other propositions found favour with the learned District Judge, has also remarked in *Candler's case* (*supra*) at p. 183 :

> " . . . . a doctor, who certifies a man to be a lunatic when he is not, is liable to him, although there is no contract in the matter, because the doctor knows that his certificate is required for the very purpose of deciding whether the man should be detained or not ; *but an insurance company's doctor owes no duty to the* (*proposed*) *insured person, because he makes his examination only for the purposes of the insurance company.* "

I find no trace of faulty logic in either of these pronouncements. Apart from other considerations, a contrary view might well result in the doctor's admitted duty to his own immediate employer coming into sharp conflict with his alleged contemporaneous duty to the " patient " concerned.

Let us suppose that, in a hypothetical situation, the doctor carelessly but honestly considers that the proposed insurance might *possibly* (but not *certainly*) be attended by some aggravated risk to the insurer. What then would be his duty ? To resolve the doubt in favour of the company to whom he was bound by contract, or in favour of the examinee to whom he was not ? The answer is obvious. The law does not favour a situation by which a person binds himself by contract to undertake conflicting duties : *a fortiori*, the law refuses to create the conflict.

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In England, " less timorous " common law judges sometimes find themselves free to invent a new cause of action to meet a new situation (if the problem is unembarrassed by binding precedent). But those of us who administer the Roman-Dutch law cannot disregard its basic principles although (on grounds of public policy or expediency) we may cautiously attempt to adapt them to fresh situations arising from the complex conditions of modern society. But we are powerless to alter the basic principles themselves, or introduce by " judicial legislation " fundamental changes in the established elements of an existing cause of action. It is in this respect that, in my opinion, the learned District Judge has erred.

Even in England, as Asquith L.J. pointed out in *Candler's case*, the *ratio decidendi* of *Donoghue v. Stevenson* [1] has never yet been applied where the damage complained of was not physical in its incidence to either person or property. The Australian Courts have also refused to extend Lord Atkin's " love thy neighbour " principle to the cases of a race-course judge who negligently fails to award the prize to the horse which actually won the race—see the decisions mentioned in an article in (*1948*) *11 Modern Law Review at pp. 31–2.* Similarly under the Roman-Dutch law, the race-course judge owes a contractual duty to his employer not to be negligent, but his only obligation to the owners of the horses is to exercise his judgment honestly on each occasion. Whether the patrons of horse-racing in this country ought to be more favourably placed than their Australian counterparts is entirely a matter for legislative decision; this problem certainly leaves no scope for the judges to " out-distance Atkin " or " out-Denning Denning " in the field of legal reform. In *Mrupi v. Hershell* (*supra*) Malan J. said at p. 553 :

> " Common sense fortifies the view that some limitation must be placed upon liability in damages for innocent non-defamatory statements negligently made, otherwise ordinary intercourse between individuals would be fraught with great danger, and a person in communicating with another would speak at his peril. "

As far as the delict of " injurious falsehood " is concerned, the limitations have long since been fixed and clarified by the basic principles of our general law.

In the present case, the honesty of the defendant's opinion was never in issue. Even therefore if the opinion which he communicated to Cable & Wireless Ltd. concerning the plaintiff's suitability to undertake the duties of a telegraphist had been negligently arrived at, this action would not have been maintainable.

In the view which I have taken, I see no necessity to examine in detail the issues of fact in the case, particularly as my brother Fernando has dealt fully with the charge of negligence in his separate judgment. I too am quite unable to attribute any degree of culpable negligence to the defendant's honest refusal to certify the plaintiff as fit to be employed

[1] (*1932*) *A. C. 562.*

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by Cable & Wireless Ltd. Dr. Gunawardene himself was not prepared to say that the defendant's opinion, even if incorrect, betrayed anything more than " at the most, an error of judgment ".

With regard to the allegation of negligence, we have enjoyed the special advantage of hearing the submissions of Mr. E. G. Wikremanayake who represented the plaintiff in both Courts. His argument on the facts may be summarised as follows :

1. The clinical finding on 14th July, 1949, that " the heart was enlarged, the apex being outside the nipple line " was demonstrably incorrect, and could not have been reached without gross carelessness ;

2. Although no legitimate complaint can be made against the original opinion based on the recordings of the plaintiff's blood pressure on 14th July, the defendant was forewarned at the date of the second examination on 27th July that two eminent doctors had specifically reported the absence of any symptoms of heart disease. In these circumstances, he was grossly negligent in adhering " obstinately " (and without sufficient further inquiry) to his earlier diagnosis ; in spite of his recording of a high systolic blood pressure on this occasion as well, he should have carefully carried out another clinical examination in order to locate the apex of the heart in relation to the nipple line ; and he should also have consulted Dr. Gunawardene (and perhaps Dr. Foenander) before arriving at a final decision adverse to the plaintiff.

As to the first complaint, I agree with my brother Fernando that the incorrectness of the defendant's clinical findings on 14th July, 1949, has not been demonstrably established. The foundation of this theory of negligence therefore disappears. The second ground of criticism suggests a counsel of perfection which might well have been observed if the defendant had been engaged (or had even gratuitously undertaken) to treat the patient for suspected heart disease ; similarly if it was his duty to give advice as to future medical treatment by another doctor ; so again, if he had been required to express an opinion as to whether, *from the patient's point of view*, the patient could safely join a strenuous mountaineering expedition. But no such professional duties were in fact undertaken either on 14th July or on 27th July, 1949.

As Lord MacMillan observed in *Donoghue v. Stevenson* (*supra*) : " The law takes no cognisance of negligence in the abstract ". My main difficulty, therefore, in approaching this part of the case is to fix some arbitrary standard of care on the false hypothesis that the situation did impose a duty on the defendant *vis a vis* the plaintiff. For not till then is it possible to consider whether he had in fact fallen short of the (assumed) standard.

I find myself on firmer ground when I address myself to the particular duty of care which the situation *actually* imposed on the defendant—namely, his duty *towards Cable & Wireless Ltd.* In this respect, I am perfectly satisfied that no negligence has been established against him.

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The company was not directly interested in the question whether Mr. Chapman was suffering from a disease of the heart. It was concerned only to obtain the defendant's professional opinion as to whether (*from the point of view of the company and of no one else*) Mr. Chapman's employment as a telegraphist and his admission to the privileges of membership of the Pension Fund were attended by undue risk. On that issue, the defendant was honestly satisfied that it would be unsafe to entrust the arduous duties of a telegraphist to a lad of 18 who, on three separate occasions within a fortnight, had (*for whatever reason*) registered an unusually high systolic blood pressure for a person of his age. Even Mr. Chapman's expert witnesses do not dispute that this was a point of view which a cautious medical man (employed only to protect the company's interests) might fairly and reasonably entertain. It necessarily follows that the particular situation did not impose on the defendant a duty to probe still further into the special causes underlying the phenomenon of the patient's high blood pressure. At the closing stages of the trial, the learned judge asked the defendant whether the plaintiff's high blood pressure might not be attributable only to " emotional stress ". The defendant pertinently replied that, even on that hypothesis, he still maintained that " the lad was not fit for the job ".

I have already explained why, in my opinion, the law did not impose any duty of care on Dr. Chissel towards Mr. Chapman. Even if I were wrong in that conclusion, it is obvious that *he could not have owned a higher duty to Mr. Chapman than he admittedly owed to Cable & Wireless Ltd.* Let us then assume that the law imposed on Dr. Chissel an obligation towards Mr. Chapman *not to fall below the standard of care which he owed to Cable & Wireless Ltd.* Even on this hypothesis, the present action fails.

Mr. Wikremanayake very fairly conceded before us that the alternative allegation of " incompetence " had not been established.

Before I conclude, I desire to make some general observations. The learned judge had clearly formed a very unfavourable impression of the defendant's attitude in the witness box. This is no doubt an opinion which an appellate tribunal ought not to ignore. My criticism, however, is that the learned judge's impression *of the witness* has unduly coloured his assessment of the defendant's sense of duty *as a professional man.*

The plaintiff (who gave his evidence with a commendable fairness and moderation) has himself described the courtesy with which the defendant behaved towards him in the quieter atmosphere of his consulting room. " Dr. Chissel was very cordial " he said, " he greeted me pleasantly and proceeded to examine me ". In those circumstances, there was really no need for the gratuitous theory that the defendant's " somewhat forbidding and frigid exterior " must have made a partial contribution to the plaintiff's systolic blood pressure on 14th July and 27th July. This is not one of those very rare cases in which it is relevant for a judge to record his personal opinion of a litigant's personal appearance.

Even the " bare written word " cannot wholly conceal from us the atmosphere that seems to have prevailed in Court at certain stages when the defendant's evidence was being recorded. He obviously lost

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his temper in the witness box, and in that state of mind he permitted himself to give some answers which, under normal circumstances, might well have justified a dignified judicial rebuke. But, in the present case, some allowance ought to have been made for the mitigating circumstances which attended the witness' verbal indiscretions. He was a professional man of long experience whose competence had previously been conceded to him by the plaintiff's expert witness Dr. Gunawardene. It is natural, therefore, to suppose that he must have deeply resented some of the insinuations which were made against him at the trial. I am content, by way of illustration, to mention only the disparaging question as to whether he had not received his Fellowship of the Royal College of Surgeons merely as a reward for war service (and not for passing the prescribed examination in the usual way). In this situation, it was quite unsafe to regard symptoms of a doctor's obstinacy in the witness box as positive proof of " perversity " and " arrogance " in his professional outlook.

I would allow the appeal and dismiss the plaintiff's action with costs in both Courts. From everybody's point of view, it is a pity that the case was not decided on the preliminary issue of law which went to the root of the matter.

FERNANDO A.J.—

I have had the advantage of reading the judgment of my brother Gratiaen on the important questions of law which have arisen in this case and I respectfully express my agreement with his conclusions. I would like only to add some brief observations on those questions.

The principle of liability recognised by the decision in *Donoghue v. Stevenson* [1]—a principle which is said also to prevail under the Roman Dutch Law—influences and sometimes compels a Judge, having regard to new situations and modern conditions, to hold in an appropriate case that a negligent act is actionable at the suit of a person to whom a duty of care would not formerly have been acknowledged to exist. But so far as I am aware no " bold spirit " has yet applied the principle in a case where its application would defeat the express protection afforded by both English and Roman Dutch Law to purely negligent misrepresentations made on occasions to which qualified privilege attaches. I therefore agree with Mr. Perera's contention that a modification of the existing law affecting communications made on privileged occasions, even if such modifications were desirable, can only be achieved by legislation and not by the exercise of the judicial function.

Apart from one or two judgments referring to the (hypothetical) case of an examination by a doctor of a proposer for life insurance, no decision which has been cited refers to the existence or scope of the duty which is owed in circumstances similar to those now under consideration. I note however that McKerron (Law of Delict, 1952 Ed., p. 16) accepts as good law a dictum of Cairns L.C. in *Robertson v. Fleming* [2] the report of which is unfortunately not available to me :—" I never had any doubt

[1] *(1932) A. C. 562.* [2] *(1861) 4 Macq. 177.*

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of the unsoundness of the doctrine . . . . contended for by respondent's counsel, that A employing B a professional lawyer, to do any act for the benefit of C, A having to pay B, and there being no intercourse of any sort between B and C—if through the gross negligence or ignorance of B in transacting the business, C loses the benefit intended for him by A, C may maintain an action against B, and recover damages for the loss sustained. If this were law a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed or attested. I am clearly of opinion that this is not the law of Scotland, nor of England, and it can hardly be the law of any country where jurisprudence has been cultivated as a science ".

This would seem to contradict the contention before us of counsel for the respondent that a proctor, who advises his client as to the validity of the title of a third party to a land which the client desires to purchase, would be liable to the third party if his negligent condemnation of the title causes pecuniary loss to the third party which could have been reasonably anticipated. If no duty of diligence is owed to the third party in such a case, I see no reason to think that such a duty existed in the present one, other of course than the duty not to cause physical injury by negligence.

I propose now to deal with the facts.

The defendant is a general medical practitioner with the qualifications of F.R.C.S. (Edinburgh), M.R.C.S. (England) and L.R.C.P. (London). At the relevant time, he had been in practice as such, for the most part in Ceylon, for 43 years. He had since 1913 been medical adviser to the Company known as Cable and Wireless Ltd., and as such, it was one of his functions to examine candidates for employment as telegraphists under the Company and to certify to their fitness for such employment. The form of application which has to be filled in by prospective candidates refers to the necessity for a medical examination by the Company's medical officer and to the fact that his " decision as to the fitness of the candidate is to be final ". The defendant has stated in evidence that he is well aware of the nature of the duties of the Company's telegraphists, that during one half of the year they have to work a six hourly shift at night time, that their duties involve severe concentration of mind in order to avoid errors in recording of telegraphic messages which they have to transmit and receive, and that a very high degree of physical and mental efficiency is therefore necessary. Plaintiff's witness, the present Manager of the Company, corroborated the defendant both on the matter of the latter's knowledge of the strenuous conditions attaching to the work of a telegraphist, as well as in the matter of the Company looking to the defendant and no one else for a report on the fitness of a candidate for employment. I may remark in passing that the learned Judge neither rejects the evidence as to the defendant's knowledge of the specially high degree of physical fitness which is required of the Company's telegraphists, nor takes that knowledge into account when considering the nature of the defendant's duty to the Company as medical adviser examining a prospective candidate.

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The minor plaintiff (whom I will for convenience refer to as the plaintiff) was admitted into the service of the Company as a probationer early in 1949 without an examination by the defendant, but subsequently he was one of a batch of fifteen young men who were sent to the defendant for examination, the latter being required to make his report on the usual form (P5) on which he makes his recommendation as to the fitness for the Company's service. (Some suggestion was made in the case for the plaintiff that the examination in this case was required for pension fund purposes and not in connection with his employment or continuation, but as the learned Judge has not considered this matter to have been of much importance it is unnecessary to deal with it). The plaintiff was examined by the defendant in the latter's consultation rooms on July 14th, 1949, being "pleasantly greeted" and "very cordially" treated by the defendant. The plaintiff's description of the nature of the examination conducted by the defendant leaves no room whatever to doubt either the defendant's evidence that he carried out an exhaustive clinical examination or his account of the various stages of the examination.

The defendant's evidence as to the results of his examination were as follows :—he noticed an impulse of the heart firstly on visual inspection ; then he located the apex beat of the heart by palpation ; he "came across the heart" by tapping it with the fingers (percussion) ; he found the heart enlarged, the apex beat being outside the nipple line (a vertical line passing through the nipple) ; he tested the blood pressure (a test he would not normally make in the case of a boy of eighteen) because of the condition of the heart noticed on palpation and inspection ; he found a pressure of 154 systolic and 70 diastolic ; he took a second blood pressure reading after letting the boy rest for a while and found the systolic pressure then to be 144. Upon these observations the defendant made his remarks in the report form (P5) : "there is a very forcible impulse over the cardiac area. The heart is enlarged, the apex being outside the nipple area. There are no murmurs. Pulse rate was 108 per minute and the blood pressure was S 154, D 70 ; at the second reading the S was 144. Applicant is an athlete which I think accounts for his hypertrophied heart. I am unable to recommend him for service with Cable and Wireless".

The report was transmitted by the defendant to the Company, whose Manager apparently read out to the plaintiff the contents of the "Remarks" column when informing him on 18th July, 1949, that he was discontinued from the Company's service. On the same day, the plaintiff had himself examined by Dr. F. J. T. Foenander who was informed (presumably by the plaintiff) that he had been physically condemned and that the defendant had reported an enlargement of the heart and high blood pressure. Dr. Foenander himself carried out an exhaustive clinical examination of a nature very similar to that conducted by the defendant. He found the blood pressure to be 120S/80D, the apex beat of the heart in its normal position within the nipple line, and the heart not enlarged "so far as he could see clinically". He therefore made his report to the following effect. (P3) "This is to certify that I examined R. C.

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Chapman on July 18th, 1949. His blood pressure was systolic 120, Diastolic 80. There was no evidence of functional or organic disorder of the heart nor was there any enlargement ".

Dr. Foenander advised the plaintiff to have an electro-cardiograph and an X-ray taken, not because he found anything suspicious in his examination, but because he knew that another doctor had taken a certain view with regard to the boy's heart condition.

The plaintiff has also produced a report from Dr. H. O. Gunawardene, then Radiologist of the General Hospital, Colombo, dated 22nd July, 1949, to the effect that the Electro cardiogram and the X-ray film of the plaintiff's heart " reveals no abnormality ". Dr. Gunawardene could not remember the particular occasion when the plaintiff came to him, and is not certain whether he himself took the Film but says definitely that he took the Electro cardiograph. Some attempt was made on behalf of the defendant to cast doubts on the accuracy of the X-ray film by suggestions that the mechanics who operate the equipment of the X-ray institute are not always efficient or careful and that care is not always taken to establish the identity of the subjects upon whom the reports are made. But the learned Judge has rightly considered himself entitled upon the evidence to assume that Dr. Gunawardene's report was based upon a film and cardiograph of the plaintiff's heart competently taken at the General Hospital.

The certificates given by Dr. Foenander and Dr. Gunawardene were handed by the plaintiff's mother to Mr. Whiteside who was then the Manager of the Company. He apparently spoke to the defendant about a second examination and instructed the plaintiff to present himself again before the defendant. The defendant confirms Mr. Whiteside's evidence on this matter and states that before the second examination he was shown the certificates given by the other two doctors. On this occasion (27th July, 1949) he found the blood pressure to be 150 S., and his entry in his day book is " failed ". The defendant states that no report form was sent to him or entered on this second occasion. Mr. Whiteside's evidence is that the defendant after the second examination confirmed his findings on the first examination and he states that " after the second report was received from the defendant he did not reconsider the employment of the minor plaintiff ". Mr. Kirby the present Manager of the Company cannot speak to a second report and states that the only report in the File is the first report (P5). The only inference that can be drawn from the evidence on this matter is that on the second occasion the defendant did communicate his opinion to Mr. Whiteside, but not by means of a written report, and that thereupon Mr. Whiteside finally decided that the discontinuance of the plaintiff would stand.

The plaint in this action alleges that *the report* (the only report referred to in the plaint is P5 of 15th July, 1949) was due to gross negligence and/or incompetence resulting in loss and damage to the plaintiff, and the learned District Judge has held this allegation to be proved. A re-consideration of the Judge's finding on the facts might be thought to be

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purely academic, in view of the opinion we have formed that negligence on the part of the defendant in this case, even if proved, does not in law render him liable in damages to the plaintiff. But where the professional reputation of a practitioner of long standing and experience has been not merely assailed by the institution of a civil action, but has been assailed in the course of long and forceful cross-examination, where he has been accused and found guilty not merely of gross negligence and incompetence, but also of conceit, arrogance, perversity, and incredible ignorance of the progress of medical science, where even his physical appearance, " his somewhat forbidding and frigid exterior ", has been the subject of adverse comment, where eminent counsel on both sides have in their arguments in appeal been much concerned with the question whether negligence has or has not been proved—in view of all these circumstances I consider that an appellate court should in the interests of justice closely examine the validity of the finding of negligence which the learned Judge has reached.

Before turning to a detailed consideration of the judgment and the evidence, it is relevant to note that the evidence in this case was first recorded by a Judge who however did not ultimately decide the case. He heard the evidence of all the plaintiff's witnesses on 3rd May, 1950, on 5th October, 1950 and 13th October, 1950 : on the latter date the plaintiff's case was closed and the defendant commenced to give evidence. In consequence of changes in personnel, the Judge who first heard the case ceased to be District Judge and was succeeded by the learned Judge whose judgment is now under appeal. It was agreed between Counsel that the evidence already led would be taken into account, with liberty for either side to recall and further examine or cross-examine. Hence it happened that both Doctors Foenander and Gunawardene were examined and cross-examined on two different occasions. This circumstance became of some importance, particularly with regard to the evidence of Dr. Foenander, because he appears on the second occasion to have acquired a fuller knowledge of text book opinions upon the matters to which he spoke than he had on the earlier occasion. This in no way reflects on Dr. Foenander's reliability as a witness, but on the contrary indicates a proper desire on his part to acquaint the Court with information which had not been conveyed by his earlier evidence. The opinions which Dr. Foenander must be taken to have held when he gave evidence on the first occasion did not diverge from those of the defendant to as nearly a high degree as did the opinions he expressed on the second occasion. I shall refer presently to the relevance of Dr. Foenander's earlier evidence upon the question whether the defendant's knowledge (or rather ignorance) of text book opinions should properly have been held to constitute negligence or incompetence.

The learned Judge has correctly directed himself that in the case of medical men duly qualified there is a presumption of competence and that accordingly, if the plaintiff is to succeed, the burden is on him to show that the defendant had been guilty not merely of negligence but also of incompetence. What we have to decide on appeal is whether the plaintiff has been correctly found to have discharged that burden.

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One matter upon which a very large volume of evidence was led and to which reference is made in a substantial part of the judgment is the conflict of medical opinion as to the blood pressure of the plaintiff, and the question whether a person whose blood pressure on 18th July was 120S/80D could have been observed on a reasonably careful and competent examination to have had a pressure of 154S/70D on the preceding 14th July. Counsel for the plaintiff in his closing address stated that he based nothing on the question of blood pressure except with regard to the question of blood pressure taken on the second occasion, that is when the plaintiff was examined a second time by the defendant. Counsel's meaning was that he did not press the issue of negligence in regard to the taking of the blood pressure on 14th July, 1949, and relied only on negligence in using an allegedly defective instrument on 27th July *after* there was reason to doubt its accuracy in view of the conflicting opinions of both Dr. Foenander and Dr. Gunawardene. I shall later consider the relevance in this action of any negligence in connection with the second examination on 27th July.

The learned Judge has not held and plaintiff's counsel has not argued that, in making his report on 14th July, 1949, the defendant was negligent in regard to his taking of the blood pressure or in the conclusion he formed upon the blood pressure as then found by him. I would say with respect that a finding against the defendant on this point would not have been justified by the evidence.

The case against the plaintiff therefore rests on his alleged negligence in diagnosing an enlarged heart, in locating the apex beat as being outside the nipple line, and in permitting this factor in conjunction with his observation as to the blood pressure to induce him to report that the plaintiff was unfit for service with the Company.

With regard to the alleged enlargement of the heart, the defendant's evidence is that he first noticed a forcible impulse over the cardiac area on his visual inspection of the plaintiff's chest. The existence of that impulse was confirmed by palpation. It was because he noticed such an impulse that he decided that it would be useful to take the blood pressure, which was ultimately done at the end of the examination. Dr. Foenander when questioned about this part of the defendant's evidence thought that what was meant was " forcible action of the heart which is more easily appreciated by the palpating hand ". Dr. Foenander also said that hypertrophy is an increase in the size of the heart associated with increased bulk of the heart muscle, and that gross enlargement of the muscle can be seen at once on clinical examination. Hypertrophy was apparently the condition which the defendant suspected on his observations by inspection and palpation, a condition which he decided to test by taking the blood pressure.

The defendant's evidence with regard to the placing of the apex beat is that he palpated the chest to locate the apex beat of the heart and thereafter percussed the heart by tapping with the fingers. Defendant stated that he had a special way of percussing " which is in his opinion

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infallible ". It is in evidence that the normal mode of percussion is to place the fingers of one hand over the area and to tap those fingers with the fingers of the other hand. Defendant said in examination-in-chief that he himself does the tapping directly and not over the fingers of the other hand. The learned Judge had very strong comments to make on this mode of examination : he makes no allowance for the defendant's admittedly long experience as a general practitioner and for the fact that the defendant's use of this special method would never have come to light but for the latter's own voluntary statement that he employed it : moreover the learned Judge formed the opinion that the defendant's method " would probably have been the early stage reached before the introduction of the present practice of placing one finger over the area percussed and striking it with two or three fingers of the other hand "—an opinion which is not based on evidence given by either Dr. Gunawardene or Dr. Foenander, and indeed appears to be contradicted by the latter's evidence that " there is nothing special in percussing the patient with one finger only ". If the Judge's finding that the defendant's method was an antiquated one is correct, then it involves a conclusion which I feel sure he neither could nor would have formed, namely that during the greater part of the 40 years during which the defendant has been in practice he has been incompetent in employing a method of percussing not known to qualified and experienced practitioners such as Drs. Gunawardene and Foenander admittedly are.

Thereafter the learned Judge proceeds to consider the adequacy of percussion as a means of locating the apex beat of the heart and he refers to certain opinions expressed in medical text books to the effect that percussion is a method highly liable to error and is regarded as obsolete—opinions by which the learned Judge himself appears to have been very much impressed.

The fact that the defendant has not read those text books, that he contradicted those opinions flatly and indeed rashly, and that he preferred to rely on his own experience, has weighed heavily in the mind of the learned Judge, and it is mainly this evidence which has led to his opinion that the defendant is arrogant and conceited. But it should be clear from the evidence given in this case by Drs. Gunawardene and Foenander, that the question whether a particular medical practitioner has been guilty of negligence cannot be answered against him merely on the score of his ignorance or disregard of the opinions which condemn the method of percussion. Dr. Gunawardene said that the apex beat is ascertained by palpation and percussion, that they are both matters of experience, and that the more experience a medical man has the more expert he becomes in placing the apex ; he also admitted that the defendant is extremely well qualified to examine the chest in that manner and that the examination in this case was made by a well qualified and well experienced practitioner.

Another passage in Dr. Gunawardene's evidence is worth reproduction in order to show the divergence of his views from those of text writers who appear to reject percussion out of hand as being dangerous and

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obsolete :—" The object of percussion is to map out the heart, that is to detect the extremities of the heart edge. The average practitioner will depend on percussing in order to assist him to map out the heart generally. As a matter of fact when I carry out a clinical examination I percuss to map out the heart very often. I have not given up that sort of examination and I have no intention of giving it up. I always do so in cases where I do not screen ".

Dr. Foenander's evidence is that he employed the same methods as the defendant in his clinical examination of the plaintiff's heart. He was satisfied from the palpation test that the apex beat was within the nipple line. In his view the object of percussing a patient's chest is to find any abnormality in the resonance :—" When you come to the heart you get a duller note because the heart is a more substantial organ than the lung. Percussion is for the purpose of finding out any abnormality in the resonance ". The inference is clear that when you notice the abnormality in resonance at a point outside the nipple line, there is an indication that the heart is where it should not normally be. Dr. Foenander himself employed the percussion test when he examined the plaintiff on July 18, 1949, with a view " to ascertaining whether he suffered from any functional or organic disorder of the heart " ; percussion was a regular item in his normal clinical examination and he agrees that percussion is very largely a matter of experience.

There is no mention whatever in Dr. Foenander's evidence on the earlier occasion of the danger or obsolescence of the method of percussion ; it is no answer to say, as might be said in regard to an ordinary witness, that no question was asked on this point, because one would rightly expect an expert witness, who is called to give evidence on the correctness of a diagnosis found upon a clinical examination of the heart, to refer to so important a matter of his own accord if he himself held unfavourable views as to the method of percussion at the time when he first gave evidence.

It was only when his evidence was (fortuitously) taken on the second occasion that Dr. Foenander expressed the view that " percussion in order to find out the condition of the heart is now obsolete ". At the same time, however, his own practice in cases similar to the present one, namely in examining proposers for life insurance on behalf of Insurance Companies, is to conduct only a clinical examination and not to require an X-ray examination before making his report ; if he is in doubt, he advises the Insurance Company to have an X-ray or cardiograph taken *if they wish to investigate further*. In the result many a proposal might well be turned down by an Insurance Company without X-rays or cardiographs being in fact taken to clear doubts raised by Dr. Foenander's clinical examination.

Having regard to the evidence of Dr. Gunawardene, as well as the earlier evidence of Dr. Foenander, my considered opinion is that, even if text writers have condemned percussion as a means of mapping out the heart and thus of estimating the size of the heart, there was no ground for holding that the employment of percussion by the defendant constituted either negligence or incompetence.

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Even on the assumption that ignorance or disregard of the opinions of recognised authorities would constitute negligence, the opinions which were put to the defendant in cross-examination do not justify the inference that it was palpably incorrect in a case like the present one to rely on palpation and percussion in finding cardiac enlargement. One passage reads " the position of the apex beat is the best clinical index, but cardioscopy must ultimately decide the extent and direction of the enlargement *for it is important to delineate the right and posterior borders of the heart* as well as the left border ". Again " Inspection, palpation and percussion are methods adequate on many occasions, *but sometimes inaccurate and sometimes not applicable* ". Thirdly, " This method of measuring the heart has much value if used reasonably . . . . *Very fantastic ideas* have been and *still are held* of the accuracy that can be obtained by percussion ". Fourthly, " Adherence to this traditional method of examination *can never advance our knowledge of cardiology* and since it inevitably deceives both teacher and student of clinical methods, *it may produce harmful effects* ". When these opinions are carefully examined it becomes evident *firstly* that they do not condemn the employment of the method of percussion in clinical examinations, *secondly* that they acknowledge the widespread use of the method by practitioners, and *thirdly* that they are in the nature of a crusade to correct the views of the many who (it is alleged erroneously) have confidence in the method.

The next point considered by the learned Judge is the failure of the defendant to have the plaintiff X-rayed in order to test or confirm the abnormality of the heart found by the defendant. He finds that the defendant was guilty of negligence of an aggravating character and almost of perversity by reason of his failure to order X-ray or screening *even though he* (the defendant) *had positive evidence that an X-ray* (Dr. Gunawardene's) *revealed no abnormality.* This finding and many of the Judge's more severe criticisms of the defendant refer to the second examination by the defendant and not to that of 14th July 1949 ; it is not a finding of negligence at the examination which preceded the report P5. Nowhere in the judgment is there a finding of negligence on the ground of making the report P5 without the confirmation by an X-ray or electro cardiograph. Even if there had been such a finding, it is doubtful whether such a finding would have been justifiable, because all that the defendant was required to do on 14th July, 1949, was to make a clinical examination of the plaintiff and furnish his report on the results of that examination—a task which he carried out to the letter. The Company was well aware, when notice of discontinuance was given to the plaintiff, that their decision to discontinue was upon a report based solely on a clinical examination.

I have dealt thus far with the findings of negligence or incompetence on the grounds of the employment of an invalid test and of the failure to employ a proper one. Counsel for the respondent also relied on the maxim *res ipsa loquitur*, not expressly referred to as such by the learned Judge. He holds that the defendant's diagnosis was wrong because he was guilty of a palpable error in locating the apex beat of the heart.

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The finding of " palpable error " appears to have been reached on the reasoning that Dr. Foenander on 18th July correctly diagnosed the apex beat to be normal and within the nipple line and that the X-ray and cardiograph correctly indicated absence of heart enlargement: that it was impossible for the apex beat to have actually been outside the nipple line on 14th July: that the defendant's observation on 14th July of a condition which was medically impossible was therefore palpably erroneous and must be held to have been attributable to negligence and/or incompetence.

The difficulty and indeed the danger in a case where the opinion of a defendant who is a professional man is contradicted by the evidence of professional colleagues is that a determination that the defendant's opinion was wrong comes to be regarded as decisive of the issue of negligence. But even on the assumption that the proposition *error = negligence* is a sound one to apply in the present case, the question to be first decided is whether the condition of the heart as found by the defendant on July 14th was a medical impossibility.

Dr. Foenander on the first occasion stated " there is the possibility of a reduction of a human being's heart within the space of three or four days. On one examination it will be found that there is an enlargement and on a subsequent examination a few days later it will be found that there is no enlargement ", and again " Q. In the case of a heart which is only slightly enlarged it is quite possible that it could be slightly enlarged on one day and three or four days later there was a reduction in the size ? A. Yes ". But on the second occasion he said that his former statement was not correct, and he also modified the former evidence by saying that the reduction in three or four days of the size of the heart " would only apply in the case of disease and not in a normal person ". Again, he said that the size of the heart could be reduced in three or four days, but the amount of the reduction can be appreciated only in a week.

Dr. Gunawardene on the first occasion said that *apart from illness* the condition of the heart as found by the defendant on 14th July " *is not likely* in view of my findings on 22nd July. *It is not usual* to get a thing like that ". Apart from illness *he did not think* the reduction was possible. In re-examination however he did state that reduction in a few days without illness " *could not be possible* ". On the second occasion Dr. Gunawardene's views are not expressed didactically; the furthest he went was to say " it can happen if a man has heart disease or some illness but not in the case of a normal person. It is a matter of opinion as to whether an enlarged heart can come to normal within a week but in the case of a normal heart there can be no variation within a week ".

Upon this important question of the likelihood of a change in the size of the heart during the relevant period, the several views of the two doctors called for the plaintiff, taken together, give us " possible " twice, " possible if there was some disease " also twice, " not likely ",

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" not usual ", " not possible without disease ", " not impossible "' " certain medical men hold that opinion " and " it is a matter of opinion ". The nature of the disease which might account for the reduction is not made clear in any of these opinions. On this evidence, there is ample reason to reach a finding of fact that it was *improbable* or even *very unlikely* that the condition found by the defendant on 14th July did actually exist on that day—but the evidence does not support a finding that the existence of that condition was an *impossibility*. And in my opinion it is only a finding of impossibility which would justify the application, in this case, of reasoning akin to that upon which the maxim of *res ipsa loquitur* is based. Obviously, if the condition was only improbable or very unlikely, the diagnosis of that condition cannot be said to be necessarily and presumptively erroneous, and proof would be required of the actual act or omission which constitutes the negligence complained of. Moreover, the learned Judge has held that the plaintiff was subjected to an exhaustive clinical examination by the defendant ; it is in evidence that the defendant does not normally take the blood pressure when examining in cases like the present ; he only did so because of his observation of a forcible impulse, and he did so a second time after an interval to check on the first reading ; his observation as to the pressure confirmed his earlier observations ; he questioned the plaintiff as to whether he had taken violent exercise ; he tested the eyes, the teeth, the throat, the stomach, the groin, the arms and knees, the urine ; all this is spoken to by the plaintiff himself. Given all these indications of a careful and conscientious examination, is it reasonable to suppose that the error, if error there was, in locating the border of the heart was attributable to carelessness *either* in palpating or percussing within the nipple line and thinking that the area tested was outside *or* in detecting a beat outside the nipple line when there was no beat there at all ?

Even on the assumption (which as just indicated has not beer shown to be applicable in this case) that the finding of the apex beat to be outside the nipple line on July 14th was a medical impossibility, there remains the question whether such a finding has necessarily to be attributed to negligence. This was in fact the principal ground upon which Counsel for th respondent relied at the agrument in appeal. He referred to passages in the evidence of Drs. Foenander and Gunawardene in order to show that in their opinion this question must be answered against the defendant. It was in this connection clearly established that the location of the apex beat is a simple matter for a person of experience, particularly in the case of a subject like the plaintiff who is proved to be thin. Dr. Foenander " did not think that he himself could have made a mistake in finding the apex of the heart " and " could not think of any reason for coming to a wrong conclusion, other than either carelessness or incompetence ". When examined in chief, Dr. Gunawardene was asked " is it a mistake that a doctor of experience could have made in the case of this boy ?". The recorded answer which is " likely " is disputed by Mr. Wikramanayake who is certain that the answer was " not likely ". Even the latter answer is not sufficiently definite to justify the presumption that the error in this

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case was a negligent one. Dr. Gunawardene on this point said in cross-examination " by an error of judgment a doctor can fail sometimes, but he ought not to ", and " I agree that at the very most it may be an error of judgment ". He also said that a failure to observe correctly " is due to inaccurate observation. It may also be due to carelessness ".

It was sought to explain that the expression " error of judgment ", when used by Dr. Gunawardene, did not carry with it the implication ordinarily attached to it that the error referred to was due to some cause other than negligence ; but Dr. Gunawardene's other evidence on this particular matter does not lend much support to this explanation, nor is there anything in his evidence to indicate that he uses common English expressions in senses unfamiliar to those who learned the language in the pre Swabasha days.

Dr. Foenander unequivocally attributes the alleged error in this case to negligence, but against this there are the much less stringent opinions of Dr. Gunawardene who has functioned as specialist in heart diseases for 30 years and has published a book on the subject. There is no need to determine, and indeed no means of determining, which of them is right and which wrong, but in the face of the disagreement on this point between the plaintiff's witnesses, it is obvious that for the purposes of a judicial decision on the question of negligence the opinions of the specialist must be preferred. I am of opinion therefore, that even assuming error in observation, the plaintiff has failed to prove negligence.

Dr. Foenander on the second occasion appeared to be somewhat more didactic in the expression of his views than was Dr. Gunawardene on either occasion. The learned Judge thought that the latter " was inclined to be a little more generous towards a fellow practitioner ", but the difference of attitude to my mind rests on a sounder basis. According to his evidence, Dr. Gunawardene appears to have had considerable experience, not only of radiology and heart disease, but also of cases of conflict of professional opinion ; and based on his latter experience are his remarks :—" If another medical man disagrees with my opinion, I would say that I am right, but I would not blame the other man for taking a different view and I would not always say that the other man is wrong ". These remarks are in my view a reflection rather of Dr. Gunawardene's professional opinions, than of his kindliness or generosity. I think therefore that more stress should have been laid on his evidence that the error was " at the very most an error of judgment".

For the reasons which I have tried to set out somewhat fully, I am of opinion that the finding of the learned Judge, that the defendant was guilty of negligence or of incompetence, or of both, in his examination of 14th July 1949 and in making his report P5 to the Company, cannot be sustained on the evidence and must therefore be set aside. Mr. Wikramanayake did not in appeal rely on the correctness

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of the finding of negligence on the ground of the employment of the percussion test, but I have referred to this matter in some detail because of the importance attached to it in the judgment.

The remaining ground relied on at the appeal in support of the finding of negligence was that the defendant, on the occasion of the second examination of the plaintiff *either* attempted again to locate the apex beat and did so negligently, *or* omitted to make such an attempt, an omission which itself constituted negligence in view of the certificates of the plaintiff's experts as to the condition of the heart. The first ground is not tenable, because there is nothing in the evidence to show that the defendant did attempt on this second occasion to locate the apex beat ; indeed the inference from the evidence both of the plaintiff and the defendant is that no such attempt was made. As for the second ground, the evidence is that the defendant took the blood pressure and finding it to be 150S decided that he would not change his earlier opinion as to the fitness of the plaintiff for employment by the Company. It will be remembered that on the first occasion also the defendant appears to have regarded the blood pressure test as confirming the possibility of an enlarged heart, and in addition there is his evidence that high blood pressure by itself even if due to nervousness or excitement would render the plaintiff unsuitable and unfit for the employment. Apparently all that the defendant intended to do when he agreed to make the second examination was to take the blood pressure and test his conclusion (as to fitness) upon it—a course which is not shown by the opinions of the plaintiff's experts to be an unreasonable one. The only justification therefore for holding the defendant to have been negligent on the second occasion would be a finding that since Dr. Foenander had previously read the blood pressure as being 120S and Dr. Gunawardene had pronounced upon the soundness of the heart condition, the defendant should have suspected some defect in his instrument and should have verified its accuracy before relying upon it. If the instrument used by the defendant had in fact been proved defective, one can appreciate the argument that he was negligent in having used defective equipment. But in the absence of any such proof of inaccuracy, it was only an inference of inaccuracy (to be drawn by reason of the different results found by the plaintiff's experts) which remained available to the learned Judge ; and this inference he was not entitled to draw, because both Dr. Foenander and Dr. Gunawardene did not definitely or even very strongly exclude the possibility of variations in blood pressure after short intervals of time.

I am of opinion that even if it was open to the plaintiff to rely solely upon negligence at the second examination as the basis of his present action, he has failed to establish that the defendant was negligent on that occasion.

I agree that the appeal should be allowed and the plaintiff's action dismissed with costs.

Appeal allowed.

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1954 *Present :* **Swan J.**

D. R. M. PANDITHAKORALEGE (Excise Inspector), Appellant, *and* V. K. SELVANAYAGAM, Respondent

S. C. 903—M. C. Point Pedro, 28,267

Indictment—Particulars—Mistake as to date of alleged offence—Effect of error—Criminal Procedure Code, s. 171.

The date given in the plaint of an alleged offence was stated to be "on or about March 28, 1954". The evidence led at the trial gave the date as March 29, 1954.

Held, that a mistaken date in an indictment is not a material error unless the date is of the essence of the offence or the accused is prejudiced.

APPEAL from a judgment of the Magistrate's Court, Point Pedro.

M. Kanagasunderam, Crown Counsel, for the Attorney-General.

No appearance for the accused respondent.

Cur. adv. vult.

October 28, 1954. SWAN J.—

In this case the accused-respondent was charged with possession of a preparation of the hemp plant commonly known as ganja under Section 28 read with Section 2 (2) and Section 76 (1) (*a*) of the Poisons, Opium and Dangerous Drugs Ordinance, an offence punishable under Section 76 (5) (*a*) of the said Ordinance.

The date given in the plaint of the alleged offence is stated to be *on or about* March 28, 1954. The accused-respondent pleaded not guilty and the case proceeded to trial. After the prosecution had closed its case it was pointed out that the evidence disclosed that the stuff was found on the 29th March, and the learned Magistrate acquitted the accused. From this order of acquittal the complainant appeals with the sanction of the Attorney-General.

The date in the plaint is obviously a mistake. In his evidence given on 12th May, 1954, the Excise Inspector mentioned the date as 28th March, 1954. That evidence was given with the object of obtaining an order for sending a sample to the Government Analyst for examination and report. In his evidence on the 23rd June, 1954, at the trial the Inspector gave the date as the 29th March. On the same day the Excise Guard in the course of his evidence gave the date as the 29th March.

Section 171 of the Criminal Procedure Code provides :—

"No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was misled by such error or omission."

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There can be no doubt that the accused was in no way misled by the mistake as regards the date in the plaint. In the case of *William Edward James* [1] it was held that a mistaken date in an indictment, unless the date is of the essence of the offence or the accused is prejudiced, need not be formally amended. In the course of his judgment dismissing the appeal the Lord Chief Justice referred to the judgment of Atkin J. in the case of *Dossi* [2] where it was held that from time immemorial a date specified in an indictment has never been considered a material matter unless time was of the essence of the offence.

I set aside the order of the learned Magistrate acquitting and discharging the accused. The case will be sent back to the lower court for retrial. The learned Magistrate who hears the case will note that the Section quoted in the charge is not correct. It should be 26 and not 28.

Acquittal set aside.

[1] *17 Criminal Appeal Reports 116.*

[2] *87 L. J. K. B. 1024.*

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1954 *Present :* **Rose C.J. and Sansoni J.**

D. S. JAYALATH *et al.*, Appellants, *and* ABDUL RAZAK *et al.*, Respondents

S. C. 65—D. C. (Inty.) Kandy, 2,259

Jurisdiction—Execution of proprietary decree—Right to challenge validity of decree—Civil Procedure Code, ss. 325, 394.

Execution proceedings to enforce a judgment are collateral to the judgment, and no inquiry into the regularity or validity of the judgment can be permitted in such proceedings.

In a suit between A and B, B died pending the action and B's devisees under his last will were substituted in his place. Subsequently decree was entered ordering A to be placed in possession of the premises which were the subject matter of the action. No appeal was filed against the judgment. When the Fiscal tried to execute the decree he was obstructed by C who had become a tenant of the premises under B during the pendency of the action and, later, under B's widow and the other substituted parties. In proceedings taken by the judgment-creditor under section 325 of the Civil Procedure Code it was contended on behalf of C that the Court had no jurisdiction to enter the decree it did because, under section 394 of the Civil Procedure Code, only the executor or administrator of the deceased B, and not his devisees, could have been substituted in the place of B.

Held, that even assuming that the judgment was based upon a misconception of the true legal position, it was not open to C to impeach the judgment for errors of law or irregularity in procedure.

Muheyadin v. Thambiappah (1945) 46 N. L. R. 370, distinguished.

APPEAL from an order of the District Court, Kandy.

N. E. Weerasooria, Q.C., with *C. Thiagalingam, Q.C.*, *H. W. Tambiah*, *E. D. Cosme* and *T. Parathalingam*, for the 1st to 4th respondents appellants.

H. V. Perera, Q.C., with *S. Sharvananda*, for the defendant petitioner respondent.

Cur. adv. vult.

October 11, 1954. ROSE C.J.—

This matter originated in an action against the present respondent by his father for a declaration that the respondent was holding certain properties in trust for the plaintiff and that the deed relating to the properties be declared null and void for the reason that they were revocable deeds of gift and had indeed been revoked by the plaintiff by deed P2 in 1947. Subsequently, before the determination of the action, the father of the respondent died and the proceedings were continued by the substituted plaintiffs who were substituted on an application made by the respondent and who claimed to be the original plaintiff's legal heirs. All the parties to the proceedings are Muslims.

7——LVI
2——J. N. B 41521-1,590 (12/54)

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On the 4th December, 1953, judgment was given in the District Court dismissing the action of the substituted plaintiffs and entering a decree in favour of the defendant-respondent in terms of paragraphs (*b*) and (*c*) of the prayer in his amended answer, that is to say, declaring that the respondent was entitled to the premises in question and ordering the ejectment of the substituted plaintiffs from the said premises.

The relevant part of the decree, which bears the date 4th December, 1953, states :—

> " It is further ordered and decreed that the defendant be and he is hereby declared entitled to the said premises.
>
> It is further ordered and decreed that the substituted plaintiffs be ejected from premises No. 132, Colombo Street, and 28, Peradeniya Road, Kandy, fully described and set out in the said schedule and the defendant placed in peaceful and quiet possession thereof ".

There was no appeal against that decree.

On 10th December, 1953, the respondent applied to the Court for execution of the decree, and his application was allowed. Writ of possession was issued on the following day against the substituted plaintiffs. When the Fiscal's Officer went to the premises in question the 1st, 2nd, and 3rd appellants stopped execution of the decree by signing the document R1 dated December 14, 1953, which was in the following terms:—

> " We the undersigned do hereby agree to quit and vacate and give peaceful possession on or before the 21st December, 1953, and without causing any damage to premises No. 132, Colombo Street, Kandy, failing which we agree to be ejected forthwith. We shall not raise any objection to the writ or take any further time but undertake to give over possession. Writ is not to be executed till then ".

The very next day the 3rd respondent filed papers in Court claiming to be allowed to remain in possession on the ground that he was not bound by the decree. His application was dismissed as he had not been ejected, but it indicates his state of mind when he signed the undertaking R1.

When the 21st December, 1953, arrived the 1st, 2nd and 3rd appellants broke their undertaking, which they probably never intended to honour, and continued in possession. When the Fiscal tried to execute the writ on 23rd December, he was obstructed by all four appellants whereupon the respondent made an application under Section 325 of the Civil Procedure Code. The appellants pleaded in their statement of objections that they were formerly the tenants of the original plaintiff and later became the tenants of his widow and the other substituted plaintiffs in November, 1953. They attacked the decree as invalid and therefore incapable of execution. This application resulted in an order of the District Court dated 10th February, 1954, ordering the respondent, as judgment creditor, to be placed in possession of the premises in question. It is of this order that the appellants now complain.

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So far as the facts are concerned, it is to be noted that the original action by the deceased plaintiff was instituted in December, 1947. The present appellants concede in an affidavit that their occupation of the premises began on the 1st January, 1950.

The appellants contend that the decree dated 4th December, 1953, is bad in law, because section 394 of the Civil Procedure Code has not been complied with by the Court in bringing the substituted plaintiffs on the record. It was submitted that only the executor or administrator of the deceased plaintiff could have been substituted in his place, whereas the persons substituted are devisees under his last will. From this it was sought to argue that the Court had no jurisdiction to enter the decree it did, and such decree must therefore be treated as a nullity. Be that as it may the decree has not been set aside by a superior Court and it seems to me to be idle to argue that, whether or not the decree is mistaken, the District Court had no jurisdiction to enter it. Assuming, but not conceding, that the judgment of the District Judge is based upon a misconception of the true legal position, it still seems to me that the matter is covered by the principle laid down in *Malkarjun v. Narhari & another*,[1] where Lord Hobhouse says at page 348 :

> " In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right ; and if that course is not taken the decision, however wrong, cannot be disturbed."

This is not a case on all fours with the case of *Muheyadin v. Thambiappa*[2] on which the appellant's counsel strongly relied. In that case Cannon J. decided that when in a preliminary proceeding before action is filed a Court appoints the heirs of a deceased mortgagor to represent his estate, although there is no proof that the mortgaged property did not exceed Rs. 2,500 as required by section 7 (2) of the Mortgage Ordinance, Cap. 74, the Court is acting without jurisdiction. But it is important to note (1) that the validity of the order of the Court was not challenged in execution proceedings in the same action but in a separate action, (2) that the separate action was filed by a third party who, as Cannon J. points out, was a stranger to the earlier action and was not bound by it, (3) that the action was brought after the Court had made an order appointing a legal representative to represent the estate of the deceased mortgagor. In all three respects that case differs from the present one.

On the first point the present appellants are seeking in execution proceedings to attack the validity of a decree which still stands, and this they cannot do because, as the Judicial Committee observed in *Girish Chunder Lahiri v. Shoshi Shikheveswar Roy* [3] " in execution proceedings we are only construing the decree and not considering its merits ". The principle is also well settled that " a proceeding to enforce a judgment is collateral to the judgment, and therefore no enquiry into its regularity

[1] *25 I. L. R. (Bombay) 338.* [2] *(1945) 46 N. L. R. 370.*
[3] *27 Cal. 951.*

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or validity can be permitted in such a proceeding ". Windham J. no doubt had this principle in mind when he decided *Chinnathamby v. Somasundera Aiyar* [1]. In that case too the Fiscal was obstructed by certain persons when he went to execute a decree ; they were not parties to the action, and when the decree holder made an application under section 325 of the Code and the matter came up for inquiry the obstructors raised objections to the regularity of the original action. The District Judge upheld the objections and dismissed the action. In appeal Windham J. said " Now section 327 of the Civil Procedure Code requires the petitioner's (plaintiff's) petition of complaint to be ' numbered and registered as a plaint in an action between the decree-holder as plaintiff and the claimant as respondent ', and it further requires the Court to ' proceed to investigate the claim in the same manner and with the like power as if an action for the property had been instituted by the decree-holder against the claimant '. But these words, though no doubt they require the investigation to be treated as if it were a ' fresh action ' (and on that point I concur with what was said in *Fernando v. Fernando* [2]) cannot in my view reasonably be construed as placing the plaintiff—the decree-holder—in the position of having to comply with all the technical requirements of the Civil Procedure Code, non-compliance with which might prove fatal to an actual fresh action brought by him. Nor is there any question of his having to show a ' cause of action '. It is sufficient that he is the holder of a decree for the possession of the immovable property. Section 327 merely says that the claim shall be investigated as if it were an action by the decree-holder against the claimant. But it is the claim (i.e., the case of the person offering resistance to the decree) which is required to be investigated, and not the decree-holder's own right. For he holds the decree, and the onus is on the claimant to support his claim as against that decree. Accordingly I think the learned Judge of the District Court erred in dismissing the plaint on issues 9 and 10, i.e., on the ground that the plaintiffs had no cause of action or had no right to maintain their action. The very decree which they held gave them that right ".

The second point on which I would distinguish this case from that decided by Cannon J. is also important. In that case it was the administrator of the deceased mortgagor who filed a separate action asking for declaration of title to the lands of the deceased which had been bought by the mortgagee in execution of the decree. That is a very different position from the one we are faced with in this appeal. It is not open to the substituted plaintiffs to attack the decree from which they filed no appeal and it is not open to those claiming rights through them, viz., the appellants, who became their tenants pending the action, to attack it either.

The third point of difference is that in this case, unlike the case decided by Cannon J., the Court had already validly assumed jurisdiction while Cannon J. thought that in the case decided by him " in the absence of evidence of the value of the mortgaged property the Court had no jurisdiction to appoint a person to represent the deceased mortgagor and

[1] *(1947) 48 N. L. R. 515.* [2] *(1923) 24 N. L. R. at p. 505.*

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therefore his estate was in law not represented in the action on the bond ". He cited in support of his decision the dictum of Lord Esher M. R. in *The Queen v. The Commissioner of Income Tax* [1] :—" It (the legislature) may in effect say that if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. Then it is not for them conclusively to decide whether that state of facts exists, and if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction ".

But the case we are dealing with is different. The passage quoted by Nagalingam J. in *Marjan v. Burah* [2] is more to the point : " After a Court has acquired jurisdiction as well as a right to decide every question arising in the case, and however erroneous its decision may be, it is binding on the parties until reversed or annulled. Here we have a competent Court with admitted jurisdiction of the subject matter and the parties, with full power and authority to decide all questions arising in the case, and it is sought to impeach the validity of its decree because forsooth it was mistaken either as to the law applicable to the facts before it or to the facts themselves ". Nagalingam J. went on to say " The principle is so well settled that it is said to be an axiom of law that when a Court has jurisdiction of the subject matter and the parties its judgment cannot be impeached collaterally for errors of law or irregularity in practice ".

The appeal, in my opinion, is misconceived and must be dismissed with costs.

SANSONI J.—I agree.

Appeal dismissed.

1954 *Present :* **Weerasooriya J. and de Silva J.**

CENTRAL UNION INSURANCE CO., LTD., Appellant, *and* BOTEJU, Respondent

S. C. 93—D. C. (Inty.) Colombo, 15,414 S

Liquid claim—Summary procedure—Instrument must bear stamp—Civil Procedure Code, ss. 703, 705 (2), 706.

A condition precedent to the issue of summons in an action by summary procedure on a liquid claim is that the document on which the action is based should be properly stamped, as required by section 705 (2) of the Civil Procedure Code.

[1] *(1888) 21 Q. B. D. 313.* [2] *(1948) 51 N. L. R. 34.*

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APPEAL from an order of the District Court, Colombo.

L. G. Weeramantry, for the defendant appellant.

J. C. Thurairatnam, for the plaintiff respondent.

Cur. adv. vult.

October 27, 1954. WEERASOORIYA J.—

This is an appeal filed by the defendant Company against an order made by the learned District Judge under s. 706 of the provisions in Chapter 53 of the Civil Procedure Code relating to summary procedure on liquid claims, giving leave to the defendant-appellant to file answer on furnishing security in a sum of Rs. 5,000.

The plaintiff-respondent sought in this action to invoke the provisions of Chapter 53 in order to obtain judgment against the defendant-appellant on a document marked " A " and annexed to the plaint. The document in question which is dated the 1st August, 1953, and addressed to the plaintiff-respondent by the defendant-appellant is in the following terms :—

" Dear Sir,

This is to confirm that we owe you Rupees nine thousand three hundred and forty-seven and cents nine only (Rs. 9,347·09) up to this day, which sum we propose to pay you at an early date.

Yours faithfully,

The Ceylon Union Insurance Co., Ltd. "

It would appear that prior to the date on which this document was written there were certain transactions between the plaintiff-respondent and the defendant-appellant mostly in the nature of loans arranged by the plaintiff-respondent for the benefit of the defendant-appellant, and on the 1st August, 1953, the plaintiff-respondent forwarded a statement marked X2 to the defendant-appellant claiming a sum of Rs. 9,927.50 due to him on these transactions. The document " A " is said to have been written by the defendant-appellant with reference to this claim, and according to that document the defendant-appellant admitted liability in the sum of Rs. 9,347·09 only, which is less than the amount claimed in X2. The defendant-appellant subsequently sent to the plaintiff-respondent the letter X3 dated the 4th August, 1953, which is in the following terms :—

" Dear Sir,

Further to our letter of the 1st August, 1953, we have now to point out to you that the amount Rs. 9,347·09 mentioned in our letter is incorrect.

However, we will send you a statement of accounts early after checking up the accounts.

Yours faithfully,

The Central Union Insurance Co., Ltd. "

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There is no evidence whether a statement as promised in paragraph 2 of X3 was sent by the defendant-appellant. This action was filed on the 2nd October, 1953.

The learned District Judge in making the order appealed from held that the document " A " is " a contract in writing for a liquidated amount of money " within the meaning of s.703 in Chapter 53 of the Civil Procedure Code and that the plaintiff-respondent could sue on it by way of summary procedure.

Learned counsel for the defendant-appellant cited to us the case of *Sabapathipillai v. The Jaffna Trading Co.* [1] where it was held by de Sampayo J. (Schneider J. agreeing with him) that the instrument or contract in writing for a liquidated amount of money referred to in s. 703 must be of the same nature as the documents referred to immediately before in that section, namely, a bill of exchange, promissory note or cheque, and that under s. 705 the Court is required to satisfy itself that the instrument is properly stamped before it allows summons.

In the present case it cannot be contended that the document " A " is in the nature of a bill of exchange, or a cheque. Whether it is in the nature of a promissory note seems to me to be extremely doubtful since according to Chalmers on Bills of Exchange [2] a document to constitute a promissory note must be such as to show the intention to make a note, a rule which is based on the view that parties are not precluded from making written contracts relating to the payment of money, other than bills and notes ; and from the document in question and the circumstances, as already set out by me, in which it came to be written, and also from the subsequent letter X3, it would seem that the defendant-appellant did not intend it to serve as a promissory note.

It is however not necessary to decide the question whether the document " A " is in the nature of a promissory note because the order made by the learned District Judge is shown to be incorrect on another ground. Even assuming that this document is in the nature of a promissory note s.705 (2) of the Civil Procedure Code requires that it should appear to the Court to be properly stamped before issuing summons. As pointed out by de Sampayo J. in the case of *Sabapathipillai v. The Jaffna Trading Co.* (supra), this is a condition precedent to the issue of summons. The document " A " bears no stamp at all and it is not contendend by learned counsel for the plaintiff-respondent that if it is a document of the nature referred to in s.703 it is not liable to any stamp duty at all.

The order of the learned District Judge is, therefore, set aside and the case is remitted to the lower Court so that a date may be given to the defendant-appellant to file answer unconditionally. The plaintiff-respondent must pay to the defendant-appellant the costs of this appeal and of the inquiry in the Court below.

DE SILVA J.—I agree.

Order set aside.

[1] *4 C. L. Rec. 210.*

[2] *11th Ed. p. 261.*

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1954 *Present :* **Nagalingam S.P.J.**

M. P. S. SHAHUL HAMEED, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 988—Application No. D765

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 6, as amended by Act No. 45 of 1952, s. 2 (2) and (3)—Acquisition of citizenship—Applicant's wife—Proof of her uninterrupted residence in Ceylon.

In an application made by a person, under the Indian and Pakistani Residents (Citizenship) Act, for the registration of himself and his family as citizens of Ceylon, the applicant, who had married in India on February 24, 1941, showed that his wife did not join him in Ceylon earlier than June 3, 1942, owing to apprehension of enemy action and by reason of the special difficulties created by the existence of a state of war.

Held, that the applicant was entitled to claim the benefit of the provision contained in the last paragraph of section 6, as amended by Act No. 45 of 1952.

APPEAL from an order of the Deputy Commissioner for the Registration of Indian and Pakistani Residents.

N. K. Choksy, Q.C., with *C. Shanmuganayagam*, for the applicant-appellant.

M. Tiruchelvam, Crown Counsel, for the respondent.

Cur. adv. vult.

November 29, 1954. NAGALINGAM S.P.J.—

This is an appeal under the provision of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949 from an order of the learned Deputy Commissioner rejecting the application of the Applicant for registration of himself and of his family as citizens of Ceylon. There are a few salient facts which are undisputed. Admittedly, the plaintiff's father was resident in Ceylon for several years and had been contractor to the Dehiwela-Mt. Lavinia Urban Council for the supply of meat. The Applicant has since his father's death in 1937 been and is contractor to the Council and has resided within its area.

Mr. L. V. Gooneratne, a prominent citizen of that area, states that he has known the applicant for the last thirteen years and in his own mind has looked upon him as part and parcel of Ceylon.

The Applicant lives in his own house in Dehiwela and is possessed of immovable property to the value of Rs. 25,000 besides owning the meat business. It is true he is also possessed of property of about the same value in India, but has no business interests there. On the 24th February

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1941, he got married in India ; the wife continued to remain in India while he returned to Ceylon within five months of the date of his marriage. His first child was born in India on the 19th January 1942, and on the 3rd June 1942 the wife and child joined him in Ceylon. The second child was born on 1st January 1943, while the third in India and the subsequent children have all been born in Ceylon. The present Chairman of the Urban Council who is the M. P. for the area states that the Applicant is personally known to him since 1942 and that he has been residing with his family continuously since 1942.

On the 12th June 1951, the Appellant made his application for registration. On the 6th August 1953, that is to say, more than two years after the application, the learned Deputy Commissioner notified the Applicant in terms of section 9 of the Act that unless he shewed cause to the contrary, he had decided to refuse his application on the ground that the Applicant had failed to prove that his wife had been resident in Ceylon from the 4th June 1942 to January 1947, and from 9th November 1947, to 11th August 1950 without absence exceeding 12 months on any single occasion. The ground specified by the learned Commissioner is one that is referable not to any express provision of the Act as it stood at the date of the application but to the Amending Act No. 45 of 1952, which had become law in the meantime and under which it was provided that a male married applicant had to satisfy the Commissioner, in addition to the other requirements prescribed by the main Act, that his wife had been *uninterruptedly* a resident in Ceylon from a date not later than the first anniversary of the date of her marriage and until the date of the application. The term uninterruptedly was assigned an artificial meaning by a declaration that the continuity of the residence of the wife should notwithstanding her occasional absence from Ceylon be deemed to have been uninterrupted if such an absence did not on any one occasion exceed 12 months in duration. The Applicant shewed cause by adducing further evidence but the Commissioner informed him that the evidence adduced by him was not conclusive and that he proposed to hold an inquiry in terms of section 9 (3) (*a*) of the Act.

At the inquiry, the Applicant himself gave evidence and called witnesses but at the conclusion thereof the learned Commissioner refused the application on the ground " that the Applicant had failed to satisfy him that his wife had been resident in Ceylon from the date of the first anniversary of marriage ". It is conceded on behalf of the appellant that as the wife had not joined him in Ceylon till the 3rd June 1942, it could not be said that she had had uninterrupted residence in Ceylon from a date not later than the first anniversary of her marriage and up to the date of her application, but it is urged on his behalf that he is entitled to claim the benefit of the last paragraph of the provision amending section 6 of the Act, which omitting words that have no bearing on the present discussion, runs as follows : " For the purposes of the preceding paragraph 2 (ii) the continuity of residence of the wife shall not be deemed to have been interrupted by reason that she was not resident in Ceylon during the period commencing on 1st December 1941 and ending on 31st December 1945 or during any part of that period if the Commissioner is satisfied

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that she did not reside in Ceylon during that period or any part thereof owing to apprehension of enemy action in or against Ceylon or owing to special difficulties caused by the war."

The Applicant stated on oath that the reason why he did not bring his wife earlier was because of his apprehension of enemy action and was also due to special difficulties caused by the existence of a state of war. In order to support his evidence as regards the first reason given by him, he called the Village Headman of the area who stated explicitly that towards the end of January or February, 1942, he brought to the notice of the residents of the area both personally and by beat of tom-tom that those who wished to evacuate to the interior might do so in view of the existing state of war. The applicant and the Headman both resided at Waidya Road at that time, close to each other. In regard to the second reason that there were special difficulties caused by war, he called a witness, Mrs. Martenesz, who testified to her assistance being sought by the appellant to secure the services of a servant woman as he had failed in the attempt, and that she too failed to secure a servant and that when the wife returned, a relative of the applicant as well as her own servant gave the wife some assistance. This witness further stated that when the wife arrived in Ceylon in June 1942, she was in a delicate state of health, a fact uncontrovertably established by the child being born in January 1943.

The learned Commissioner has taken the view that the fact that, as early as 3rd June, 1942, the applicant was able to bring his wife to Ceylon, led to the irresistible conclusion that the reasons for his having not brought his wife earlier was not that he had apprehensions in regard to enemy actions nor due to any special difficulties caused by the war but that it was due, as he had affirmed to in his affidavit of 1951, that she was in delicate health. Such an inference is undoubtedly possible but the question is whether that is the proper inference to be drawn from all the facts deposed to by the applicant taken in conjunction with evidence of the other witnesses as well.

At the date the affidavit was sworn to in 1951, the amending Ordinance of 1952 had not been enacted and any apprehension of enemy action which may have been one mental element inducing a husband not to bring his wife to Ceylon would have had no bearing at all on an application made under the Act and hence one can quite appreciate why one, especially a skilled draughtsman, drafting an affidavit in those circumstances, would have omitted to refer to any such fear in the mind of the applicant, as being irrelevant. But at the date of the inquiry which was subsequent to the legislature giving legal recognition to the existence of anxious feelings in the mind of the husband for the safety of his wife and children by providing that a husband should be entitled to satisfy the Commissioner that the absence of the wife was due to an apprehension of enemy action or to special difficulties caused by a state of war, the question whether the applicant had such an apprehension or not became relevant and he gave evidence of the fact and called the Headman to establish that his apprehension was real in that it was moulded and based upon official pro-

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nouncements, which not only could not be lightly rejected but which on the other hand brought home to him most forcibly the grave risks to which he would be exposing his wife and child if he were to bring them into an area which was without doubt regarded as a danger zone. Can it be said that the applicant was devoid of all tender feelings towards his wife and child, that he remained unaffected by the announcement of the Headman that those who wished to evacuate to the interior may do so, and that he was so callous as not to care for the welfare, not to speak of the lives, of his wife and child? These questions admit only of one answer and that answer has been anticipated by the Legislature when it enacted the last paragraph of the amending provisions to section 6 of the Act. In particular, the period December 1941 to about April 1942 was one of very great anxiety and mental strain for all the peoples of the Island and especially for those living in Colombo and the neighbouring coastal areas. Singapore had fallen ; the enemy had announced over the radio that Ceylon was to be the next target of attack and that Colombo and Trincomalee had been singled out for air-raids. The atmosphere was charged with these stories of impending enemy attack and when the applicant says that he was influenced by apprehension of enemy attack in not bringing his wife earlier than he did, is it possible in those circumstances to reject his statement? The facts that his wife was also in a delicate state of health and that he was unable to secure the services of a servant woman were also factors which operated on his mind are in no way in conflict and are in fact quite compatible with his attitude that he did fear enemy action. That servants were not willing to be employed either in Colombo or the coastal area about this period owing to apprehension of enemy action is also a matter of common knowledge. It is not difficult to appreciate therefore that the averments in his affidavit of 1951 far from throwing doubt on his case only affirms the well known general proposition that human conduct is governed not by a single but by various emotions and that each emotion may be the resultant product of several factual elements, of which some may indeed be in conflict with one another. It is however said by the learned Crown Counsel that the fact that the wife and child were brought by the applicant in June, 1942, must be regarded as destroying completely any inference that the apprehension of enemy action was in fact an element that in any way controlled the conduct of the applicant. This argument however loses sight of two important considerations ; firstly that after the raids over Colombo and Trincomalee had become realities by April 1942, further raids were regarded as remote in view of the enemy having had the worst of the encounters; secondly the mental anguish of the wife during the period of the raids when the husband was in Ceylon and in a target area cannot be disregarded as a determining factor which made husband and wife decide to brave together the dangers if any of enemy action at that time, each being prepared to perish or survive with the other. Besides, the argument of learned Crown Counsel leads to this unsatisfactory result that had the applicant not brought his wife in June 1942, but brought her in December 1945, then his statement that due to apprehension of enemy action he had not brought his wife would have been entitled to prevail and his application would then have had a plain sailing. But because he or rather the wife braved the perils of enemy action, because the wife was

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herself prepared to stand by the husband and share the hazards of war, his conduct is penalised, but to my mind such conduct is worthy of commendation ; in fact I find that the applicant has had certificates granted to him by more than one Chairman of the Urban Council lauding him for remaining behind when a number of shopkeepers had left the area.

I am satisfied on a review of all the facts that the proper and reasonable inference to be drawn is that the wife did not join the husband earlier than 3rd June 1942 because of the latter's apprehension of enemy action and also by reason of the special difficulties created by the war in that servants had been scared away from Colombo and coastal areas as a result of the state of war, and that he is entitled to claim the benefit of the provision contained in the last paragraph amending section 6 of the Act.

For these reasons, I set aside the order of the learned Commissioner and hold that there is a prima facie case made out for allowing the Applicant's application and direct the Commissioner to take further action as required by law. The Appellant will be entitled to the costs of the appeal.

Order set aside.

1953

Present : **Pulle J.**

R. F. BILLIMORIA, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS

S. C. 690—Appeal under the Indian and Pakistani Residents (Citizenship) Act

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, as amended by Act No. 37 of 1950—Section 2A (b)—Effect of words " while in Ceylon ".

The words " while in Ceylon " in paragraph (*b*) of Section 2A of the Indian and Pakistani Residents (Citizenship) Act connote actual physical presence in Ceylon.

APPEAL from an order of the Commissioner for the Registration of Indian and Pakistani Residents.

Cyril E. S. Perera, Q.C., with *R. Manicavasagar*, for the applicant-appellant.

M. Tiruchelvam, Crown Counsel, for the Commissioner-respondent.

Cur. adv. vult.

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December 15, 1953. PULLE J.—

On the 19th October, 1941, the appellant made an application to be registered as a citizen of Ceylon under the provisions of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949. In that application he stated that he had been continuously resident in Ceylon during the period of ten years commencing on 1st January, 1936, and ending on 31st December, 1945, and thereafter he had been continuously resident from 1st January, 1946, to the date of the application. Whether the appellant had these periods of uninterrupted residence within the meaning of section 3 of the Act had to be considered in relation to the fact that in October, 1941, he went to Bombay and there he became an employee under an Indian military organization called the Indian Engineer's (Railway) Unit. From Bombay he proceeded to Africa on service with that unit and eventually returned to Ceylon in July, 1946. It is obvious that at the time he made his application he was not qualified for citizenship because the continuity of his residence in Ceylon had been interrupted. Vide section 3 (3). In 1951 the appellant requested that his case be reconsidered in the light of section 2A of the Act as amended by the Indian and Pakistani Residents (Citizenship) (Amendment) Act, No. 37 of 1950, which came retrospectively into operation on 5th August, 1949.

The question arising on this appeal is whether the Commissioner was wrong in holding that the appellant's case was not covered by section 2A, paragraph (*b*), which reads as follows :—

> " (2A) For the purposes of this Act, the continuity of residence of an Indian or Pakistani resident shall be deemed to have been uninterrupted notwithstanding his absence from Ceylon for any period,—
>
> (*b*) if, having become while in Ceylon a member or an employee of any of His Majesty's forces, he was during that period on service in any other country as such member or employee ".

It was argued for the appellant that although he was in Bombay at the time he became an employee under the military unit he became so, in a legal sense, *while in Ceylon*. I cannot accept this argument. Paragraph (*b*) does not, in my opinion, make an exception in favour of an applicant who became an employee of one of His Majesty's forces at a point of time when he could have been regarded as a *resident* of Ceylon. The words " while in Ceylon " are self explanatory and connote actual physical presence in Ceylon. In other words, the commencement of the period of " absence from Ceylon " must be coincident with the time of departure from Ceylon of the applicant in the character of an employee of one of His Majesty's forces.

The appeal fails and is dismissed with costs which I fix at Rs. 157·50.

Appeal dismissed.

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1954 *Present :* **Swan J.**

K. WIJESINGHE (Excise Inspector), Appellant, *and* A. DON MARTIN, Respondent

S. C. 1,074—M. C. Colombo South, 55,620

Charge—Duplicity—Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172), s. 26—Criminal Procedure Code, ss. 171, 425.

The charge against the accused was that he did "sow, plant or cultivate" hemp plants in breach of section 26 of the Poisons, Opium and Dangerous Drugs Ordinance.

Held, that the charge was not bad for duplicity. Section 26 of the Poisons, Opium and Dangerous Drugs Ordinance created one offence, whether it was committed by sowing, planting or cultivating.

Held further, that, even if there was error in the charge, the error was immaterial.

APPEAL from a judgment of the Magistrate's Court, Colombo South.

E. H. C. Jayetileke, Crown Counsel, for the complainant appellant.—The failure to mention in the charge the Minister of Health as the proper authority to issue the licence is a curable irregularity—*Simon Singho v. Thoradeniya* [1]. The facts establish cultivation on the part of the accused—*Marambe v. John* [2].

Boyd Jayasooriya, for the accused respondent.—The charge is bad for duplicity. It alleged that the accused did either "sow or plant or cultivate five hemp plants" on a particular day. It alleged therefore that the accused committed several offences in the alternative, not that he committed one offence in alternative ways. The English Court of Criminal Appeal held in *R. v. Molloy* [3] that such a charge was bad in law and quashed the conviction. *Molloy's case* was followed here in *Pakir Saibo v. Nayar* [4].

In *Sub-Inspector of Police, Dehiowita v. Perera* [5] Jayewardene A.J. held that a conviction on a charge which was bad for duplicity should be quashed, if it prejudiced the accused in his defence, although in an earlier judgment in *Police Sergeant, Lindula v. Stewart* [6], he had taken the view that the defect was curable. *Molloy's case* had not been cited to His Lordship in either case. In the present case the accused pleaded that he was unable to defend himself because he did not know what offence he was charged with.

[1] *(1954) 55 N. L. R. 451.*
[2] *(1946) 47 N. L. R. 526.*
[3] *(1921) 2 K. B. 364.*
[4] *(1940) 42 N. L. R. 151.*
[5] *(1926) 27 N. L. R. 511.*
[6] *(1923) 25 N. L. R. 166.*

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For an example of a charge which alleged that the accused committed one offence in alternative ways, see *Thomson v. Knights*[1].

E. H. C. Jayetileke, in reply, referred to section 171 of the Criminal Procedure Code and relied on *Police Sergeant, Lindula v. Stewart* (supra).

Cur. adv. vult.

November 22, 1954. SWAN J.—

This is an appeal by the complainant with the sanction of the Attorney-General from an order of the learned Magistrate of Colombo South acquitting the accused. The accused was charged in this case that he did on 13.3.1954 "without a licence from the Minister sow, plant or cultivate five hemp plants (*Cannabis Sativa L*) on his land called Gorakagahawatta, in breach of section 26 of the Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172) read with section 76 (1) (*a*) and thereby committed an offence punishable under section 76 (5) (*a*) of Chapter 172 of the said Ordinance." He was acquitted after trial on the ground that the charge was defective in that it referred to the Minister without particularizing which Minister it was. In point of fact it is the Minister of Health (see *Gazette* Notification No. 10,407 of 2.6.52 and No. 10,608 of 28.10.53) who is the proper authority.

In the course of his order the learned Magistrate said :—" I accept the evidence of the prosecution witnesses on the facts. I have not the slightest doubt that the accused was seen by the prosecution witnesses doing certain acts, that he was cultivating the plants—such as heaping the earth and removing a thorny creeper round the plants. Advocate Mr. Perera also raised the question whether the charge was defective inasmuch as it states, ' sow, plant or cultivate '. I hold that the charge is not defective on this ground for, the section is so worded, ' No person shall . . . . sow, plant or cultivate ' and it would not be necessary for the prosecution, in the plaint itself, to take up a definite position whether it was sowing, planting or cultivating as in this case. The evidence led would establish any one of these matters mentioned in the charge. But, the point raised by Advocate Mr. Perera that the charge was defective in that the proper authority, that is, the Minister of Health is not mentioned, is entitled to prevail. It was held in a case reported at page 451 of *55 N. L. R.* that there was an error in the charge in that case where the proper authority was mentioned as the Minister of Justice and not the Minister of Health. The Supreme Court held that the mention of the wrong person was nothing more than a mere irregularity under section 425. The powers under section 425 are reserved only for the Supreme Court. I hold therefore that the charge has been defective in that the proper authority has not been mentioned."

[1] *(1947) 1 K. B. 336.*

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The case of *Simon Singho v. Thoradeniya*[1] referred to by the learned Magistrate was decided by me. There I held that the mention of the wrong Minister was a mere irregularity that did not vitiate the conviction. I expressly made reference to section 425 of the Criminal Procedure Code because it says *inter alia* "no judgment passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the . . . . charge . . . unless such error, omission, or irregularity has occasioned a failure of justice". But section 171 of the same Code expressly states that "no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission".

Learned Crown Counsel submits that the learned Magistrate is clearly wrong and that the order of acquittal must be set aside and the accused convicted and sentence passed on him. Mr. Jayasooriya who appeared for the respondent did not seek to justify the order of acquittal for the reasons given by the learned Magistrate. He however maintains that the charge is bad for duplicity. Sow, plant or cultivate, he argues, connote three different and distinct operations, each of which constitutes an offence. In this connection he referred me to the case of *Pakir Saibo v. Nayar*[2] where Wijeyewardene J. held that the charge was defective in that it failed to give particulars of the manner in which the alleged offence was committed *and that it was open to objection on the ground of duplicity.* But duplicity is not a fatal defect. It is an irregularity and not an illegality. As Jayewardene A.J. said in *Police Sergeant, Lindula v. Stewart*[3] "the defect is, however, not fatal to the conviction as it is one of duplicity and not of misjoinder".

The learned Magistrate himself considered whether the charge was bad for duplicity and came to the conclusion that it was not. I am inclined to agree. The section is so worded that one is forced to the conclusion that it created one offence, whether it was committed by sowing, planting, cultivating, obtaining or having in one's possession any of the prohibited plants, or collecting or having in one's possession the seeds, pods, leaves, flowers or any part of such plant. The gravamen of the charge is that one should have anything to do with the prohibited plants *without the licence of the proper authority.* The manner in which the law has been transgressed is only incidental.

But the evidence led at the trial was of cultivation and as the accused cannot conceivably complain of prejudice, I would hold that the error in the charge, if error there is, is immaterial.

I set aside the order of acquittal and convict the accused. The case will be remitted to the lower Court for the learned Magistrate to pass sentence.

Acquittal set aside.

[1] *(1954) 55 N. L. R. 451.* [2] *(1940) 42 N. L. R. 151.*
[3] *(1923) 25 N. L. R. 166.*

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1954 *Present :* **Sansoni J.**

A. C. SUPPIAH CHETTIYAR *et al.*, Appellants, *and*
S. M. D. B. SAMARAKOON, Respondent

S. C. 117-118—C. R. Kandy, 9,066

Rent Restriction Act—Business premises—" Reasonable requirement " of landlord—Factors for consideration.

Plaintiff was the landlord of the defendants in respect of certain premises. He sought to have them ejected on the ground that he required the premises for his trade and business. The evidence showed that the premises were already being used by the tenants since the year 1938 as the principal place of their chief business of selling sundry goods.

Held, that, when assessing whether the landlord reasonably required the premises, the Court should give due weight to the advantage to the tenant of continuing to occupy the same premises and to the proportionate disadvantage suffered by him by being forced to leave them. The value of a business such as selling sundry goods would depend to a large extent on the length of time that it had been carried on in the same premises.

Held further, that the fact that the plaintiff invested a large sum of money in the purchase of the premises in the expectation of getting vacant possession was not a measure of the reasonableness of his claim.

Quaere, whether it is hardship to the landlord or the tenant alone that must be taken into account, or whether there is a " claim of third persons whose reflected hardship, so to speak, may be taken into account ".

APPEAL from a judgment of the Court of Requests, Kandy.

H. V. Perera, Q.C., with *H. W. Tambiah*, for the defendants appellants.

C. Thiagalingam, Q.C., with *P. Somatilakam*, for the plaintiff respondent.

Cur. adv. vult.

October 6, 1954. SANSONI J.—

The plaintiff-respondent in this appeal is the landlord of the two defendants-appellants in respect of premises No. 150, Colombo Street, Kandy. The defendants-appellants have been carrying on in partnership the business of selling sundry goods in those premises since 1938. In 1946 they started an additional business of money lending along with one Alagu, and this business too has been carried on upstairs in these premises since then. There is a third business in tobacco being carried on solely by one Murugesu in those same premises. Murugesu had been a tenant under the respective owners of these premises for as long as the defendants themselves, and he became the tenant of the defendants when they purchased the premises in 1949.

The defendants took a five-year lease of these premises in 1946, from the owner Saul Hamid. In 1949, they purchased the premises from Saul Hamid subject to an agreement to retransfer to him within 4 years. In 1951 the plaintiff bought Saul Hamid's right to get a retransfer, but

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agreed contemporaneously to retransfer the premises to Saul Hamid at any time after 8 years, and within 10 years of the execution of that deed of purchase. The defendants necessarily had to convey the premises to the plaintiff after he had bought Saul Hamid's right to get a retransfer from the defendants, and this they did in 1952. The plaintiff is therefore the owner subject to Saul Hamid's right to get a retransfer from him, and he has paid Rs. 36,000 in all to acquire his present right in the property. After he became the owner on 22nd January, 1952, the plaintiff accepted rent from the defendants ; on 27th February, 1952, he gave the defendants notice to quit the premises but the defendants have not yet vacated the premises. The plaintiff brought this action on 6th May, 1952, to have the defendants ejected on the ground that he requires the premises for his trade and business, and the only issue for determination is whether they are reasonably required for that purpose.

The plaintiff runs a fairly large wholesale business in sundry goods in Maturata where he lives. He owns a house and other property there and he says he is worth about half a lakh of rupees. The purpose for which he requires the premises in dispute is an import and export business which he expects to set up. He carried on such a business under a licence in Colombo from 1949 till about the end of 1950, when he says he closed it down because he incurred losses through residing in Maturata which is far away from Colombo. He now wants to restart the business in these premises, apparently hoping that Maturata is not too far from Kandy though the two places are 28 miles apart. But I would emphasise that the plaintiff is not in the position of a person who requires the premises in order to earn his livelihood. He wants them merely to start an additional business and thereby add to what is probably already a fairly large income. The defendants' central place of business is in these premises but they also have a branch at Katugastota. While the former yields a net annual profit of over Rs. 30,000, the latter yields only Rs. 3,000 or 4,000. They had another branch at Ampitiya (another suburb of Kandy) which the 1st defendant says they closed down after receiving the notice to quit, because it was being run at a loss. At Katukelle (yet another suburb of Kandy) they have a room on rent for the purpose of stocking their goods, and it is also used by their employees as sleeping quarters. It is very doubtful whether any trading is done there. The money lending business to which I have referred yields a net annual profit of about Rs. 8,000. The 1st defendant stated in evidence that he had been searching for other suitable premises after he received the notice to quit but he had failed to find any.

The learned Commissioner of Requests gave judgment for the plaintiff and the defendants have appealed. On the very day he delivered judgment the plaintiff applied for execution of his decree (which was presumably entered with the maximum degree of despatch) and the defendants filed their petition of appeal together with an application to stay execution of writ. The Commissioner after inquiry refused to stay execution because he was not satisfied that irremediable or irreparable damage would be caused to the defendants or their business by such execution since they had other places of business. I think the Commissioner failed to give due weight to the fact that it was a business and also

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the principal place of that business that were under consideration : in such a case the advantage of continuing to occupy the same premises and the proportionate disadvantage suffered by being forced to leave them, are not matters that should be regarded lightly. The defendants had to seek relief from this order in this Court to obtain a stay of execution. I refer to this matter because I think the Commissioner has in his judgment under appeal also failed to appreciate the importance of the defendants' occupation of these premises since 1938. The value of a business such as this would depend to a large extent on the length of time that it has been carried on in the same premises, for it is to those premises that their customers would naturally have acquired the habit of going. It is little consolation to them to be told that there are other premises available to them " round about Kandy ", which is one reason given by the Commissioner in his judgment. In Katukelle they have a one-room store and in Katugastota they have a branch business. I do not think they would prove adequate substitutes for the premises in dispute. Another reason given by the Commissioner is that the defendants have " sub-let a portion of the premises to a money lending business ", and in veiw of this and the other reason I have already referred to the Commissioner says : " I am unable to resist the conclusion that the need of the defendants is not so great as the need of the plaintiff who has invested a big sum of money in the purchase of these premises to recommence a business for which he holds a licence and which he had to close down at Colombo for the reason that he had sustained losses. I also hold that the sub-letting by the defendants of a portion of the premises to a separate money lending business is contrary to the provisions of the Rent Restriction Act ". Earlier in his judgment also the Commissioner refers to these grounds as the reasons which led him to hold in favour of the plaintiff. With regard to the alleged sub-letting to a money lending business, what happened was that the defendants took in a third partner and added money lending to their other activities ; by doing this they were not sub-letting any portion of the premises. Nor does it follow that because the defendants chose to add money lending to their other pursuits their need of these premises to carry on their business of dealing in sundries became any the less. Apart from this the money lending business was started in 1946 ; even if one assumes wrongly that it amounted to sub-letting, there was no legal bar to such a sub-letting until 1949, when Section 9 of the Rent Restriction Act, No. 29 of 1948, first prohibited it. With regard to the other reason given by the Commissioner, while one sympathises with a man who invests a large sum of money in property in the expectation of getting vacant possession, that factor only indicates his anxiety to obtain the premises but is not a measure of the reasonableness of his claim. Mr. H. V. Perera asked me also to consider the needs of Murugesu who has been running a tobacco business in these premises for many years as a tenant. He submitted that it was relevant to take into account the hardship that would be caused to Murugesu who is now in the position of a sub-tenant. In England under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the First Schedule enacts :—(omitting unnecessary words) " A Court shall have power to make or give an order or judgment for the recovery of premises . . . .

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or for the ejectment of a tenant . . . . if (*h*) the dwelling-house is reasonably required by the landlord . . . . provided that an order or judgment shall not be made or given . . . . if the Court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it ". This Court has in many cases decided that it is after weighing in the balance the relative hardship to the landlord and to the tenant that an order granting or refusing ejectment should be made. The further question then is whether it is hardship to the landlord or the tenant alone that must be taken into account, or whether there is a " claim of third persons whose reflected hardship, so to speak, may be taken into account "—see *Harte v. Frampton* [1]. In that case Asquith L.J., in giving the judgment of the Court of Appeal said, " To attempt to define classes, hardship to whom and to whom alone (apart from the parties) can be taken into account (whether as an element entering into the party's hardship, or on its own account) appears to us an unhelpful line of approach to the construction of the proviso. The true view, we think, is that the county court judge should take into account hardship to all who may be affected by the grant or refusal of an order for possession—relatives, dependants, lodgers, guests, and the stranger within the gates—but should weigh such hardship with due regard to the status of the persons affected and their ' proximity ' to the tenant or landlord and the extent to which, consequently, hardship to them would be hardship to him. The inability to take in a guest for the week-end would no doubt be assessed by the judge at nil. The exclusion of a loved and trusted relation, whether dependant or not, would weigh heavily in the scales ". The learned Lord Justice refers to two earlier cases—*Baker v. Lewis* [2] and *Cumming v. Dawson* [3]—where it had been decided that the Court could consider the claims of third parties such as close relations even though they were not dependants.

It is not necessary for me to consider now whether the principle laid down in those cases should be followed by this Court, though I incline to the view that it should be followed. The more difficult question, if I had to decide the matter, would have been whether Murugesu fell within the class of third persons referred to or whether such a class would be confined to relatives and dependants. It seems to me that regardless of Murugesu's claims the defendants have shown that their right to remain in occupation is stronger than the plaintiff's right to obtain possession. I am satisfied that the defendants' principal business as well as their money lending business will be so adversely affected if they are forced to leave these premises as to result in their being left with a mere fragment of what they now own ; the plaintiff on the other hand would only be deprived of the extra profits he may earn if the new business venture should achieve greater success than its predecessor.

For these reasons I allow this appeal and dismiss the plaintiff's action with costs in both Courts.

Appeal allowed.

[1] *(1947) 2 A. E. R. 604.* [2] *(1947) K. B. 187.*
[3] *(1942) 2 A. E. R. 653.*

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1953 *Present :* **Swan J.**

PODINONA PERERA, Appellant, *and* HANIFFA (Inspector), Respondent

S. C. 860—M. C. Kegalle, 37,335

Brothels Ordinance—Charge of "Keeping or managing a brothel"—Quantum of evidence —Sentence.

If a person keeps in a place even one solitary prostitute to be supplied to all comers, that person may be convicted of "keeping or managing a brothel".

Where a Magistrate chooses to impose a sentence of imprisonment rather than a fine for a first offence under the Brothels Ordinance, he must give reasons for so doing, or at least the proceedings must show that he has exercised his discretion properly.

APPEAL from a judgment of the Magistrate's Court, Kegalle.

C. R. Gunaratne, for the accused appellant.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 30, 1953. SWAN J.—

The appellant was charged with having on 20. 3. 1952 kept or managed a brothel. She was convicted and sentenced to undergo a term of two months rigorous imprisonment. Mr. C. R. Gunaratne appearing for her contends that the evidence falls far short of establishing the charge of "keeping or managing a brothel". At the time of the raid there was only one woman in the house besides the accused. It is, he submits, an isolated case of prostitution.

The word *brothel* is not defined in the Ordinance. The definition given to it in *Singleton v. Ellison* [1] was adopted by Withers J. in *Pieris v. Magrida Fernando* [2] and followed by de Sampayo J. in *Morris v. Cornelis* [3] and *Wickremasuriya v. Mary Nona* [4]. In these cases a *brothel* is defined as a place to which men resorted for purposes of prostitution with women. In the last mentioned case de Sampayo J. held that the occupation of a house or room by a single prostitute did not constitute it a brothel. But that does not mean that if a person keeps a single prostitute in a place to be supplied to all comers that person cannot be said to keep or manage a brothel.

[1] *(1895) L. R. 1 Q. B. 607.*
[2] *(1895) 1 N. L. R. 212.*
[3] *3 Bal. Notes 48.*
[4] *(1922) 24 N. L. R. 26.*

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In *Eliyatamby v. Wijelath Nona* [1] Akbar J. held that a single act of prostitution was insufficient to render a place a brothel. But in *Toussaint v. Cecilia* [2] Soertsz A.J. in a very interesting judgment went into the derivation of the word "*brothel*" and gave it the following definition :

> "A brothel is a house of ill-fame to which men resort for purposes of prostitution with women who are to be found in the place or with women who resort to or are introduced to the house."

With this definition I am in complete agreement, but I do not think it excludes such a case as I have referred to above, namely, a case where a single prostitute is kept to be supplied to all comers.

Referring to the proposition that a solitary instance of prostitution is insufficient to render a house a brothel Soertsz A.J. remarked:—

> "Generally a solitary instance of prostitution in a house no more makes that house a brothel than one swallow can make a summer."

And he referred to a passage in Stroud's Judicial Dictionary which says "the one proved instance may prove itself not a solitary but one of many instances".

In the present case John Singho who was both informant and decoy says that when he went to the accused's house it was the accused who opened negotiations and asked him whether he wanted a "badua" and when he answered this cryptic question in the affirmative, demanded Rs. 5 for the "badua", took him inside a room where later a woman was brought to him. There is also his evidence that about a year earlier he took a gentleman to the same house and procured a woman for him. This by itself constitutes no offence, but gives an indication of what went on in the house. In my opinion the learned Magistrate was justified on the material before him in holding that the charge was proved.

I see no reason to interfere with the conviction but as regards the sentence I am inclined to accept the submissions made by Counsel for the appellant. The Ordinance provides a penalty for a first offence of a fine not exceeding Rs. 500 " or *in the discretion of the Court* to simple or rigorous imprisonment for a term not exceeding six months or to both such fine and imprisonment". In a matter like this where a Magistrate chooses to impose a sentence of imprisonment rather than a fine he must give reasons for so doing, or at least the proceedings must show that he has exercised his discretion properly. I see no reason why the accused should have been deprived of the option of a fine. Accordingly I delete the sentence of two months rigorous imprisonment and substitute therefor a fine of Rs. 200 in default two months rigorous imprisonment. Subject to this variation the appeal is dismissed.

Sentence altered.

[1] *(1934) 36 N. L. R. 300.*

[2] *(1935) 37 N. L. R. 308.*

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1954 *Present :* **Swan J.**

W. A. SURABIEL, Appellant, *and* K. D. C. EKANAYAKE (Inspector of Police), Respondent

S. C. 906—M. C. Horana, 16,228

Excise Ordinance—Possession of unlawfully manufactured liquor—Proof.

A conviction for possession of unlawfully manufactured liquor cannot be based on an inconclusive report of the Government Analyst.

APPEAL from a judgment of the Magistrate's Court, Horana.

P. B. Tampoe, for the accused appellant.

M. Kanagasunderam, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 2, 1954. SWAN J.—

In this case the appellant was charged with possession of a large quantity of unlawfully manufactured liquor. His defence was that it was introduced by the Police. After trial the learned Magistrate found him guilty and sentenced him to four months' rigorous imprisonment.

At the appeal the only point pressed by learned counsel for the appellant was that there was no proof that the stuff was unlawfully manufactured liquor. It was at first contended by Mr. Tampoe that the Government Analyst's report was not properly received in evidence. Latterly the point was confined to the inconclusive nature of the report.

The Government Analyst has said that the stuff examined by him contained 5·6% alcohol and did not fall into any one of the following categories :—

(*a*) Approved brands of imported liquors ;

(*b*) Arrack ;

(*c*) Gin ;

(*d*) Toddy ;

(*e*) Beers, wines, polpala decoctions and tea ciders manufactured under licence issued by the Excise Commissioner.

He also reported that it was not distilled spirits but a fermented liquor.

Mr. Tampoe said that there were tea ciders, fruit and coconut ciders and other decoctions that could be manufactured under licence, and that such beverages could contain more than 4% alcohol. Learned Crown Counsel maintained that no such lawfully manufactured stuff

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could contain more than 4% alcohol; no licence is ever issued for the manufacture of any beverage containing more than 4% alcohol. This may be so, but it does not appear in or from the evidence. The Analyst has not been called and there is no apparent reason why he has excluded only certain liquors and beverages. The prosecution has not proved that the stuff found with the accused was unlawfully manufactured liquor and the accused is therefore entitled to be acquitted.

I set aside the conviction and acquit the accused.

Appeal allowed.

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1954 *Present :* **Rose C.J. and de Silva J.**

URBAN COUNCIL, NAWALAPITIYA, Appellant, *and*
THE ATTORNEY-GENERAL, Respondent

S. C. 379—D. C. Kandy, 312.

Urban Council—Contract entered into by Chairman—Liability of Council—Urban Councils Ordinance, No. 61 of 1939, ss. 34 (2), 47 (f).

Where the Chairman of an Urban Council ordered a quantity of fish and received it on behalf of the Council—

Held, that the Urban Council was liable to be sued on the contract as the Chairman was, by virtue of section 34 (2) of the Urban Councils Ordinance, the chief executive officer of the Council.

Held further, that buying and selling fish fell within the permitted activities of an Urban Council, within the meaning of section 47 (*f*).

APPEAL from a judgment of the District Court, Kandy.

Ivor Misso, for the defendant appellant.

B. C. F. Jayaratne, Crown Counsel, for the plaintiff respondent.

Cur. adv. vult.

September 15, 1954. ROSE C.J.—

This matter relates to a quantity of fish which was alleged to have been delivered by the Director of Fisheries to the Chairman of the Urban Council, Nawalapitiya, on behalf of the Council during the period June, 1944, to November, 1945. The first question that arises for consideration is whether, assuming that the fish was in fact delivered, the Chairman was acting within his authority in ordering the fish and receiving it on behalf of the Urban Council.

The English authorities which were cited in the course of argument are perhaps of little assistance on this matter owing to the specific provisions of the relevant section of the Urban Councils Ordinance, No. 61 of 1939. Section 34 (2) expressly provides that the Chairman of an Urban Council shall be the executive officer of the Council, and all executive acts and responsibilities directed or empowered to be done or discharged by the Council may, unless the contrary intention appears from the context, be done or discharged by the Chairman.

It is true that the proviso to that sub-section states that the Chairman in the exercise of his powers under the section shall act in conformity with such resolutions as may from time to time be passed by the Council. No attempt was made at the trial to establish the existence of any resolution which limited the powers of the Chairman in any particular. *A fortiori* the plaintiff cannot be held to have had notice of any such limitation.

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2——P. N. R 41739-1,590 (1/55)

The sole question, therefore, that remains for decision on this aspect of the case is whether buying and selling fish falls within the permitted activities of an Urban Council. The learned District Judge came to the conclusion, after consideration, that the supply of fish to the inhabitants of the town of Nawalapitiya is an act that the Urban Council is permitted to do for the furtherance of the promotion of the public health, welfare and convenience of the town and its inhabitants ; and that therefore this activity is covered by Section 47 (*f*) of the Ordinance. From this view I see no reason to dissent.

The only remaining question therefore for consideration is whether the plaintiff-respondent has established that the fish in question was delivered to the Chairman.

The decision of this question has no doubt been made more difficult by the unusual delay which attended the institution of the present proceedings. The learned District Judge, however, has applied his mind with care to the relevant considerations for the determination of this matter and has referred in particular to three documents, (P7, P8 and P9), which purport to be letters signed by the then Chairman—Mr. R. E. Jayatileke—relating to these consignments of fish. Some objection was taken to the admissibility of two of these letters, but whatever the merits of these objections may be, one at least of the three letters is clearly admissible, and indeed the contrary was not seriously contended for by learned Counsel for the appellant. Moreover, as regards all three of these documents—which were accepted by the learned District Judge—there seems to be little doubt that they were written on behalf of and signed by Mr. R. E. Jayatileke the then Chairman.

Having regard to the lapse of time since this fish is alleged to have been delivered it is perhaps not altogether unexpected that the proof of its delivery should be lacking in precision. The learned District Judge, however, has considered such evidence as there was with care and he has formed the view that the necessary book entries sufficiently identify the fish in question. Moreover, apart from the evidence of Mr. K. A. Somapala who appears to have been the official in charge of books of the Fisheries Department at the relevant time, he accepts and relies upon the evidence of Mr. K. W. D. Perera, an Inspector of Fisheries of Colombo. This witness states that he was in charge of the despatch of fish from the Department of Fisheries during the period June, 1944, to November, 1945 ; that he despatched fish in accordance with the entries in the relevant books of the Urban Council, Nawalapitiya ; and this was done on the instructions of the Director of Fisheries. He also describes the method used for the actual despatch of the fish by railway.

It seems to me that it would be wrong for this Court to hold that the learned District Judge should not have accepted this evidence. That being so, I consider that the liability of the Urban Council to pay for this fish is established. The appeal must therefore be dismissed with costs.

I would add that I feel a certain sympathy for the present members of the Urban Council if indeed it is true, as was suggested on their behalf, that the Council itself has not had the benefit of any revenues derived from the sale of the fish by the then Chairman. No doubt the Council will consider,

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if they have not already done so, what remedies may be available to them against the then Chairman, but, of course, for the reasons that I have already stated, the fact, if fact it be, that the Council have been led into financial loss through the actions of a past Chairman, cannot affect their liability to pay for the value of the goods to the deliverer of them.

DE SILVA J.—I agree.

Appeal dismissed.

1954 *Present :* **Pulle J. and Swan J.**

VALACHENAI CO-OPERATIVE STORES, Appellant, *and*
A. VELLACUDDY, Respondent

S. C. 158—D. C. Batticaloa, 521 (Special)

Co-operative Societies Ordinance—Dispute between co-operative society and an officer—Arbitrator's award—Cannot be set aside for too technical reason.

Defendant was the manager of a co-operative society. A dispute between him and the co-operative society was referred to arbitration, but the arbitrator's award itself did not state what office the defendant held under the co-operative society.

Held, that the mere failure to describe the defendant in the award as the ex-manager of the co-operative society did not make the award bad on the face of it.

APPEAL from an order of the District Court, Batticaloa.

E. R. S. R. Coomaraswamy, for the plaintiff appellant.

No appearance for the defendant respondent.

Cur. adv vult.

March 8, 1954. PULLE J.—

The respondent to this appeal was at all material times the manager of a Co-operative Society who are the plaintiffs-appellants. At the request of the Society a dispute between them and the respondent in regard to a deficiency of money was referred under the Co-operative Societies Ordinance to arbitration and an award dated 13th June, 1951, was made by the arbitrator directing him to pay to the Society the sum of Rs. 2,104.26. This award was filed and made a decree of Court and certain proceedings in execution were thereafter taken. The respondent then appeared and took various objections to the award. The appeal is from an order holding that the award was bad.

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I should like to state that the respondent did not appear and answer the claim made against him when summoned by the arbitrator. It was no doubt open to him to have ignored the summons if the arbitrator had assumed a jurisdiction which he did not possess. It has however been established and the Judge specifically finds that the arbitrator had jurisdiction to inquire into this dispute between the appellants and the respondent and that it was competent for him to have made the award in question. When the notice of the bill of costs of the appellant's Proctor was served the respondent did not care to appear and the only point of any substance on which he has succeeded is that in the award itself it is not stated what office the respondent held under the Co-operative Society. In my opinion a mere failure to describe the respondent in the award as the ex-manager of the Co-operative Societey did not make the award bad on the face of it. When in all other respects the proceedings before the award and the award itself are good, except for the omission to describe in the award the relationship in which the respondent at one time stood to the appellants, it would be too technical to hold that the award is bad *ex facie*. I would accordingly set aside the order under appeal with costs both here and below which together are fixed at Rs. 157·50.

SWAN J.—I agree.

Order set aside.

1953 *Present :* **Gunasekara J. and Pulle J.**

K. KADIRGAMADAS *et al.*, Appellants, *and* K. SUPPIAH *et al.*, Respondents

S. C. (Inty.) 2—D. C. Jaffna, 3,468

Civil Procedure Code—Proctor—Appointment—Requirement of writing signed by the client—Section 27—Death of plaintiff—Assignee's claim to be substituted as plaintiff—" Legal representative "—Section 394 (2).

When the petition of appeal was filed on behalf of the defendants, the Proctor who presented it had not been appointed in writing, as required by section 27 of the Civil Procedure Code, to act for some of the appellants. He was so appointed after the appealable time had expired. He had, however, without objection from any of the parties, represented all the defendants at various stages of the proceedings earlier.

Held, that the irregularity in the appointment of the Proctor was cured by the subsequent filing of a written proxy.

Held further, that where the plaintiff in a pending action dies it is only his legal representative who can be substituted as a party in his place. A person, therefore, who claims the plaintiff's interests in the action by virtue of an assignment which had been made by the plaintiff is not entitled to be substituted, as he is not a legal representative within the meaning of section 394 (2) of the Civil Procedure Code.

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APPEAL from a judgment of the District Court, Jaffna.

S. J. V. Chelvanayakam, Q.C., with *H. W. Tambiah* and *Felix Dias*, for the substituted defendants.

C. Renganathan, for the 1st substituted plaintiff respondent.

Cur. adv. vult.

September 22, 1953. GUNASEKARA J.—

This appeal arises out of an action instituted in the District Court of Jaffna by Sithamparapillai Arumugam against two defendants, Kumaravetpillai and his son Kadirgamadas. The plaintiff Arumugam and the first defendant Kumaravetpillai have both died, and the present defendants, including the second defendant Kadirgamadas, have been substituted in the place of the first defendant, being his legal representatives. The appeal is against an order made by the learned District Judge on the 4th April, 1952, by which he purported to set aside an order that had been made by his predecessor on the 4th June, 1951, substituting the second to sixth respondents in place of the deceased plaintiff Arumugam, and to substitute instead the first respondent Suppiah. The appeal has been filed in the name of all the present defendants by Mr. Nalliah, who has signed the petition as proctor for the appellants.

A preliminary objection to the hearing of the appeal was taken by the learned counsel for the first respondent on the ground that Mr. Nalliah had authority to sign the petition of appeal only on behalf of the second defendant Kadirgamadas and not on behalf of the other defendants. When the petition of appeal was filed, on the 25th April, 1952, Mr. Nalliah had not been appointed in writing, as required by section 27 of the Civil Procedure Code, to act for these defendants. He was so appointed later, on the 8th May, 1952, after the appealable time had expired. In the meantime, however, he had, without objection from any of the parties, appeared for these defendants and acted as their proctor in the proceedings that were held upon the first respondent Suppiah's application to be substituted in place of the deceased plaintiff. On the 16th November, 1951, he applied for time to file on behalf of these defendants a statement of objections to Suppiah's application, and was granted time to do so. On the 17th December, 1951, he filed a statement of objections on their behalf. On the 23rd January, 1952, and the 21st March, 1952, he appeared for them at the inquiry into the application, and he also represented them when the order that is appealed from was delivered on the 4th April, 1952. We are satisfied that Mr. Nalliah had been authorised by the substituted defendants to file an appeal on their behalf, although they had omitted to appoint him in writing as required by section 27 of the Code. That requirement, however, is merely directory, as was held in *Tillekeratne v. Wijesingha* [1], and in our opinion the irregularity in the appointment was cured by the subsequent filing of a written proxy.

[1] *(1908) 11 N. L. R. 270.*

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" No doubt ", said Hutchinson C.J. in the case cited, " the enactment means, though it does not in terms say so, that the appointment is to be signed and filed before the proctor does anything in the action. But if the omission to sign is not because the proctor has not in fact any authority, and if the client afterwards ratifies what has been done in his name by signing the authority, in my opinion that satisfies the requirements of the enactment ". *Reginahamy v. Jayasundara* [1] and *Silva v. Cumaratunga* [3], which were relied upon by Mr. Renganathan, are distinguishable : in each of those cases the proctor who had signed the petition of appeal was a proctor who could not be authorised to sign it, for the reason that a proxy granted to another proctor was already in the record. In *Silva v. Cumaratunga* [2] the *ratio decidendi* is stated to be that " this Court cannot recognize two proctors appearing for the same party in the same case ". In the present case there was no bar to the appointment of Mr. Nalliah to act for the defendants. For these reasons we over-ruled the preliminary objection and heard the appeal.

The original plaintiff Arumugam had sued Kumaravetpillai on a promissory note in case No. 1339 of the District Court of Jaffna and had obtained a decree against him on the 28th November, 1931, for the recovery of Rs. 2,638 with legal interest and costs. In execution of this decree the property that is the subject of the present action was seized on the 17th September, 1946. The second defendant Kadirgamadas claimed the property, and his claim was upheld on the 2nd April, 1947. Arumugam then instituted the present action, under section 247 of the Civil Procedure Code, to have the property declared liable to be sold in execution of the decree that had been entered in case No. 1339. The action was dismissed on the 27th September, 1948, and Arumugam appealed. While the appeal was pending before this court Kumaravetpillai died, and the record of the proceedings was remitted to the District Court for the substitution of his legal representatives in his place. The record was received in the District Court on the 12th December, 1949, and the plaintiff was given time till the 13th February, 1950, to make the necessary application, but before that day the plaintiff himself died. On the 12th October, 1950, the second defendant applied for the substitution of himself and the other children of the first defendant in place of the latter, as his legal representatives, and also for the substitution of the deceased plaintiff's children in the plaintiff's place as his legal representatives. These applications were allowed on the 4th June, 1951, and the second defendant and the other appellants were substituted in the place of the first defendant, and the 2nd to 6th respondents in the place of the original plaintiff. On the 12th October, 1951, the first respondent Suppiah submitted to the District Court a petition praying for an order substituting him " in place of the above-named plaintiff (Arumugam) who is dead ".

It appears that on the 15th September, 1946 (before the institution of the present action and before the seizure of the property), Arumugam had assigned to one Selvadurai his interests in the decree in case No. 1339

[1] *(1917) 4 C. W. R. 390.* [2] *(1938) 40 N. L. R. 139.*

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" and the full benefit profit sum and sums of money and advantage whatsoever that now can or shall or may hereafter be obtained by reason or means of the same or of any execution thereupon now had or to be had, sued out executed or obtained ". By a deed executed on the 17th September, 1951, which recites, *inter alia*, the institution of the present action, Selvadurai assigned to the first respondent Suppiah these interests " and all chose or choses in action founded on the said 247 action bearing 3468 of the D. C. Jaffna ". Suppiah claimed that by virtue of this assignment he was " entitled to have himself substituted in place of the said plaintiff who is dead and to the exclusion of the plaintiff's heirs ". The learned District Judge accepted this contention and said in his order :

> " If the application of the petitioner Suppiah for substitution is not granted, his interests would obviously suffer as the legal representatives of the deceased plaintiff have already agreed to settle this case and withdraw the appeal.
>
> I hold that Suppiah is entitled to be substituted in the room of the deceased plaintiff and substitute him accordingly. The substitution of the 1st to 4th substituted plaintiffs made on June 4th, 1951, is set aside. "

The only provisions for the substitution of a party in the place of a plaintiff in a pending action who has died appear to be those contained in Chapter XXV of the Civil Procedure Code. Under those provisions it is only the legal representative of the deceased plaintiff who can be substituted, and section 394 (2) provides that for the purposes of this Chapter legal representative shall mean an executor or administrator, or in the case of an estate below the value of two thousand five hundred rupees the next of kin who have adiated the inheritance. Suppiah was not the legal representative of the deceased plaintiff and was therefore not a person who could be substituted as a party in the place of the plaintiff. Mr. Renganathan sought to meet this difficulty by arguing that Suppiah's application must be regarded as an application that he should be substituted in the place of the deceased's legal representatives, the second to sixth respondents to the present appeal, who had already been made parties plaintiff. The application was not understood in that sense in the lower court, and it seems to me that its language cannot bear the meaning that Mr. Renganathan now seeks to put upon it. It is therefore unnecessary to consider whether the assignments upon which the first respondent relies entitle him to be substituted in the place of the second to sixth respondents, and if they do, what rights he would acquire by stepping into their shoes after they have agreed to withdraw the appeal that was filed by the deceased plaintiff.

The learned District Judge's order of the 4th April, 1952, which is the subject of the present appeal, must be set aside and the first respondent must pay the appellants their costs in this court and the court below.

PULLE J.—I agree.

Order set aside.

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[PRIVY COUNCIL]

1954 *Present :* **Lord Morton of Henryton, Lord Cohen, Lord Keith of Avonholm, Mr. T. Rinfret and Mr. L. M. D. de Silva**

P. MURUGIAH, Appellant, *and* C. L. JAINUDEEN, Respondent

PRIVY COUNCIL APPEAL NO. 37 OF 1953

S. C. 140—D. C. Matale, 203

Privy Council—Collation—Matrimonial Rights and Inheritance Ordinance (Cap. 47)—Section 35—Donee's right to keep his gift and renounce share in donor's estate—Registration of Documents Ordinance (Cap. 101)—Section 8—" Instrument affecting land ".

If a father gives property to his son on the occasion of the son's marriage, and dies intestate, the son is not deprived by section 35 of the Matrimonial Rights and Inheritance Ordinance of the option of renouncing all claim to share in his father's estate or of bringing the property into collation. If he chooses the latter alternative, he has a further option of bringing in either the property itself or the value thereof.

Pending administration of the estate of a person who had died intestate it was decided by Court on the 3rd February, 1941, that certain immovable property which had been gifted by the deceased to his son on the occasion of the son's marriage should be brought into collation. No formal order was drawn up to give effect to this decision and no transfer by the donee was executed in favour of the administrator. Subsequently the property was mortgaged by the donee and sold to A by the Fiscal in pursuance of a hypothecary decree entered in favour of the mortgagee. The present action was instituted by A against the administrator for declaration of title to the property and for ejectment of the administrator therefrom.

Held, that the order made by Court on the 3rd January, 1941, could not deprive the donee of his right to sell or mortgage the property. As the property had been mortgaged, and sold to A, the donee could only claim to participate in the estate of the deceased person if he brought in the value of the property gifted, since he was no longer in a position to bring in the property itself, but this fact in no way affected A's title to the property.

Held further, that the order of the 3rd February, 1941, could not be regarded as an instrument affecting land within the meaning of section 8 of the Registration of Documents Ordinance.

APPEAL from a judgment of the Supreme Court reported in *54 N. L. R. 446.*

R. O. Wilberforce, Q.C., with *Gilbert Dold*, for the defendant appellant.

Dingle Foot, Q.C., with *Sirimevan Amerasinghe*, for the plaintiff respondent.

Cur. adv. vult.

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November 3, 1954. [*Delivered by* LORD MORTON OF HENRYTON]—

This is an appeal from a judgment of the Supreme Court of Ceylon which reversed a decision of the District Court of Matale given on the 25th January, 1951, and declared that the respondent was entitled to ten acres of land part of a parcel of 27 acres one rood and twenty-two perches of land known as Kirigalpottewatta situate at Udugama in the Central Province of Ceylon.

In the year 1927 one Ponniah was the owner of the whole parcel but on the 1st November, 1927, he executed a deed of gift by which he conveyed the ten acres now in question to his son Sellasamy, reserving a life interest to himself. In the deed of gift the ten acres were expressed to be of the value of Rupees six thousand. This deed was never registered under the Registration of Documents Ordinance.

Ponniah died on the 26th May, 1936, and in September, 1936, his widow commenced proceedings (Case No. 5437) in the District Court of Kandy, asking for letters of administration to be granted to her of the deceased Ponniah's estate and asking also that certain lands donated by Ponniah in his lifetime (including the land now in question) should be brought into hotchpot and treated as part of his estate. Sellasamy was the first respondent to that suit and five other persons were made respondents thereto. On the 7th December, 1936, Sellasamy swore an affidavit opposing grant of letters of administration to the widow in the course of which he (*a*) denied that the second, third and fourth respondents to the suit were the legitimate issue of Ponniah, and (*b*) alleged that he was not bound to bring into hotchpot the said ten acres of land since they were not given to him on the occasion of his marriage or for his advancement or establishment in life.

The relevance of this allegation is that by s. 39 of Ordinance No. 15 of 1876, reproduced by section 35 of the Matrimonial Rights and Inheritance Ordinance (Cap. 47 of the 1938 Edition of the Laws of Ceylon) it is enacted that

> "Children or grandchildren by representation becoming with their brothers and sisters heirs to the deceased parents are bound to bring into hotchpot or collation all that they have received from their deceased parents above the others either on the occasion of their marriage or to advance or establish them in life, unless it can be proved that the deceased parent, either expressly or impliedly, released any property so given from collation."

On the 28th June, 1937, the District Judge granted letters of administration to the widow, and by consent the donated properties were left, for the time being, in the possession of the donees.

The questions raised by Sellasamy's affidavit of the 7th December, 1936, were dealt with by the District Judge on the 3rd February, 1941. He found that the second, third and fourth respondents were legitimate and then proceeded:—

> "The only other question to be decided is whether the 1st respondent who was given a Deed of Gift No. 7881 of 1927 (1 R 3) by his

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father Ponniah should bring the property gifted into collation if he wishes to inherit as an heir.

The point to determine is whether, as is stated by respondents 2 to 6 such gift was made on the occasion of his marriage. "

After referring to section 39 of Ordinance No. 15 of 1876 and considering the evidence, which was directed to the point that the only marriage contemplated by Sellasamy at the date of the deed of gift had never taken place, he expressed the opinion that the fact that the marriage did not take place made no difference, as the section applied to a gift made on the occasion of a marriage performed or contemplated. He concluded as follows:—

" I therefore hold that:—

1. All the respondents are lawful heirs.

2. The property gifted to the 1st respondent was on the occasion of his marriage and that its value was 6,000 and that it must be brought into collation. I would also order that the 1st respondent do pay to the other respondents the costs of this inquiry. "

No formal order appears to have been drawn up to give effect to this decision and no transfer by Sellasamy to the administrator was ever executed. Sellasamy appealed first to the Supreme Court and then to this Board on the question whether the property was liable to collation and in both Courts the decision of the District Judge was affirmed.

On the 26th February, 1942, Sellasamy mortgaged the property for Rupees 1,500 but this mortgage was paid off. It was entered on the register of incumbrances pursuant to the Registration of Documents Ordinance (Cap. 101) but the appellant alleges that this registration had no effect as section 15 (1) of the Ordinance had not been complied with.

On the 24th February, 1944, Sellasamy mortgaged the property for Rupees 4,000 advanced by one Appuhamy. This mortgage was also registered but the appellant alleges that this registration also had no effect.

On the 26th August, 1948, Appuhamy commenced proceedings to enforce his mortgage and recovered judgment on the 25th February, 1949. The property was in due course sold by the Deputy Fiscal pursuant to an order made on the 9th August, 1949. It was bought by the respondent for Rupees 400 and was conveyed to him by the Deputy Fiscal on the 21st February, 1950.

In passing their Lordships would observe that in his answer to Appuhamy's claim Sellasamy alleged that the property now in dispute was then included in the estate of Ponniah in Case No. 5437. It was at one time suggested that this was an admission on which the appellant could rely as against the respondent. Having regard to the fact that it was merely a statement made by Sellasamy in proceedings against him by his mortgagee, their Lordships are unable to regard it as in any way binding on the respondent, who derives his title from a sale by the Court at the instance of that mortgagee.

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On the 19th May, 1950, the appellant procured the registration of the decree of the 3rd February, 1941, on the footing, presumably, that the judgment was an instrument affecting land within the meaning of section 8 of the Registration of Documents Ordinance (Cap. 101).

On the 9th August, 1950, the respondent commenced the present proceedings against the appellant, who had become the administrator of Ponniah's estate, in succession to the widow. The respondent alleged that the appellant had wrongfully and forcibly entered into possession of the land in dispute some three months previously, and claimed a declaration that he (the respondent) was entitled to the land and to consequential relief. The appellant relied on the said order made in Case No. 5437 on the 3rd February, 1941, and contended that by virtue thereof Sellasamy lost all rights to the land in dispute. The appellant also relied on the registration of that order as giving him priority over the respondents under section 7 of the Registration of Documents Ordinance. On the 21st December, 1950, the respondent moved to amend his plaint so as to enable him to rely on section 3 of the Prescription Ordinance No. 22 of 1871. It is not clear whether this application was granted but for reasons which will appear hereafter this point is of no importance.

The pleadings being closed, issues were framed as follows :—

(1) Has the title of Sellasamy derived on P2 (the mortgage of 24th February, 1944) passed to the plaintiff on P3 (the conveyance by the Deputy Fiscal on the 21st February, 1950) ?

(2) Is the order made on 3rd February, 1941—D2 in Testamentary proceedings 5437 of D. C. Kandy, *res judicata* between the parties ?

(3) If so, is defendant as administrator of the said estate in lawful possession of the said premises ?

On the 25th January, 1951, the District Judge gave judgment dismissing the action. He held that the effect of the order of the 3rd February, 1941, was that the subject matter in dispute lost its identity and got submerged in the estate, Sellasamy and the other heirs becoming entitled to an undivided share of the whole estate. Accordingly he answered the issues as follows;— "1. No. 2. Yes. 3. Yes."

From this order the present respondent appealed, and on the 18th September, 1952, the Supreme Court allowed the appeal, declared the present respondent entitled to the property in dispute, and made an order for the ejection of the appellant therefrom.

As the appellant's claim to the property rests entirely upon the order of 3rd February, 1941, it is convenient first to consider what was the law applicable at the date when that order was made. It was agreed before their Lordships that the following passage from Steyn's "Law of Wills in South Africa" (1935 Edition, p. 103) was a correct statement of the law applicable in Ceylon before the passing of Ordinance No. 15 of 1876 :—

"Collation is the duty incumbent on all descendants who as heirs wish to share in the succession to an ancestor, either by will

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or *ab intestate*, of accounting to the estate of the ancestor for certain kinds of gifts and debts received from or owing to him by them during his lifetime.

Thus, if a child, grandchild or more remote descendant wishes in inherit from a parent, grandparent or remote ascendant from whom he has during his lifetime received any property or money as his portion of his inheritance, or as a marriage gift or otherwise for his advancement in trade or business or such like, he will, before the division of the estate, have to bring into or collate with the estate of such parent, &c., either what he may have so received or enjoyed or the true value of the same at his option, so that the whole estate, thus augmented, may be divided in terms of the will of the testator or according to the law of succession *ab intestate*. "

Thus, if a father gave property to his son on the occasion of the son's marriage, and died intestate, the son had the option of renouncing all claim to share in his father's estate or of bringing the property into collation. If he chose the latter alternative, he had a further option of bringing in either the property itself or the value thereof.

Mr. Wilberforce for the appellant submitted that the effect of section 39 of Ordinance No. 15 of 1876 (which has already been quoted in full) was to take away both of these options and to impose on the donee a positive obligation to bring into the estate, so as to form part thereof, the property the subject of the gift; that there was no option to surrender the value of the property instead of the property itself; and that the order of the 3rd February, 1941, was in effect a declaration of title in favour of the administrator of Ponniah's estate. He relied in particular (*a*) upon the fact that the section does not contain any qualifying words such as " if they wish to share in the estate " and (*b*) upon the absence of any reference in the section to the alternative of bringing into hotchpot the value of the property instead of the property itself.

If Mr. Wilberforce's argument is correct, the section made a very striking change in the law, for which he could suggest no reason. Their Lordships do not doubt that if and so far as any provision of the section is inconsistent with the provisions of the Common Law, the section must prevail. It was for this reason that the Supreme Court in *Vaitianathen v. Meenatchi* [1] held that after the passing of the section collation took place only when a parent gives property to his children either on the occasion of their marriage or to advance or establish them in life. In their Lordships' view, however, there is nothing in the section inconsistent with the preservation of the two options already mentioned. The first option is preserved by the words " becoming . . . heirs to the deceased parents ", which do not rule out the alternative that the donee may elect not to claim his share as an heir. The second option is preserved by the use of the words " bring into hotchpot or collation ". The Ordinance under consideration contains no definition of " hotchpot

[1] (*1913*) *17 N.L.R.* 26.

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or collation " nor does it contain any provision from which their Lordships can attribute any particular meaning thereto. The proper course in these circumstances is to attribute to the words the meaning which they bore under the law applicable immediately before the section was enacted. That meaning undoubtedly conferred upon the donee the second of the two options already mentioned.

Mr. Dingle Foot for the respondent referred their Lordships to the following passage in Maxwell's "Interpretation of Statutes" 10th Edition, page 81 :

> "*Presumption against Implicit Alteration of Law*
>
> One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness-"

Their Lordships agree that the law is correctly stated in the passage cited. They would only add that they agree with the opinion expressed by Gunasekara J. in the Supreme Court that the language of the section, " confirms rather than negatives the view that the legislature did not intend to take away the heir's option to discharge a liability to collation by bringing the value of the property into account. "

Turning to the question of the effect of the order of the 3rd February, 1941, it is important to observe the learned District Judge's statement of the question he was deciding. Their Lordships will therefore repeat the citation they have already made :

> " The only other question to be decided is whether the 1st respondent who was given a Deed of Gift No. 7881 of 1927 (1 R 3) by his father Ponniah should bring the property gifted into collation if he wishes to inherit as an heir.
>
> The point to determine is whether, as is stated by respondents 2 to 6, such gift was made on the occasion of his marriage. "

It is no doubt true that the form of his final conclusion indicates that the learned judge was assuming that Sellasamy would claim his share in the inheritance, but having regard to the way in which the learned judge had stated the question he had to determine their Lordships are unable to construe his order as depriving Sellasamy either of his right to retain his gift and renounce his share in the inheritance or, if he desired to participate, of his option to bring in the value of the gift instead of the property given. Sellasamy thus retained the legal estate in the property, and there was no fetter upon his power to sell or mortgage it. As their Lordships have already stated, he proceeded to mortgage the property and it was sold to the respondent by the Deputy Fiscal in proceedings

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commenced by the mortgagee. Thereafter Sellasamy could only claim to participate in the inheritance if he brought in the value of the property given, since he was no longer in a position to bring in the property itself, but this fact in no way affects the respondent's title to the property.

Having regard to the view of the order which their Lordships have just expressed, they cannot regard it as being an instrument affecting land, within s. 8 of the Registration of Documents Ordinance. Thus the registration of the order in 1950 was ineffective to defeat the title of the respondent, even if it be assumed that the registration of the two mortgages was also of no effect.

It was suggested in argument that the registration of the order was ineffective to defeat the title of the respondent for other reasons also but it is unnecessary to state these reasons or to arrive at a conclusion upon them.

As the respondent succeeds on the strength of the conveyance to him by the Deputy Fiscal, their Lordships need not consider whether he ought to be allowed to rely on the Prescription Ordinance, No. 22 of 1871.

Their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the respondent's costs.

Appeal dismissed.

1954 *Present :* **Sansoni J. and Fernando A.J.**

K. K. SILINDUHAMY *et al.*, Appellants, *and*
P. WEERAPERUMA, Respondent

S. C. 181—D. C. Galle, 4,395

Res judicata—*Several previous but conflicting decisions—Principles applicable then—Partition action.*

In an action for the partition of what was described by the plaintiff as a land consisting of two portions (A and B) the contesting defendants took up the position that the two portions were distinct and separate lands in one of which the plaintiff had no share and, therefore, that the two lands could not be joined in one action for partition.

There had been three earlier actions—Cases Nos. 1, 2 and 3—in regard to the same point in dispute. In Case No. 1, it was held that portions A and B constituted one land. On this question it was decided in Case No. 2 that the previous decree in Case No. 1 was *res judicata*. The question arose again in Case No. 3 where the defendants pleaded the decree in Case No. 1 as *res judicata*, but the decree in Case No. 2 was not pleaded as *res judicata*. It was

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however, decided in Case No. 3 that A and B were two separate adjoining lands. In Case No. 3 the predecessors in title of the plaintiff and contesting defendants of the present action were parties.

Held, that, for the purpose of deciding the present action, the decisions in Cases Nos. 1 and 2 were superseded by the decision in the later Case No. 3 which was *res judicata* as between the plaintiff and the contesting defendants. Two principles governed the matter, viz., (1) A judgment of a Court of competent jurisdiction directly upon the point in dispute is a bar between the same parties or those claiming through them if pleaded ; but if not so pleaded, the matter is left at large. (2) Where there are conflicting judgments *inter partes*, the later adjudication should be taken as superseding the earlier.

APPEAL from a judgment of the District Court, Galle.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for the 4th, 11th and 19th defendants appellants.

Cyril E. S. Perera, Q.C., with *A. W. W. Gunawardene*, for the plaintiff respondent.

Cur. adv. vult.

September 24, 1954. SANSONI J.—

The plaintiff-respondent brought this action for the partition of a "land called Rukmalgahaowita and Kumbura adjoining each other situated at Aluttanayamgoda in Mapalagama in the Gangaboda Pattu of the District of Galle, Southern Province, and bounded on the North by Diganegoda Potuwila, East by Modera Pelessa, South by Kamarangeowita and West by Walagawawatta containing in extent about five acres (5 A. 0 R. 0 P.)". He traced title to the land from two persons, Liyanage Nonnehamy and Liyanage Seuhamy who were alleged to have owned the land in the proportion of 7/8 and 1/8. Nonnehamy married Ketipe Kankanange Adirian in community of property and the latter died leaving his widow who then got 7/16 share and the four children Udaris, Andiris, Nonahamy and Babahamy who each got 7/64 share. The widow Nonnehamy by deed P1 of 12th September, 1901, sold her 7/16 share to Singhoappu, and the plaintiff by purchase on deed P3 of 1942 claims that share. The 19th defendant has purchased certain interests out of Udaris' share in the southern portion of the land. Andiris married Gimara and they had two children the 4th and 20th defendants who sold their share to the 11th defendant. With regard to Seuhamy's 1/8th share, on her death it passed to her four children Sancho, Aranolis, Endiris and Dingihamy. Sancho's share was bought at a sale in execution against her by Karunaratne and Abeyhamy on Fiscal's Conveyance P8 of 1906, and that share has devolved on the plaintiff. Endiris' share in the southern portion was bought by Gimara on deed 11D2 of 1911, and on Gimara's death it passed to her children the 4th and 20th defendants who sold it to the 11th defendant. I have referred to the devolution of only some of the shares in order to set out how the disputes in this appeal arise.

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The plaintiff's case was that the entire land comprising of the 11 lots A to K, as depicted in the plan Z was the land to be partitioned. He pleaded that the judgments and decree in C. R. Galle Cases Nos. 749 and 9212 were *res judicatae* and binding on the defendants. The 4th, 11th and 19th defendants, whom I shall refer to as the contesting defendants, filed a joint answer. They took up the position that the 4 lots A, B, C, and D form a paraveni land called Rukmalgaha Owitagoda Owita of which Liyanage Nonnehamy owned 7/8 share while the remaining 7 lots E to K form a distinct and separate divel land called Rukmalgaha Owita and Kumbura which formerly belonged to Liyanage Adirian. These defendants further pleaded the judgment and decree in C. R. Galle Case No. 4923 as *res judicata*. It was the case of the contesting defendants that the land shown in plan Z comprised two separate lands, viz., a divel land (lots E to K) lying north of the ridge which runs from West to East, part of it paddy field and part owita, and a distinct paraveni land (lots A to D) lying south of the ridge. An examination of the earlier deeds produced establishes this position beyond any doubt. In 1879 Liyanage Adirian, who the contesting defendants say was the former owner of the divel land, leased the owita portion of it to Weerasinghe de Silva by deed 11D6 for four years. The land leased is described as Rukmalgaha owita of 3 pelas. In a subsequent deed of lease 11D7 of 1890 between the same parties the leased premises are described as Rukmalgaha divel owita. But the divel land also contained a field portion (lots 1, J and K in plan Z), in extent 3 pelas and in 1899 Liyanage Adirian sold the entire divel land by deed 11D4 to Ketipe Kanakanange Andiris de Silva, describing it as Rukmalgaha Kumbura and Owita of 6 pelas. The boundaries mentioned in that deed are important and they are :—

North—Digane Godage Pothuwila,

East—Diyaambe Owita and Watte,

South—*Rukmalgahaowita Paraveniwatte*,

West—Walagawa wagura.

The earlier document in respect of the southern or paraveni portion (lots A to D) is a Fiscal's transfer 11D9 of 1886 issued after a sale in execution held in 1880 against Nonahamy's son Udaris. The following description of the land appears in it—Rukmalgahaowita bounded as follows :—

North—*Rukmalgahaowita Divel owita*,

East—Moderapelessa Owita Divel Watta,

South—Kaberankka owita and Batelewatte.

West—Nugagahawite Medewatte and Walagavawatta.

There is no reason why these old documents should be disregarded when one has to examine the question whether there was one land, as the plaintiff says, or two lands as the contesting defendants say. What is more, since 1879 Liyanage Adirian who is the predecessor in title of the contesting 4th and 11th defendants was dealing with the divel portion

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to the north of the ridge on the footing that it belonged solely to him He sold the entirety to K. K. Andiris in 1899, the latter being the son of Nonnehamy and K. K. Adirian ; on the death of Andiris and his wife Gimara this land is said to have devolved on their sons the 4th and 20th defendants, and the 20th defendant sold this divel portion (along with the paraveni portion to the south) to the 11th defendant.

But the plaintiff's reply to the strong case made out on the old deeds is that there was a decision in an action C. R. 749 of 1898 which is binding on the contesting defendants. Now that action was filed by Liyanage Nonnehamy (already referred to) against 8 defendants, one of whom (Endiris) subsequently sold his 1/32 share of the paraveni portion to Gimara by deed 11D2 of 1911, and in that way he may be said to be a predecessor in title of the 4th and 11th defendants. Nonnehamy for herself and her children (though they were not added as parties) obtained declaration of title to 7/8 of the entire land sought to be partitioned in this action. The remaining 1/8 share presumably was the property of Seuhamy from whom certain of the defendants in that action (including Endiris) claimed to have inherited it. It is not necessary to consider the legal effect of the failure to add Nonnehamy's children as parties, or even to consider to what extent the decree in that action would be *res judicata* against the contesting defendants, because there were two later actions which render it unnecessary to consider these matters. In 1907 Karunaratne and Abeyhamy (who are the plaintiff's predecessors in title in respect of 1/4th of the 1/8th share which belong to Seuhamy) sued Gimara, Endiris and another in C. R. No. 9212 for a declaration of title to their 1/32 share of the entire land sought to be partitioned. The defendants resisted the claim on the ground that the plaintiffs were entitled to 1/32 share only of the paraveni portion while the divel portion belonged to Gimara alone. The Commissioner of Requests decided that the previous decree in C. R. Case 749 was *res judicata* on this question. I do not intend to discuss the validity of this decision or its effect either, for reasons which I shall presently give. In my opinion the decree entered in the next case C. R. 4923 is all important. In that case Gimara (who is the 4th and 11th defendants' predecessor in title) sued the present plaintiff's and the present 3rd defendant's predecessors in title, viz., Sinnoappu and Babahamy in respect of the divel portion only. She complained that the defendants had claimed 7/16 share of the land and she asked that she be declared entitled to and quieted in possession of that share. The defendants filed answer pleading the decree in C. R. No. 749 as *res judicata*, but the decree in C. R. 9212 was not pleaded as *res judicata*. Sinnoappu further pleaded that he was entitled to 7/16 share by purchase from Nonnehamy after the decision of C. R. 749 (on the footing that Nonnehamy was entitled to 1/2 of 7/8), while Babahamy pleaded that she was entitled to 7/64 as one of the 4 children of Nonnehamy who were entitled under that decree to the remaining 1/2 of 7/8. The two defendants asked that they be declared entitled to 7/16 plus 7/64 shares of the portion in dispute. The portion in dispute was clearly depicted in the plan made for that case and corresponds to the portion claimed in this action also as the divel land. Decree was entered declaring Gimara entitled to these very shares which the two defendants had

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claimed. The Commissioner of Requests in his judgment held that Gimara was not estopped from showing that there were two separate adjoining portions, one divel and the other paraveni, and that Liyanage Adirian was the former owner of the divel portion.

We thus have the very dispute which has been raised in this action considered and decided in that case to which the plaintiff's and the 3rd defendant's predecessors in title on the one hand, and the contesting defendants' predecessors in title on the other, were parties. The plaintiff's and the 3rd defendant's predecessors in title put forward the claim which is now put forward in this action and they failed to establish it. In passing I would refer to the two principles which must govern this matter. One is that a judgment of a Court of competent jurisdiction directly upon the point in dispute is a bar between the same parties or those claiming through them if pleaded ; but if not so pleaded, the matter is left at large (*Feversham v. Emerson*[1]). The other principle is that when there are conflicting judgments *inter partes*, the later adjudication should be taken as superseding the earlier (*Akkammal v. Komarasami Chettiar*[2]). Both principles apply to the judgment and decree in C. R. case No. 4923, and it is for this reason that I consider the decisions in the two earlier cases to be of no importance. They were superseded by the decision in the third case which is *res judicata* as between the plaintiff and the 3rd defendant on the one hand and the contesting defendants on the other.

The learned District Judge after discussing the issue of *res judicata* held that the contesting defendants are bound by the decree in C. R. No. 9212 and cannot now be heard to say that the 7 lots E to K form a separate land. He took the view that as no evidence had been led to show what the issues were in C. R. No. 4923 the decision in that case is not *res judicata*. I have already referred to the claims of the parties in that case and upon those claims the 2 issues which arose (even though they were not framed before evidence was led) were (1) whether there were two lands or only one and (2) whether Gimara or the two defendants owned the shares in dispute out of the divel land. The learned Judge also points out that some of the more recent deeds describe the entire land shown in the plan Z. But where the parties executing them were entitled to deal only with the paraveni portion, this circumstance cannot convert the two distinct lands into one land. The boundary which the contesting defendants rely on as separating the two lands is depicted in the old plan of 1910 made in C. R. 4923. There is some evidence led by the plaintiff who tried to show that he and his co-owners used to possess the northern portion (except the coconut and rubber plantations) along with the contesting defendants. But even this will not help the plaintiff to establish that the two lands were in reality one land in the face of the clear evidence afforded by the old deeds, some of which were executed long prior to the first action instituted by Nonnehamy. It was she who first attempted to treat both lands as forming one entity, possibly with a view to claiming a share out of the divel portion which her brother Adirian alone had been leasing as owner of the entirety.

[1] *11 Exch 385.*

[2] *55 Madras Law Weekly 511.*

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At a late stage of the argument the plaintiff-respondent's counsel drew attention to the fact that Adirian, when he transferred in 1899 to Andiris, recited title to the divel portion by inheritance through his paternal grandfather. He argued from this that Adirian's sister Nonnehamy must therefore have been entitled to a share of this divel portion. But this does not meet the objection that there are two distinct portions ; nor does it help the plaintiff on the question of *res judicata*.

It is unnecessary for me to discuss the question whether the contesting defendants have established prescriptive title to the divel portion for they do not need to rely on a prescriptive title. Once it is found in their favour that the divel portion is a distinct land from the paraveni portion and that the plaintiff has no share in the divel portion, that portion must be excluded because the two portions cannot then be joined in one action for partition. It is not suggested that the plaintiff and/or the other parties to this action have prescribed against the contesting defendant in respect of this portion.

I would accordingly direct that the corpus to be partitioned be confined to lots A, B, C, and D in plan Z ; lots E, F, G, H, I, J, and K must be excluded from the scope of this action because the plaintiff owns no share in them, and the interlocutory decree will be varied by deleting the references to these lots. The plaintiff respondent must pay the 4th, 11th and 19th defendants-appellants their costs of the contest in the lower Court and of this appeal. The other costs will be in the discretion of the Judge who deals with the action in the lower Court.

FERNANDO A.J.—I agree.

Decree varied.

1954 *Present :* **Gratiaen J. and Fernando A.J.**

CARGILLS (CEYLON) LTD., Appellant, *and* COMMISSIONER OF STAMPS, Respondent

S. C. 250—Appeal under Section 31 of the Stamps Ordinance

Stamps Ordinance—Business—Agreement to sell it—Movable assets—Liability to duty—Meaning of "business"—Section 26A—Schedule, Items 4 (c) and 23 (2a) (vii).

An agreement for the sale of a business is chargeable to duty as such under Item 23 (2*a*) (vii) of the Schedule to the Stamps Ordinance notwithstanding that the various assets of the business are separately specified in the agreement.

Where such an agreement includes a provision for the sale of the goods, wares and merchandise belonging to the business the exemption in Item 4 (*c*) is not applicable.

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APPEAL under section 31 of the Stamps Ordinance against a determination by the Commissioner of Stamps.

N. E. Weerasooria, Q.C. with *H. W. Tambiah* and *S. Sharvananda*, for the appellant.

T. S. Fernando, Q.C., Solicitor-General, with *M. Tiruchelvam*, Crown Counsel, for the respondent.

Cur. adv. vult.

July 8, 1954. FERNANDO A.J.—

At the conclusion of the argument in this case, we made order dismissing the appeal with costs, and indicated that reasons would be given later.

This was an appeal under S. 31 of the Stamps Ordinance against a determination by the Commissioner of Stamps. The instrument in question is an agreement No. 3819 of 19th February, 1946, entered into between the attorney of Cargills Ltd. (a Company incorporated in Scotland) (" the vendor ") and Mr. Abraham Gardiner (" the purchaser ") which first recited the receipt by the vendor of an earlier written offer by the purchaser and the agreement by the Board of Directors of Cargills Ltd., which was communicated by cablegram, to accept the said offer. By the agreement the vendor bound himself to sell and the purchaser to buy with effect from 1st April, 1946 " the movable and immovable assets of Cargills Ltd. hereinafter specified at a price hereinafter mentioned ", the price being " the aggregate sum of Rs. 11,500,000 for all the assets concerned ". The specified assets were :—1. Immovable property briefly described in the Schedule, and the goodwill of the business of the vendor, 2. Furniture, fittings and plant equipment, 3. Customers outstandings due to the vendor on March 31st, 1946, 4. All the stocks, wares and merchandise remaining undisposed of in Ceylon belonging to the vendor on 31st March, 1946. The agreement stated that in arriving at the aggregate sum, the sum payable for the assets fourthly mentioned had been tentatively fixed at Rs. 3,300,000 and provided for adjustment by reference to the actual position on 31st March, 1946. (At a later stage it was accordingly agreed between the parties that the sum payable in respect of the fourth asset should be adjusted to Rs. 4,374,768.) The payment by the purchaser of a deposit of 10% of the aggregate sum was acknowledged and the balance of the aggregate was declared to be payable on or before August 1946. The vendor agreed to execute the necessary conveyances relating to the transfer of the assets to the purchaser.

The agreement was ultimately carried into execution and the necessary formal instruments of conveyance were executed by the vendor, transferring to the nominee of the purchaser, Cargills Ceylon Ltd., the assets

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included in the categories 1 and 3. Stamp duty having been paid on these conveyances, the Commissioner in making his determination of the duty payable on the agreement No. 3819 deducted the amount of the duty so paid, and we are therefore concerned in this case only with the amount of duty, if any, payable on the remaining assets namely :— (*a*) the furniture, fittings plant and equipment belonging to the vendor, (*b*) the stocks wares and merchandise belonging to the vendor on 31st March, 1946. The Commissioner has determined that both categories of assets are chargeable with duty under S. 23 (2) of the Schedule to the Stamps Ordinance.

The principal question for determination is whether the document No. 3819 constituted an agreement for the sale of the business of Cargills Ltd. and therefore chargeable under Item 23 (2*a*) (vii) of the Schedule to the Ordinance.

Mr. Weerasooria contends that it is not, but is merely an agreement to sell certain specified assets belonging to the vendor, in which case, he argues, duty is not chargeable upon the agreement covering the goods, wares and merchandise. He relied at first on S. 26A of the Ordinance which was inserted in the main Stamps Ordinance by the amending Ordinance of 1941. He urged that the section conferred an exemption in regard to agreements for the transfer of goods, wares and merchandise, but it became manifest during the course of the argument that the mention of the item " goods, wares and merchandise " in an exception clause in S. 26A cannot be construed as conferring an exemption in respect of property of that class, if in fact a charge on it is imposed in the Schedule to the Ordinance.

Mr. Weerasooria relied secondly on Paragraph (*c*) of Item 4, in the Schedule, which does confer an exemption for agreements relating to the sale of goods, wares and merchandise, but only if such an agreement is not otherwise charged by the Ordinance. If therefore the agreement in this case is one covered by Item 23 (2*a*) (vii) of the Schedule as amended in 1941, neither item 4 nor the exemptions to that item would be applicable. I would like to refer in passing however to the cases of *South v. Finch* [1] and *Horsefall v. Hay* [2] where a similar exemption in respect of goods wares and merchandise in England was held not to apply to agreements for the sale of goods *together with other property*, and to the test applied in India " to see whether the document evidences only a transaction of sale or a sale and some other independent transaction ". (Donough-Indian Stamp Law 9th Ed. p. 581).

Was this then an agreement for the sale of a business ? In determining for the purposes of the Stamp Law whether a document falls within a description of documents which attract duty, regard must be had to its true meaning and intent. As authority for this principle is scarcely necessary, I am content merely to refer to the case of *Chesterfield Brewery Co. v. Commissioner of Inland Revenue* [3] which was cited by the learned

[1] *3 Bing N. C. 506.* [2] *17 L. J. Exch. 266.* [3] *(1899) 2. Q. B. 7*

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Solicitor General. If therefore a scrutiny of the deed here in question reveals that what was really agreed upon by the vendor and the purchaser was that all the assets or substantially all the assets of the business of Cargills Ltd. were to be transferred, then the agreement becomes liable to duty under the relevant item. The transaction covered several immovable properties upon which the business of the vendor had been carried on, the goodwill of the business, customers outstandings, fixtures and the whole of the stocks ; it also covers agencies for imported commodities in so far as the agent was in a position to secure their transfer to the purchaser ; in fact Mr. Weerasooria was unable to suggest any assets held by Cargills Ltd. for the purposes of its business (other than actual cash in hand or money in the Bank) which was not included within the scope of the transaction. In so far as the disputed item of goods, wares and merchandise is concerned, it is important to note that the agreement covered all goods, wares and merchandise in stock on 31st March, 1946, including even goods afloat, and the total value of these assets amounted to nearly Rs. 4½ million. It is clear that but for the transfer of these stocks the purchaser would not have been able to exercise with any hope of profit the rights expressly conferred on him by the agreement " to hold himself out as carrying on a similar business in Ceylon in succession to Cargills Ltd., and if so desired to carry on such business under the name and style of Cargills (Ceylon) Ltd. ". This right would have been an empty one, and indeed purchase of the other assets would have been a hazardous venture, if the purchaser had not obtained a binding undertaking from the vendor to hand over all stocks in hand at the time of the transfer. It is a debatable question whether the purchaser could have avoided the payment of stamp duty on the value of the stocks by taking it on trust that the vendor would hand them over on payment together with the other assets, though successful avoidance of the duty by that means would have been perfectly legitimate. But the purchaser actually chose a different course and made the transfer of the entire stocks an integral part of the obligations binding upon the vendor by the agreement.

In the case of *In re Rhagg, Easten v. Boyd*[1] Simonds J. (as he then was) in construing a bequest of " my business as a solicitor " said " The word ' business ' in such a context as this bears much the same meaning as when it is said that a man has sold his business. It means the undertaking or enterprise itself, not the process of carrying it on ".

I am of opinion that the agreement before us cannot, merely on the ground that the various assets of the vendor were separately specified and valued, be construed as anything other than an agreement for the sale of the undertaking or enterprise theretofore carried on in Ceylon by the vendor under the name of Cargills Ltd. and that it is therefore chargeable with duty as an agreement for the sale of a business.

GRATIAEN J.—I agree.

Appeal dismissed.

[1] *(1938) Ch. D. 828.*

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1954 *Present :* **de Silva J.**

D. H. EKMON, Appellant, *and* B. W. SUGATHADASA (Inspector of of Police), Respondent

S. C. 679—M. C. Balapitiya, 8,410

Grievous hurt—" Potential danger to life "—Not the same thing as endangering life—Penal Code, ss. 311, 317.

An injury which causes " a potential danger to life " is not grievous hurt within the meaning of section 311 of the Penal Code.

APPEAL from a judgment of the Magistrate's Court, Balapitiya.

K. C. de Silva, with *M. L. de Silva*, for the accused appellant.

M. Kanagasunderam, Crown Counsel, for the Attorney-General.

October 22, 1954. DE SILVA J.—

In this case the accused appellant was charged with causing grievous hurt to one Piyaratne by stabbing him on the left side of his chest with a knife, an offence punishable under section 317 of the Penal Code. After trial the learned Magistrate, who tried the case in his capacity as Additional District Judge, found the accused guilty of the charge and convicted him and sentenced him to one year's rigorous imprisonment, and also ordered him, under section 80 of the Criminal Procedure Code, to enter into a bond in a sum of Rs. 250/250 to keep the peace for a period of six months.

Mr. K. C. de Silva, who appears for the appellant, contends that the prosecution has failed to establish the charge of grievous hurt. He refers to the medical evidence. The doctor has stated that the injury was $1\frac{1}{4}$" long and that the knife had entered the chest cavity. He described the injury as being grievous but he proceeded to state further that the injury brought about " a potential danger to life ". This injury had not caused any damage to any vital organ. In the circumstances of this case it could have been grievous only if it endangered life. A " potential " danger to life is not the same thing as endangering life. For the injury to be regarded as grievous the injured person's life should have been in fact in danger. The word " potential ", according to the Oxford Dictionary, means " capable of coming into being or action " or " in possibility not in fact ". The mere possibility of this injury becoming a danger to life at a later stage is not sufficient to base a charge under section 317 of the Penal Code in respect of that injury. It is clear from the evidence of the doctor that at no stage did this injury in fact endanger the man's life. There was only a possibility of his life being in danger. That possibility was not realised. Accordingly the conviction under section 317 must be set aside.

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There is not the slightest doubt that the appellant in fact inflicted the injury in question. Accordingly, I alter the conviction to one under section 315 of the Penal Code and sentence him to six months' rigorous imprisonment, and also direct him under section 80 of the Criminal Procedure Code to enter into a bond in a sum of Rs. 250/250 to keep the peace for a period of six months after the sentence of imprisonment has been served. Subject to this variation the appeal is dismissed.

Conviction altered.

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[TRIAL AT BAR]

1954 *Present :* **Rose C.J., Gunasekara J. and Pulle J.**

THE QUEEN *v.* THEJAWATHIE GUNAWARDENE

Information No. 1 of 1954 exhibited in the Supreme Court by the Attorney-General

Informations—Power of Attorney-General to exhibit informations—Circumstances when informations may be presented—Criminal Procedure Code, s. 385.

Trial at Bar—Direction of Minister of Justice—Jurisdiction of Court to adjudicate upon its validity—"Disturbance of public feeling"—Test of its existence—How far justiciable—Criminal Procedure Code, s. 440A (1) and (2).

Information was exhibited by the Attorney-General against the defendant on August 5, 1954, charging her with criminal defamation in respect of a defamatory statement published on July 1, 1954, in a newspaper called "Trine", concerning a person who had held high office in Government for many years in various capacities and who, on the day previous to the date of publication of the statement, had ceased to hold office as Minister of Finance and was Governor-General designate. The alleged libel was to the effect that the Governor-General designate had been engaged in swindles on an international scale and that a public trial of the gang—of which presumably he was a member —was imperative.

On August 6, 1954, the Chief Justice received from the Minister of Justice a written communication dated the previous day and purporting to be a direction under Section 440A of the Criminal Procedure Code that the defendant should be tried at Bar by three Judges without a Jury.

Before defendant pleaded to the information her Counsel moved that the information be quashed on the ground that it was one which the Attorney-General could not validly exhibit, and also contended that the direction of the Minister of Justice was invalid.

Held, that if the Attorney-General in whom rested the discretion either to proceed by indictment or information took the view that the imputations which were the subject of the information tended to disturb or endanger the Government, it was impossible to hold, assuming that the Court had the power to review that discretion, that that view was wrong. The speedy process of information was designed not to vindicate the personal honour of the officer libelled but to counteract what was essentially a public mischief. In the circumstances the Attorney-General had the power under Section 385 of the Criminal Procedure Code to file the information, and the application to quash it must accordingly fail.

Quaere, whether in any event the Court had the power to quash an *ex officio* information ?

Held further, (i) that the Court had jurisdiction to adjudicate upon the question whether the direction given by the Minister of Justice was a valid direction in the sense that it complied with the requirements of Section 440A of the Criminal Procedure Code. The circumstance that the Minister had purported to direct that the information "shall be tried before the Supreme Court at Bar by three Judges without a Jury" did not have the effect that a Bench of three Judges which assembled to hear the information ceased to be the Supreme Court and became a different tribunal created by the Minister.

(ii) that there was no requirement to give the Minister of Justice an opportunity of being heard in support of the direction given by him.

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2——J. N. B 42096—1,595 (1/55)

(iii) (by the majority of the Court) that in a case of disturbance of public feeling, before the Minister of Justice proceeds under Section 440A (1) (*b*) to the consideration of the question as to whether the matter is appropriately triable by three Judges without a Jury there must be reasonable grounds for his belief that there is a disturbance of public feeling. The sole test to be applied in such a case is whether, in the opinion of the Court, a reasonable man occupying the seat of the Minister could reasonably come to the conclusion that there existed a disturbance of public feeling.

(iv) (by the majority of the Court) that the principle *omnia praesumuntur rite esse acta* was applicable to the Minister's order.

(v) that the phrase "disturbance of public feeling" was not (in the opinion of the majority of the Court) limited to cases where there was an open manifestation of public feeling. One of the tests which could be applied to determine whether or not a disturbance of public feeling exists would be to consider the reactions to the matter in question of the ordinary citizen in various walks of life. Applying that test in the present case, the question as to whether there was reasonable ground for the belief that there existed a disturbance of public feeling in consequence of the publication of the defamatory statement should be answered (by the whole Court) in the affirmative.

ORDER made in respect of preliminary objections taken to a trial at Bar upon information exhibited by the Attorney-General. The facts appear from the head-note.

D. N. Pritt, Q.C., with *Izadeen Mohamed, A. S. Vanigasooriar, L. Muttutantiri* and *F. R. Dias*, for the defendant.—My preliminary objection is really in the form of a "double motion" seeking to deprive the Crown of both its advantages, viz. : trial at Bar by 3 Judges without a Jury and proceedings by Criminal Information.

(1) The direction by the Minister of Justice under Section 440A of the Criminal Procedure Code must be quashed. In the first place it must be borne in mind that Section 440A was introduced into the Statute Book to meet a particular situation, the disturbances of 1915. The section must therefore be construed in the light of the circumstances that obtained at *that* time. The Court can take judicial notice of those circumstances and can even make reference to the proceedings of the Legislative Council during the debate on this amendment to the Criminal Procedure Code. Those circumstances were extraordinary circumstances and it is only in similar circumstances that the powers conferred in the Executive by this Section were intended by the Legislature to be invoked. It cannot even be suggested that the country found itself in any such situation at the time of the Minister's direction in this case, viz. August, 1954.

Secondly, the words of the Section must be interpreted strictly. Section 440A (1) (*b*) provides that "in the case of any other offence" (i.e. any offence other than an offence under Section 120 of the Penal Code) "which by reason of civil commotion, disturbance of public feeling or any other similar cause, the Minister of Justice may consider to be appropriately triable in the manner in this section provided, the Minister of Justice may direct . . . . .". It is submitted that before the Minister can make a direction under this section there must exist *in fact* some "civil commotion, disturbance of public feeling or any other similar cause",

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Thereafter, the Minister must consider whether the offence is " appropriately triable " as provided. Those are the two requirements of the section.

As regards the first requirement, " any other similar cause " must be read " *ejusdem generis* " with " civil commotion, a disturbance of public feeling ". The Crown must prove the existence, in fact, of such circumstances at the relevant time. On a proper interpretation of Section 440A (1) (*b*), those are matters the existence of which must be established to the satisfaction of the Court. The Court has jurisdiction to enquire into that question as it is a necessary and essential pre-condition to the valid exercise of the Minister's powers. The question of whether or not there existed in fact " civil commotion, disturbance of public feeling or any other similar cause " is a " justiciable " or " judiciable " issue and not one on which the Minister and he alone must decide. This view is supported by the decisions in *Liversidge v. Anderson*[1]; *R. v. Halliday*[2]; *Eshekbye Eleko v. Officer Administering the Government of Nigeria*[3] and the Ceylon cases of *Bracegirdle*[4]; *Nakkuda Ali v. M. F. de S. Jayaratne*[5] and *M. F. de S. Jayaratne v. Miya*[6]. The case of *Liversidge v. Anderson*, which is now regarded as a leading case, upon close analysis supports the above contention. The facts in that case were totally different and though the actual decision in that case is based on those particular facts, the principle on which the House of Lords arrived at the decision is now well established.

If this view is acceptable, then the Court must have evidence placed before it of the existence of " civil commotion, disturbance of public feeling or any other similar cause ". What is " civil commotion " ? There must be violence and tumult—see *Cooper v. General Accident Assurance Corporation*[7]; *Levy v. Assicurazioni Generali*[8]; *Motor Union Insurance Co. v. Boggan*[9]. For " disturbance " see *Tillmans & Co. v. Steamship Knutsford Co.*[10]. The defence is under no obligation to prove the *non*-existence of any such circumstances. The Crown must satisfy the Court of the existence of such circumstances. There is no evidence at all, so far, placed before the Court that at the time of the Minister's direction there was, in fact, any of these conditions existing.

The second requirement of Section 440A (1) (*b*) is that the Minister must consider that the offence is appropriately triable as provided. The word " consider " must mean " hold the view ". That is a matter for the Minister's sole discretion and the Court has no jurisdiction to question the Minister's conclusions. The Minister must give his mind (i.e. consider) and must come to a conclusion. In this case there is no evidence before Court that the Minister has " considered " in the sense that he gave his mind to it and arrived at a conclusion. The instrument signed by the Minister does not state that he had given his mind to it and was satisfied that this was a case appropriately triable without a Jury. The direction signed by the Minister is a bald direction *simpliciter*.

[1] (*1942*) *A. C. 206.*
[2] (*1917*) *A. C. 260.*
[3] (*1931*) *A. C. 662.*
[4] (*1937*) *39 N. L. R. 193.*
[5] (*1950*) *51 N. L. R. 457.*
[6] (*1951*) *52 N. L. R. 249.*
[7] (*1922*) *128 L. T. 481.*
[8] (*1940*) *A. C. 791.*
[9] (*1923*) *130 L. T. 588.*
[10] (*1908*) *24 T. L. R. 454.*

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[To Rose C.J. : The doctrine *omnia praesumuntur rite esse acta* can only be applied if it is established that the Minister did bring his mind to bear on the matter.]

Finally, the Minister's direction is bad on the face of the instrument. It does not state that there exists in fact any " civil commotion, disturbance of public feeling or any other similar cause ". Nor does it state that by reason of any one of these the Minister considers this to be a case appropriately triable under Section 440A.

[To Rose C.J. : Even if the direction had stated " whereas I am satisfied " it still would not affect my principal submission that it is the *Court* and *not the Minister* that must be satisfied as to the existence of civil commotion, &c.]

The doctrine *omnia praesumuntur rite esse acta* will not apply in a case where a document is *ex facie* bad or invalid.

Summary (i) There must have existed, in fact, a " civil commotion, disturbance of public feeling or other similar cause "—Whether or not these existed is a matter for the Court to decide on evidence.

(ii) The Minister must bring his mind to bear on the question whether—once it has been established that there is civil commotion, &c.—the case is one for trial under Section 440A.

(iii) The Minister's direction must bear on the face of it a statement that he did so consider the matter.

[To Gunasekara J. : It is conceded that if the Minister's direction is bad, that does not mean that the Attorney-General's Information must necessarily be quashed. That is another matter.]

(2) The information exhibited by the Attorney-General must be quashed.

The only section which empowers the Attorney-General to exhibit a Criminal Information is Section 385 of the Criminal Procedure Code. That section enables the Attorney-General to exhibit criminal informations only for those purposes for which the Attorney-General in England may exhibit informations on behalf of the Crown in the High Court and for no other. The word used is " purposes " and not " offences ". For the purpose for which this procedure is resorted to in England—see Short & Mellor on Crown Office Practice. The information in this case nowhere states what the purpose is for which it has been exhibited.

[To Rose C.J. : It is conceded that the meaning of the word " purposes" in the section is somewhat difficult. It could mean " objects ".]

Secondly , the Courts in England act strictly in giving leave to bring criminal informations—see Blackstone's Commentaries, Vol. 4, Ch. 23, and *R. v. Labouchere* [1]. The cases in England where criminal information procedure has been resorted to are generally cases of sedition e.g. *R. v. Cobbett* [2] ; *R. v. Home* [3] ; *R. v. Burdelt* [4].

[1] *(1882) 12 Q. B. D.*
[2] *29 Howe's St. Tr. 1.*
[3] *20 Howe's St. Tr. 651.*
[4] *3 B. Ald. 717.*

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[To GUNASEKARA J.: Archibold in his treatise on Criminal Pleading does mention a case in which the offence related to a vast fraud in respect of a Bank—i.e. *R. v. Brown et al.* [1].]

[To ROSE C.J.: In the case of *R. v. Mylius* in 1911 no objection was raised to the use of the procedure by Criminal Information.]

Thirdly, *ex officio* informations are exhibited only where the Sovereign herself or her Ministers are libelled for such "enormous misdemeanours" as tend to interfere with the exercise of royal functions or tend to endanger the Government. In this case, on the 1st of July Sir Oliver Goonetilleke was a mere private person. There is no office known as "Governor-General Designate". In this case procedure by Information is unwarranted and the Information should be quashed.

H. H. Basnayake, Q.C., Attorney-General, with *T. S. Fernando, Q.C.*, Solicitor-General, *V. S. A. Pullenayagam, N. T. D. Kanakaratne* and *R. S. Wanasundera*, Crown Counsel, for the Crown.—My first submission is really a kind of preliminary objection to the preliminary objection raised by Counsel for the defence, that is that the Minister's direction cannot be questioned in *these* proceedings and that this Court has no jurisdiction to consider its validity. That submission is based on the following grounds—(1) The Minister's direction under Section 440A of the Criminal Procedure Code is the sole authority for the trial of the defendant by three Judges without a Jury. The original jurisdiction of the Supreme Court is to be found exclusively in Sections 19, 29, 42 and 45 of the Courts Ordinance. There is no "inherent" jurisdiction apart from the Statute —see *Mohamado v. Ibrahim* [2]; *In re Election of a Member for the Local Board of Jaffna* [3]; *Deonis v. Samarasinghe* [4]. The only power for three Judges of the Supreme Court to try a person without a Jury is therefore derived from the Minister's direction and the Judges who assemble in pursuance of that direction have no jurisdiction to go into its validity and make any pronouncement thereon.

[To ROSE C.J.: If the Minister's direction be illegal the defendant must seek his remedy elsewhere—perhaps by way of habeas corpus proceedings or appeal to the Court of Criminal Appeal (see Court of Criminal Appeal Ordinance Section 5 (4).]

The Court cannot examine the very instrument which brought it into existence. (2) The direction made by the Minister cannot be questioned in these proceedings. It can be questioned, if at all, only in proceedings to which the Minister is a party. The Minister is not a party to these proceedings. To declare the Minister's direction invalid or bad without giving him an opportunity of being heard would be a violation of the rules of natural justice. In all the English cases where similar Ministerial directions have been questioned the Minister has been made a party, e.g.: *R. v. Inspector of Lehman Street Police Station, ex p. Venicoff* [5]; *O'Brien v. Home Secretary* [6]; *R. v. Home Secretary, ex p. Bressler* [7];

[1] *(1858) 7 Cox. C. C. 442.*
[2] *(1895) 2 N. L. R. 36.*
[3] *(1907) 1 A. C. R. 128.*
[4] *(1911) 15 N. L. R. 39.*
[5] *(1920) 3 K. B. D. 72.*
[6] *(1923) A. C. 603.*
[7] *(1924) 131 L. T. 386.*

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Stuart v. Anderson[1] ; *R. v. Governor of Brixton Prison, ex p. Pitt Rivers*[2] ; *R. v. Home Secretary ex p. Budd*[3] ; *Liversidge v. Anderson*[4] ; *Point of Ayr Collieries Ltd. v. Lloyd George*[5] ; *Carltona Ltd. v. Commissioners of Works*[6] ; *Amand v. Home Secretary*[7] ; *Robinson v. Minister of Town and Country Planning*[8] ; *Johnson & Co. v. Minister of Health*[9] ; *Franklin v. Minister of Town & Country Planning*[10] . The only cases in which the Minister has not been made a party are cases where it was not the validity of his order which was questioned, but the validity of the law itself as in *R. v. Halliday*[11] ; *R. v. Governor of Brixton Prison, ex p. Savarkar*[12] ; *R. v. Inspector of Vine Street Police Station, ex p. Liebmann*[13] ; *R. v. Governor of Lewes Prison, ex p. Doyle*[14] ; *R. v. Governor of Wormwood Scrubs Prison*[15] ; *R. v. Superintendent of Chiswick Police Station, ex p. Sacksteder*[16]. (3) The statute provides for no appeal from the Minister's direction. To hear objections amounting to an appeal from the direction would amount to the assumption of an unwarranted jurisdiction. The Court cannot act as an appellate body and review the Minister's direction. *R. v. Home Secretary, ex p. Lees*[17] ; *Stuart v. Anderson*[18].

My second submission—assuming, without conceding, that the Judges who assemble in pursuance of the Minister's direction *can* go into the validity of that direction—is that the Minister's direction is valid and regular. He undoubtedly has the power to make the order he purports to make. The order cites the provision of law under which he purports to act and the order is under his own hand. Such an order is valid and regular—see *Point of Ayr Collieries Ltd. v. Lloyd George*[19] ; *Liversidge v. Anderson*[20] ; *R. v. Home Secretary, ex p. Lees*[21] ; *Stuart v. Anderson*[22] ; *El Dabbah v. A. G. for Palestine*[23]. Where a Minister makes a direction in which he cites the statutory power under which he is acting and signs it the presumption is that he has complied with all the conditions requisite for the making of such a direction. The maxim *omnia praesumuntur rite esse acta* applies. See Evidence Ordinance Section 114 Illustration (*d*); *R. v. Reynolds*[24] ; *Bhagat Singh v. Emperor*[25] ; *Vallibhai Ibrahim v. Emperor*[26] ; *Liversidge v. Anderson*[27]. The onus of rebutting this presumption is on the Defendant—see *Greene v. Home Secretary*[28] ; *Liversidge v. Anderson*[29] ; *Point of Ayr Collieries Ltd. v. Lloyd George*[30].

My third submission is that the words of Section 440A (1) (*b*) must be given their natural meaning—that is the cardinal principle of interpretation. The words must be construed as they would have been construed on the day the provision was introduced. On a natural construction of the

[1] (*1941*) *2 A. E. R. 665.*
[2] (*1942*) *1 A.E.R. 207.*
[3] (*1942*) *1 A. E. R. 373.*
[4] (*1942*) *A. C. 206.*
[5] (*1943*) *2 A. E. R. 546.*
[6] (*1943*) *2 A. E. R. 560.*
[7] (*1943*) *A. C. 147.*
[8] (*1947*) *1 A. E. R.851.*
[9] (*1947*) *2 A. E. R. 395.*
[10] (*1948*) *A. C. 87.*
[11] (*1917*) *A. C. 260.*
[12] (*1910*) *2 K. B. 1056.*
[13] (*1916*) *1 K. B. 268.*
[14] (*1917*) *2 K. B. 254.*
[15] (*1920*) *2 K. B. 305.*
[16] (*1918*) *1 K. B. 578.*
[17] (*1941*) *1 K. B. D. 72, at 84.*
[18] (*1941*) *2 A. E. R. 665, at 670.*
[19] (*1943*) *2 A. E. R. 546, at 548.*
[20] (*1942*) *A. C. 206.*
[21] (*1941*) *1 K. B. D. 72, at 78.*
[22] (*1941*) *2 A. E. R. 665, at 669.*
[23] (*1944*) *A. C. 156 at 163.*
[24] (*1893*) *2 Q. B. D. 75.*
[25] (*1931*) *A. I. R. (P.C.) 111.*
[26] (*1933*) *A. I. R. (Bombay) 79.*
[27] (*1942*) *A. C. 206, at 225.*
[28] (*1942*) *A. C. 284, at 295.*
[29] (*1942*) *A. C. 206, at 225.*
[30] (*1943*) *2 A. E. R. 546, at 547.*

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section it seems clear that the Legislature has made the Minister the sole Judge of the matters that should be decided before a direction under that section is made. The jurisdiction of the Court has been excluded. It would be unthinkable that the Legislature would have created such an unpractical and impracticable situation as to make the Court decide, on evidence, whether or not there existed in fact a civil commotion, disturbance of public feeling, &c. It is submitted that this is not a "justiciable" issue. Similar words in other cases have received the interpretation contended for by the Crown in this case—see *Bhagat Singh v. Emperor*[1]; *Liversidge v. Anderson*[2]; *Emperor v. Sarma*[3]. The entire trend of judicial decisions today in interpreting words giving similar powers to Ministers is in support of this contention—*Point of Ayr Collieries Ltd. v. Lloyd George*[4]; *Carltona v. Commissioners of Works*[5]; *Robinson v. Minister of Town & Country Planning*[6]; *Franklin v. Minister of Town and Country Planning*[7]. Nor is this rule of construction restricted to times of emergency only—see *Wijesekera v. Festing*[8]; *Robinson v. Minister of Town & Country Planning*[9]. It was conceded by Defence Counsel that the Court cannot go into the reasons for the Minister considering this a case "appropriately triable" as provided, once the existence of the pre-conditions is proved. It was sought to split the section into one part subject to the "objective" test and into another subject to the "subjective" test. The section cannot thus be split up so as to enable the Court to look into one part and not the other—see *Liversidge v. Anderson*[10].

It is finally submitted on the first motion that it is only when the Minister's good faith has been questioned that the Courts would investigate the grounds for or the reasonableness of the Minister's direction. In this case the Minister's *bona fides* has not been questioned. All the Court can do is to see whether the power the Minister claims to exercise is one which falls within the four corners of the statutory provision.

[The Attorney-General then distinguished the cases cited by Mr. Pritt as being inapplicable to the issue now being argued]. *Nakkuda Ali's* case (followed in *Mohamed Miya's* case) has to be considered on its particular facts. The Textile Control Regulation there considered was one of a number of regulations which formed part of a vast wartime control scheme. The only principle to be derived from that decision is that each set of words must be interpreted in their context without overdue reference to generalisations. In *Edurkbayi Eleko v. Officer Administering the Government of Nigeria*[11], the question that had to be considered by the Governor was a "judiciable" issue, viz.: whether or not the petitioner was a Native Chief and whether or not he was deposed. The Courts undoubtedly had a right to review the Governor's decision in that case. In the *Bracegirdle case*[12], the question of whether or not a state of emergency existed was never in issue so that the question whether the Governor's opinion as to the existence of such a state of emergency could be canvassed before the Court never arose in that case.

[1] *(1931) A. I. R. (P.C.) 111.*
[2] *(1942) A. C. 206.*
[3] *(1945) A. C. 14.*
[4] *(1943) 2 A. E. R. 546.*
[5] *(1943) 2 A. E. R. 560.*
[6] *(1947) 1 A.E.R. 851.*
[7] *(1948) A. C. 87.*
[8] *(1919) A. C. 646.*
[9] *(1947) 1 A. E. R. 851.*
[10] *(1942) A. C. 206, at 221.*
[11] *(1931) A. C. 662.*
[12] *(1937) 39 N. L. R. 193.*

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Coming now to the objection regarding procedure by way of Criminal Information. In the first place this Information is well within the powers conferred on the Attorney-General by Section 385 of the Criminal Procedure Code. The word " purposes " in that section can only mean " objects " if the section is to have any meaning at all. The objects for which the Attorney-General in England can exhibit *ex officio* Informations are fully set out in a number of treatises—see *Blackstone's Commentaries* Vol. IV, p. 308–309, *Bacon's "Abridgment"* Vol. IV, p. 402–404, *Cole's " Informations "* p. 9–10, 12–13 ; *Wood Renton's " Encyclopoedia of the Laws of England*, Vol. VII. Libels on the Sovereign and on her Ministers and Judges are clearly one class of such objects. In England the last occasion on which an " ex officio " Information was exhibited was for a libel on H. M. King George V—*R. v. Mylius*, [1911], *Times* of 11.2.1911. In Ceylon, Informations were exhibited in a sedition case in *R. v. Sirisena* in 1917 and in the *Bo-Tree Case* in 1929. Though technically not a Minister on July 1st, 1954, Sir Oliver Goonetilleke can by no means be described as a private person. He had been appointed to succeed Lord Soulbury. The Information procedure was therefore proper in this case. *R. v. Brown*[1] shows that in England Information was used even in cases where private individuals were affected, but in a way amounting to a public scandal.

Secondly, the Court will not quash an " *ex officio* " Information—see *Bacon's "Abridgment"* Vol. IV, p. 404 ; *Blackstone's " Commentaries "* Vol. IV, p. 262 ; *Cole's " Information "* p. 70 ; *Holt's " Law of Libel "* p. 104. Also *R. v. Abraham*[2] ; *Prynne's Case*[3] ; *R. v. Nixon*[4].

D. N. Pritt, Q.C., replied.—Any Court in every case has power to consider the question of its jurisdiction to hear the matter before it. There is no difference in a case where the question relates to the very creation of the Court. There is an inherent power in the Court to entertain a plea to jurisdiction—*R. v. City of London &c. Rent Tribunal, ex p. Honig*[5] ; *R. v. Jameson*[6] ; *R. v. Wilson*[7] ; *In re s.s. " Arnaldo da Brescia "* [8]. It is not necessary that the Minister should be made a party in a case where his direction is to be considered. The *Audi alteram partem* rule presupposes a " lis " between parties. Here, there is no such " lis "—it is analogous to a Judge's order being reviewed by a Court of Appeal without that Judge being made party to the appellate proceedings.

The maxim *omnia praesumuntur rite esse acta* is not applicable in this case. It applies only where there is evidence that an act has been done. The rule of presumption is not that an act has been done but that where it is proved that an act has been done, it is presumed to have been done properly—see Monir on Evidence, p. 866. Also *Gwilt v. Emperor*[9] ; *Harjiran Shah v. Emperor*[10].

As regards the actual interpretation of the words of Section 440A (1) (*b*), the words must be examined in their context. " Disturbance of public feeling " can mean a " simmering " of public feeling as opposed to an

[1] *(1858) 7 Cox C. C. 442.*
[2] *(1688) 90 E. R. 392.*
[3] *(1689) 87 E. R. 764.*
[4] *(1765) 93 E. R. 462.*
[5] *(1951) 1 A. E. R. 195.*
[6] *(1896) 2 Q. B. D. 425.*
[7] *(1846) 6 Q. B. 620.*
[8] *(1922) 23 N. L. R. 391.*
[9] *(1945) A. I. R. (Bomb.) 368.*
[10] *(1946) A. I. R. (Bomb.) 492.*

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actual "boiling over", e.g. the recent constitutional and political crisis in Pakistan may be regarded as having led to a disturbance of public feeling. Similarly in Great Britain the abdication crisis resulted in a disturbance of public feeling. The onus of establishing the existence of any such phenomenon is on the Crown—see Sections 101,103 and 106 of the Evidence Ordinance. Also *R. v. Halliday*[1].

The decision in *Liversidge v. Anderson*[2] must be restricted to the facts and circumstances of that case. It would be improper to attempt to derive from that judgment a general principle of interpretation—see Lord Radcliffe's view on *Liversidge's case* in *Nakkuda Ali v. Jayaratne*[3]. These special matters must be remembered when considering *Liversidge's case*—(1) it was a period of grave national emergency, (2) the information on which the Home Secretary purported to base his decision was of a highly confidential nature, (3) the grounds for the Home Secretary's action were therefore quite unsuitable for consideration in a Court of Law. It is submitted that too much must not be sought to be gained from that decision. The Indian cases cited by the Attorney-General—*Bhagat Singh v. Emperor*[4] and *Emperor v. Sarma*[5]—were both cases dealing with total powers conferred on the Governor-General to act in times of emergency.

D. S. Jayawickreme, Q.C., with *Stanley de Zoysa*, watched the interests of the "Free Press of Ceylon".

Cur. adv. vult.

November 9, 1954.

The following is the order of the Court :—

The defendant has appeared before this court to answer a charge of criminal defamation alleged against her in an information exhibited by the Attorney-General on the 5th August, 1954. The information alleges that on or about the 1st day of July, 1954, the defendant defamed Sir Oliver Goonetilleke, then Governor-General designate, by publishing in an issue of a newspaper called "Trine" a statement, *inter alia*, to the effect that he had been engaged in swindles on an international scale and that a public trial of the gang—of which presumably he was a member—was imperative. On the 6th August the Chief Justice received from the Minister of Justice a written communication dated the previous day and purporting to be a direction under Section 440A of the Criminal Procedure Code that the defendant should be tried at bar by three

[1] (*1917*) *A. C. 260, at p. 273.*
[2] (*1942*) *A. C. 206.*
[3] (*1950*) *51 N. L. R. 457.*
[4] (*1931*) *A. I. R. (P.C.) 111.*
[5] (*1945*) *A. C. 14.*

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Judges without a Jury. The defendant's counsel moves that the information be quashed and also contends that the Minister's direction is invalid.

An order quashing the information is asked for on the ground that it is one which the Attorney-General could not validly exhibit. It was submitted that if one examines the purposes for which the Attorney-General in England may, *ex officio*, exhibit an information, the present information falls outside those purposes. In particular it was urged that on the date of the alleged libel, namely, the 1st July, 1954, Sir Oliver Goonetilleke was not the Governor-General, that he did not hold any high office and that he was not part of the apparatus of Government and that, therefore, the imputations published only affected him as a private citizen which might well be the subject of an ordinary criminal or civil suit but not justifying recourse to the extraordinary procedure by way of information *ex officio*.

The Attorney-General contended that the information filed against the defendant was within the powers conferred on him by Section 385 of the Criminal Procedure Code, that a motion to quash an *ex officio* information could not be entertained in these proceedings and that, in any event, a court has no power to quash such an information.

It may perhaps be helpful to state here that immediately prior to 1st July, 1954, Sir Oliver held high office in Government for many years in various capacities. On the 21st April, 1954, an official announcement was made that he would succeed Lord Soulbury in the Office of Governor-General. On the 24th June, 1954, a Commission was issued under Her Majesty's Sign Manual and Signet appointing him to that office. The Commission further provided that upon his taking the prescribed oaths and entering upon the duties of his office it should supersede the Commission appointing Lord Soulbury. Sir Oliver was sworn in as Governor-General on the 17th July, 1954.

Section 385 of the Criminal Procedure Code confers on the Attorney-General the power to proceed by information in the like circumstances in which the Attorney-General of England would have the right to exhibit an information, subject to the limitation that while the *ex officio* information in England is confined to misdemeanours, in Ceylon the class of offences is limited with reference to the punishment provided for them. We would point out that while in England the procedure by way of private information has been abolished comparatively recently, the powers of the Attorney-General to exhibit informations, *ex officio*, remain unaffected. This procedure is no doubt intended to apply to those exceptional circumstances, to which we will in a moment refer, in which it is desirable that the machinery of the criminal law should be put swiftly in motion. A number of commentaries and cases dealing with the power of the Attorney-General in England to file *ex officio* informations have been read to us. We do not think it necessary to

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refer to them because their result is conveniently summarized in Archbold's Criminal Pleading, 33rd edition, page 115, in the following words :

"The usual objects of an information *ex officio* are properly such enormous misdemeanours as peculiarly tend to disturb or endanger the King's Government, or to molest or affront him in the regular discharge of his royal functions, such, for instance, as . . . . libels upon the King or His Ministers, the Judges or other high Officers, reflecting upon their conduct in the execution of their official duties."

We do not think that there is substance in the argument that because on the 1st July, Sir Oliver was not holding the Office of a Minister and had not then entered upon the duties of the Office of Governor-General, to which he had been appointed by the Commission dated the 24th June, he falls outside the class of persons described as "other high officers" in the passage cited from Archbold. It has to be remembered that the imputations which are the subject of the information are, at least by implication, a grave reflection on the very Government the Head of which was responsible, while Sir Oliver was still a member of it, for advising Her Majesty to appoint him to the highest office in the country. If the Attorney-General in whom rests the discretion either to proceed by indictment or information takes the view that the imputations tend to disturb or endanger the Government, it seems to us that it is impossible to hold, assuming that we have the power to review that discretion, that that view is wrong.

No case raising a point similar to the one with which we are presently concerned has been cited. Nevertheless we presume that the common law of England under which the Attorney-General of that country acts in presenting informations *ex officio* can adapt itself to varying circumstances which come within the ambit of the principle; so that the present matter would not seem to be excluded from the speedy process by way of information, which process is not designed to vindicate the personal honour of the officer libelled but to counteract what is essentially a public mischief.

The case of *Reg. v. Brown and others*[1] would seem to be in point. In that case the directors of a joint stock bank were tried by a jury on an *ex officio* information filed by the Attorney-General charging them with conspiracy to defraud the public by false representation. They were convicted and before passing sentence Lord Campbell, C.J., pointed out at page 452 that the information was properly filed by the Attorney-General because the matter alleged was not a mere breach of contract with the shareholders or customers of the bank but amounted to a criminal conspiracy inevitably leading to a great public mischief.

Although it may be technically correct to say that Sir Oliver did not hold high office between the 30th June when he resigned from the Office of Minister of Finance and the 17th July when he was sworn in as Governor-General, it seems to us that for the purpose which we are now considering it would be no less mischievous to defame the Governor-General designate than to defame the Governor-General himself.

[1] 7 Cox C. C. 442.

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We are of the opinion for the reasons stated that the Attorney-General had the power under Section 385 of the Criminal Procedure Code to file the information and the application to quash it must accordingly fail. We need not, therefore, answer the subsidiary question whether in any event the court has the power to quash an *ex officio* information.

We now come to consider the defence contention that the Minister's direction is invalid. Sub-sections (1) and (2) of Section 440A of the Criminal Procedure Code as originally enacted read as follows :—

" (1) In the following cases, that is to say—

(*a*) in the case of any offence under Section 120 of the Penal Code (hereinafter, unless the context otherwise implies, referred to as ' sedition ') ;

(*b*) in the case of any other offence which by reason of civil commotion, disturbance of public feeling, or any other similar cause, the Governor may consider to be appropriately triable in the manner in this section provided,

the Governor may, by warrant under his hand, direct that the person charged shall be tried before the Supreme Court at Bar by three Judges without a Jury.

(2) A trial under this section may be held either upon indictment or upon information exhibited by the Attorney-General and the limitations of Section 385 shall not apply to any information so exhibited. " By a proclamation issued by the Governor on the 18th September, 1947, in pursuance of powers vested in him by Section 88 (1) of the Ceylon (Constitution) Order-in-Council, 1946, the words " Minister of Justice " were substituted for the word " Governor " in Section 440A (1) and the words " by warrant under his hand " were omitted.

Under the law as it stood prior to the enactment of Section 440A a person appearing before the Supreme Court to answer a charge alleged in an indictment or information filed by the Attorney-General was entitled to a trial by jury. Where the charge was contained in an indictment he was entitled to notice of the evidence against him and an opportunity of dealing with that evidence before his committal for trial. While he did not have this latter right where the charge was contained in an information, the Attorney-General's right to exhibit informations was a very limited one. As we have already stated, by reason of the provisions of Section 385 he could do so only for purposes for which the Attorney-General of England could exhibit informations on behalf of the Crown in the High Court and only for offences not punishable by death or by rigorous imprisonment for three years or upwards. Section 440A made a fundamental change in the law in that it empowered the Governor, and now the Minister of Justice, to take away from an accused person appearing before the Supreme Court for trial on indictment or information both his right to a trial by jury and his right not to be tried summarily

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and without prior notice of the evidence against him for any offence punishable by death or by rigorous imprisonment for three years or upwards. Mr. Pritt contends that what purports to be a direction made by the Minister under this section is not a valid direction, and that therefore the defendant is not deprived of her right to a trial by jury in the event of the information not being quashed.

The Attorney-General raises an objection to our considering this contention. His submissions in support of his objection he has formulated, both orally and in writing, in the following terms :—

"1. The direction under Section 440A of the Criminal Procedure Code is the sole authority for the trial of the defendant by three Judges without a Jury. The Judges who assemble in pursuance of that direction have no jurisdiction to go into its validity and make any pronouncement thereon.

2. Any order made without jurisdiction would be a nullity.

3. The direction of the Minister cannot be questioned by the defendant in these proceedings. It can be questioned, if at all, only in appropriate proceedings to which the Minister is a party. The Minister is not a party to these proceedings.

4. To declare the Minister's direction invalid or bad without giving him an opportunity of being heard would be a violation of the rules of natural justice.

5. The statute provides for no appeal from the Minister's direction. To hear objections amounting to an appeal from the direction would amount to the assumption of an unwarranted jurisdiction.

6. The Judges who assemble in pursuance of the Minister's direction can make a binding order only when they act within their authority."

Elaborating the first of these submissions the learned Attorney-General argued that this Bench is a tribunal whose jurisdiction is derived solely from the Minister's direction and that it has no powers other than those given to it by that direction. The basis of the submission that this is not a tribunal which has jurisdiction to adjudicate on the validity of the direction is that it is a special tribunal created by the direction itself. It seems to us that this view is clearly erroneous. Whatever may be said about the soundness of the contention as regards the jurisdiction of a special tribunal created by a direction given by the executive, we would point out that we constitute a Bench of the Supreme Court and not such a tribunal. The circumstance that the Minister has purported to direct that an information "shall be tried before the Supreme Court at Bar by three Judges without a jury" does not, in our opinion, have the effect that a bench of three Judges which assembles to hear the information ceases to be the Supreme Court and becomes a differen tribunal created by the Minister. After the defendant has pleaded to the

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information such a bench can try it with or without a jury according as there is not or is a valid direction in terms of Section 440A of the Criminal Procedure Code. Obviously the Court must be satisfied that there is such a direction before it can dispense with a jury, and therefore must have jurisdiction to decide that question. Indeed, the learned Attorney-General conceded that that question must be decided, but he contended that it must be decided by the Chief Justice upon the receipt of the Minister's direction, before a bench of three judges assembles. Once they assemble, according to the Attorney-General's argument, they must try the information without a jury even though they may be of the view that the Minister's direction is invalid and they therefore have no jurisdiction so to try it. We need say no more than that an objection to the jurisdiction of a court can be taken at any time. Moreover, such an objection " is one which the court itself is bound to take, providing its attention is called to it " : *Upper Agrigg Assessment Committee v. Gartsides (Brookside Brewery), Ltd.*[1]. We are unable to accept the contention that this Bench cannot adjudicate on the validity of the direction.

The proposition that any order made without jurisdiction would be a nullity is, of course, unexceptionable ; but nothing would seem to flow from it in view of our decision on the first submission.

Many cases were cited by the Attorney-General as supporting the third submission, that the validity of the Minister's direction cannot be questioned except in proceedings to which the Minister is a party. But they were all cases in which a party asked for relief against a Minister ; such as an application for a writ of *habeas corpus* or an action for damages for false imprisonment where it was alleged that a person was detained upon an illegal order by a Minister, or an action in respect of property alleged to have been illegally requisitioned by a Minister. No relief is claimed by or against the Minister of Justice in these proceedings, and a decision of the issue raised as to the validity of his direction cannot result in an order granting or refusing any relief. The fourth submission, too, is based upon what seems to us the unwarranted assumption that the Minister has such an interest as a party litigant would have in defending the validity of his direction. We do not agree that there is any requirement of the rules of natural justice that he should have an opportunity of being heard in support of the direction given by him.

In regard to the fifth submission it is enough to say that the defence contention, that there is no valid direction under Section 440A and this Court therefore has no jurisdiction to try the information without a jury, does not amount to an appeal from the direction that the Minister has purported to make under that section. The Court is not invited to affirm, vary or set aside the direction, but to try the information with a jury on the ground that it has no power to try it without a jury. In view of what has already been said the sixth submission calls for no comment.

[1] *(1945) 1 All England Reports 338 at 340.*

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We are therefore of the view that we have jurisdiction to adjudicate upon the question whether the Minister's direction is a valid direction in the sense that it complied with the requirements of Section 440A of the Criminal Procedure Code. The relevant part of the section reads as follows :—

" (1) In the following cases, that is to say—

(*a*) . . . .

(*b*) in the case of any other offence which by reason of civil commotion, disturbance of public feeling, or any other similar cause, the Minister of Justice may direct that the person charged shall be tried before the Supreme Court at Bar by three Judges without a Jury. "

The decision of this matter raises a difficult point of interpretation. An illustration of this difficulty is perhaps provided by the fact that the members of this Court are themselves not unanimous in their view as to what the correct interpretation is. Learned Counsel for the defendant contends, in effect, that the sub-section should be read in the same sense as if it had been " in the case of any other offence, in the event of any civil commotion, disturbance of public feeling, or any other similar cause, the Minister of Justice may consider whether it is appropriately triable . . . . and may direct . . . . ". Upon this view of the matter the contention is that while the Minister's consideration of the appropriateness of the matter being tried by three judges without a jury is not justiciable in the absence of bad faith, which is not suggested in the present matter, the element of civil commotion, disturbance of public feeling or any other similar cause involves a question of fact which is objective and is determinable by the Court in the same way as any other question of fact comes to be determined. In other words, unless the Court is satisfied that there is, in fact, a civil commotion, disturbance of public feeling, and so on, there is an absence of the condition precedent to the exercise by the Minister of his power to consider the appropriateness of the method of trial contemplated by the sub-section. It is perhaps convenient at this point to advert to what in our view we are called upon to determine. It is not, in our opinion, for us to consider the desirability or otherwise of this particular provision of the law, which was introduced in 1915 in a year of stress, being retained upon the Statute Book. That is a question of policy with which this Court is not concerned. It is not, in our opinion, for this Court to consider the desirability or wisdom of the power retained in the Statute Book being invoked by the executive. It is not for us to consider whether in the public interest it is desirable that there should be such a limitation upon the Minister's power as is contended for by the defendant. In our view the task which devolves upon us is a narrower one—the arid task of determining the meaning of the words themselves.

In this connection it is perhaps permissible to point out, as the matter was adverted to in the course of his argument by learned counsel for the defendant, that when this Court at an earlier stage of these proceedings

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was considering an application by the defendant that she should be supplied by the Attorney-General with a copy of the evidence that it was proposed to adduce, what it decided was that in its view it had no power to make such an order. The question as to whether or not it was fair that such information should be provided to the defence did not arise for the consideration of the Court and it was not therefore necessary to express a view upon it.

We have been referred in the course of the argument to many examples where the legislature has provided precisely the type of safeguard which is now contended for by the defendant, but it would seem that little assistance is to be derived from that fact for the reason that it is indubitably within the power of the legislature so to provide and it may well be—although that must always remain eminently a matter of opinion—that such a safeguard has much to be said in its favour. The question before us, however, is whether in this particular piece of legislation that particular safeguard has been provided.

It seems to the majority of the Court that to construe the words " in the case of any other offence which by reason of . . . . disturbance of public feeling . . . . the Minister of Justice may consider to be appropriately triable . . . . " as if they read " in the case of any other offence, in the event of there being a disturbance of public feeling . . . . the Minister of Justice may consider whether . . . . " would be to step into the shoes of the legislature and to introduce a limitation upon the Minister's exercise of his power to give a direction which, however desirable or undesirable in the abstract that may appear to be, is not provided by the language of the sub-section.

Not only would it seem not to be difficult, as a mere matter of drafting, for the legislature, had they wished to do so, to have imposed an objective condition precedent to the exercise of the Minister's power, but in fact they have done exactly that in sub-section (*a*) of the same section where they state " in the case of any offence under Section 120 of the Penal Code . . . . the Minister of Justice may direct . . . . ". Surely if the legislature had intended in sub-section (*b*) to impose a similar objective condition precedent it would be reasonable to expect that they would have used the same formula.

It is in the light of these considerations that the majority of the Court consider that one must seek another construction of the words in question. It seems to them that there is only a distinction in literary style between saying " in the case of any other offence which by reason of disturbance of public feeling . . . . the Minister of Justice may consider to be appropriately triable . . . . " and " in the case of any other offence which the Minister of Justice may consider by reason of disturbance of public feeling to be appropriately triable". The meaning in both cases, in their view, would be the same.

It is, no doubt, the position of the Crown, on this part of the case, that the words " by reason of disturbance of public feeling . . . . " are merely directive and constitute nothing more than guidance to the

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Minister as to the matters on which he should satisfy himself before proceeding to consider whether any particular case is appropriately triable in the manner provided in this sub-section and impose no justiciable limitation upon his exercise of the power to give a direction. The case of *Liversidge v. Anderson*[1] was cited in support of that position. It is perhaps unnecessary to consider in detail the reasons given by the majority of the Law Lords in that case for the reason that, for our present purposes, the majority decision in that case is summarised in a later case in the Privy Council by Lord Radcliffe (*Nakkuda Ali v. M. F. de S. Jayaratne*[2]). Lord Radcliffe says at page 461 :

" It would be impossible to consider the significance of such words as ' Where the Controller has reasonable grounds to believe . . . . ' without taking into account the decision of the House of Lords in *Liversidge v. Anderson.* That decision related to a claim for damages for false imprisonment, the imprisonment having been brought about by an order made by the Home Secretary under the Defence (General) Regulations, 1939, Regulation 18B, of the United Kingdom. It was not a case that . . . . but it did directly involve a question as to the meaning of the words ' If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations . . . . ' which appeared at the opening of the Regulation in question. And the decision of the majority of the House did lay down that those words in that context meant no more than that the Secretary of State had honestly to suppose that he had reasonable cause to believe the required thing. On that basis, granted good faith, the maker of the order appears to be the only possible judge of the conditions of his own jurisdiction.

" Their Lordships do not adopt a similar construction of the words in Regulation 62 which are now before them. Indeed it would be a very unfortunate thing if the decision of *Liversidge's case* came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments. It is an authority for the proposition that the words ' If A. B. has reasonable cause to believe ' are capable of meaning ' If A. B. honestly thinks that he has reasonable cause to believe ' and that in the context and surrounding circumstances of Defence Regulation 18B they did in fact mean just that. But the elaborate consideration which the majority of the House gave to the context and circumstances before adopting that construction itself shows that there is no general principle that such words are to be so understood ; and the dissenting speech of Lord Atkin at least serves as a reminder of the many occasions when they have been treated as meaning ' if there is in fact reasonable cause for A. B. so to believe '. After all, words such as these are commonly found when a legislature or law-making authority confers powers on a Minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been

[1] (*1942*) *A. C. 206.* [2] (*1950*) *51 N. L. R. 457.*

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satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith ; but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality. "

We would add that had it been the intention of the legislature only to give a direction by way of guidance to the executive authority, whether it be the Governor of the Colony as it was when the Ordinance was originally enacted or the Minister of Justice as it stands upon the statute book today, this result could conveniently and suitably have been arrived at by instructions from the Secretary of State in the first case or an indication of Cabinet policy in the second. In that event there would be no need, nor would it seem to be appropriate, to place such a matter upon the statute book. Once it is so placed, it seems to us that in the words of Lord Radcliffe it " must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power ".

It is perhaps relevant to consider at this stage whether there are present in the matter now before us the elements which appear to have inclined the majority of the learned Law Lords in the *Liversidge case* to give their highly specialised interpretation. On a perusal of the speeches of Lord Maugham, Lord Macmillan, Lord Wright and Lord Romer, it appears that five matters came under their consideration on this head : first, that there was in existence what might be termed an " emergency " in the sense that the country was engaged in a desperate war, it being borne in mind that the relevant matters that were alleged against Mr. Liversidge took place in the year, 1940 ; secondly, that the information which would lead a Secretary of State to come to his conclusion in considering any case of detention under the Defence Regulation 18B must necessarily be of a highly confidential nature which it would be against the public interest to disclose even if the case were heard in camera ; third, the unsuitability for the consideration by a court of the particular question or questions involved in coming to a conclusion whether a detention in any particular case was justified.

These may perhaps be said to be the principal matters which affected the minds of their Lordships although in two of the speeches reference is made to the fact that the Home Minister is a high officer of state and must therefore be presumed to exercise his responsible functions with discretion and that in any event there is the further safeguard of his having to answer for his actions in Parliament.

As to the last two considerations they are, in our opinion, disposed of by Lord Radcliffe in the passage to which we have already referred where he says, " After all, words such as these are commonly found when a legislature or law-making authority confers powers on a Minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise . . . . ".

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With regard to the other three matters we are of the opinion that there is no material before us and nothing has been said in the course of the arguments to lead us to suppose that the consideration of whether or not there is reasonable cause for considering that public feeling is disturbed would involve the examination of information of a highly confidential nature or is a topic which would be unsuitable for a Court to adjudicate upon. Moreover, an emergency, in the sense of the word as it existed in England in 1940, would happily not seem to be present in Ceylon today.

We are therefore of the opinion that before the Minister proceeds to the consideration of the question as to whether a matter is appropriately triable by three judges without a jury there must be reasonable grounds for his belief that there is a disturbance of public feeling (which would seem to be the relevant head in the present case). The majority of the Court holds that the sole test to be applied in this matter is whether, in the opinion of the Court, a reasonable man occupying the seat of the Minister could reasonably come to the conclusion that there existed a disturbance of public feeling. While this test, which the majority of us suggest is the apposite one, is less exacting than that contended for by the defence and which commends itself to one member of this Court, it is, in our view, none the less justiciable, for as stated by Lord Atkin in his dissenting speech in the *Liversidge case* at page 228 (a passage which would appear to be quite non-controversial) it has been " accepted in innumerable legal decisions for many generations, that ' reasonable cause ' for a belief when the subject of legal dispute has been always treated as an objective fact to be proved by one or other party and to be determined by the appropriate tribunal ".

Although for reasons which will subsequently appear it may not be of practical importance in the present case, some argument was addressed to us on the question of who should begin when the question of disturbance or no disturbance comes to be tested. It seems to the majority of us that whichever test is applied, either that which the majority of the Court favour or that contended for by the defence, the position would be the same. The majority of us consider that the principle " *omnia praesumuntur rite esse acta* " is applicable to the Minister's order in this case. The order is on the face of it good in that it is signed by the appropriate person, invokes the appropriate section and refers to a power which, in a proper case, can appropriately be exercised. If then the question as to which party has to begin does arise—and by reason of what we think is the correct approach to the matter it does not arise—the presumption in question would have the effect that, in the absence of challenge, there existed either a factual disturbance of public feeling according to one test or reasonable grounds for a reasonable Minister to believe that there was a disturbance of public feeling according to the other and that he had considered whether the case was appropriately triable in the manner provided for in the section. In that view of the matter it would seem that it is for the defendant to begin.

From the practical point of view we consider that it is reasonable to limit our investigation to the question of " disturbance of public feeling or any other similar cause " for the reason that there is no material

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before us, and indeed it has not been contended, that there was in existence either a civil commotion or reasonable ground for supposing that there was a civil commotion. What, then, is the meaning of the phrase "disturbance of public feeling"? There are no doubt disturbances of public feeling which are manifested—by, for instance, public meetings, organized demonstrations of protest, processions, and so on—but it seems to us that the phrase is not limited to cases where there is an open manifestation of a disturbance of public feeling. In our view one of the tests which could be applied to determine whether or not a disturbance of public feeling exists would be to consider the reactions to the matter in question of the ordinary citizen in various walks of life. To take a homely example, if the normal private citizen on his lawful occasions travelling by bullock cart, bus, train or motor car, as the case may be, were to say to himself or think to himself "What is the country coming to?", that should surely be regarded as indicating the existence of a disturbance of public feeling. To say, for example, of the Prime Minister of a country engaged in war that he is in the pay of the enemy would obviously give rise in the mind and heart of the ordinary citizen to the kind of anxiety to which we have just referred. In the present matter a fundamental question for our consideration is whether an allegation, true or false, in a newspaper of any considerable circulation that the person who has been selected by the Sovereign to fill the position of Governor-General of Ceylon is engaged in swindles on an international scale and that a public trial of the gang of which he is a member is imperative has caused (on one view) or could reasonably be considered to have caused (on the other) a disturbance of public feeling.

It seems to all of us that applying the test which commends itself to the majority of the Court, that the question as to whether there was reasonable ground for the belief that there existed a disturbance of public feeling can only be answered one way. We find ourselves quite unable to adopt any other view than that to say these hard things, whether they be true or false, of the first Ceylonese to be appointed Governor-General of the Island, affords reasonable ground for a Minister of State or indeed any other reasonable person to believe that public feeling had been disturbed in the sense to which we have already adverted.

Incidentally, learned counsel for the defendant submitted that the words "disturbance of public feeling" should be limited to cases in which such disturbance is of a nature that would make a trial by jury unsuitable. In our opinion there is no substance in that contention for the reason that the very matter which the Minister has to consider is whether the case in question can appropriately be tried without a jury. If the words are subject to the limitation suggested by learned counsel for the defendant, then there would be nothing left for the Minister to consider and the words "Which . . . . the Minister of Justice may consider to be appropriately triable . . . ." would be meaningless.

Before examining what flows from our principal conclusion, we must consider two other points that were raised by learned counsel for the defendant. First, he contended that in a case such as the present where

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the Minister in his direction does not refer to the matters which influenced him nor to the precise head under which he regarded the matter as falling, it is impossible for this Court to determine the question whether the Minister was reasonably entitled to believe, when we do not know what it is that he did believe. While we are not disputing that there might be cases under other statutes in this or other countries where such a difficulty might arise in view of the number and complexity of the various heads which a Minister might take into consideration, we feel that in the present case no such difficulty arises for the reason that it is clear, or seems to us to be clear, from the very nature of the libel alleged in the information, that the appropriate head to be considered is that relating to disturbance of public feeling. Secondly, it was contended that the direction was bad in that it was unlimited as to time. Assistance for this proposition was sought in the circumstance that in the *Liversidge case* in considering the applicability of regulation 18 (B) one of the elements that the learned Law Lords took into consideration was the fact that a terrible war was in full progress. It is no doubt true that once the emergency, that is to say the war in question, had ended the need and, indeed, even the propriety of detaining persons under that regulation would have passed away. Even if it would be proper for us to take such matters into account, we are of the opinion that no considerations of that nature arise in regard to the present matter. The libel was published on the 1st of July, 1954; the information was filed on the 5th of August and the direction was issued on the 6th. The present proceedings began on the 26th October, a date which was some weeks later than might have been achieved were it not for the fact that a reasonable adjournment was granted to the defence to enable the leading counsel, who is a member of the English Bar, to comply with the necessary requirements to enable him to be called to the Bar of Ceylon. We do not consider that there is any substance in the objection. Moreover any disturbance of public feeling that may have been aroused by this libel in July would, in our view, reasonably have been expected to continue up to the present day and until such time as the questions raised by the libel are resolved.

On the view, therefore, of the words in the section which has been adopted by the majority of the Court, we all consider, as we have already stated, that the test has been satisfied. That is therefore sufficient to determine the present matter, and we hold that the information is in order, that the Minister's direction is valid, and the trial must proceed.

It only remains for us to refer to the matter of certain affidavits which were tendered by Counsel on either side to us at the conclusion of the arguments. It is, of course, apparent that had we adopted the construction contended for by the defendant and which has commended itself to one member of this Court, the reception of evidence would, no doubt, have been relevant in determining whether or not the factual test as to the existence of a disturbance of public feeling at the material

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time had been satisfied. In view, however, of the opinion which the majority of the Court have formed and upon which our order is based, the affidavits cease to be germane and do not require our consideration. *

(Sgd.) ALAN ROSE,
Chief Justice.

(Sgd.) E. H. T. GUNASEKARA,
Puisne Justice.

(Sgd.) M. F. S. PULLE,
Puisne Justice.

Preliminary objections overruled.

* On December 3, 1954, the Court made order acquitting the defendant on the ground that the material adduced by the Crown to establish that the defendant published the issue of the newspaper in question with the necessary knowledge of its contents was insufficient to justify the Court in calling upon the defendant for her defence.—Ed.

1954 *Present :* **Nagalingam S.P.J.**

K. V. PERERA, Appellant, *and* K. A. DHARMATILLAKE (Assistant Clerk, Teldeniya Town Council), Respondent

S. C. 1,054—M. C. Teldeniya, 10,264

Town Councils Ordinance, No. 3 of 1946—Section 183—Arrears of rates—Procedure for recovery—Distress warrant—Must contain necessary particulars—Municipal Councils Ordinance, No. 29 of 1947, s. 252—Penal Code, ss. 183, 314.

When the Chairman of a Town Council authorises an officer to distrain the goods of a rate-payer who is in arrears with his rates, the warrant must specify the name of the defaulter, the description and situation of the properties and the amount of rate in arrears, as required by section 183 of the Town Councils Ordinance read with section 252 of the Municipal Councils Ordinance. Such particulars are an essential part of the warrant, and resistance to the execution of a warrant which does not contain the particulars is not punishable under sections 183 and 314 of the Penal Code.

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APPEAL from a judgment of the Magistrate's Court, Teldeniya.

B. S. C. Ratwatte, for the accused appellant.

T. B. Dissanayake, for the complainant respondent.

Cur. adv. vult.

November 23, 1954. NAGALINGAM S.P.J.—

This is an appeal by the appellant from convictions under Sections 183 and 314 of the Penal Code. The facts briefly are that the appellant was in arrears with his rates and the Chairman of the Town Council authorised certain of his officers to distrain the property of the appellant to recover the arrears. The case for the prosecution is that when the distraining officers had seized and were removing a certain quantity of tiles from the appellant's premises the appellant met them on the highway and upturned a cart in which the tiles were being transported and assaulted the complainant.

On the facts I see no reason to differ from the view taken by the learned Magistrate, but a point of law has been raised by the Counsel for the appellant which does not however appear to have been brought to the notice of the learned Magistrate. It is, that under Section 183 of the Town Councils Ordinance, No. 3 of 1946, the procedure prescribed for the recovery of arrears of rates is the same as that contained in the Municipal Councils Ordinance where no other method of recovery is specifically provided by the Town Councils Ordinance. There are no specific provisions in the Town Councils Ordinance and as such the provisions of the Municipal Councils Ordinance have to be looked to, to ascertain the necessary provisions. Section 183 of the Town Councils Ordinance expressly refers to Sections 135 to 148 of the Municipal Councils Ordinance as applicable. The Municipal Councils Ordinance, No. 29 of 1947, replaced the earlier Ordinance No. 37 of 1943 (Chap. 193) and Section 252 (which section is the relevant provision) specifically enacts in Sub-section 2 thereof that every warrant *shall be* in the form contained in the 5th schedule thereto with such variations as circumstances require. The warrant, which is the basis for distraining the appellant's goods, is the document P4, but it is deficient in one important respect. It does not specify the name of the defaulter or the description or the situation of the properties or the amount of rate in arrears, which particulars are an essential part of the warrant. It cannot be said that the omission to particularise these details could be regarded as variations which were necessitated by special circumstances.

The position therefore is that the warrant does not confer authority on the distraining officers to seize the property of the appellant. The evidence of the Chairman of the Town Council lends support to the view that no schedule was annexed to the warrant. His statement " I produce

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letter of authority P4 dated 23rd of November, 1953, authorising Kiribanda to distrain the goods of all defaulters in rates " supports the contention of learned Counsel for the appellant that the warrant itself had no schedule attached to it and that it was left to the distraining officers to ascertain who the defaulters were and to proceed to seize the goods of such persons whom they considered to be in default.

The issue of a warrant for distraining the goods of a rate-payer is a serious act and one which should not be looked upon lightly by the Chairman. He must satisfy himself that any particular rate-payer has defaulted and he must particularise the defaulters whose goods are to be distrained by the distraining officer. In the absence of any such specific direction the warrant must be regarded as a nullity and any person acting under such illegal and void document has only to blame himself. I think the objection is sound and the conviction cannot be allowed to stand. In the circumstances the conviction under Section 314 cannot also stand where the charge under Section 183 fails. I, therefore, set aside the convictions and sentence and acquit the accused-appellant.

Appeal allowed.

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[Court of Criminal Appeal]

1954 *Present:* **Rose C.J. (President), Pulle J., Swan J., Sansoni J. and Fernando A.J.**

D. M. MUTHU BANDA, Appellant, *and* THE QUEEN, Respondent

Appeal No. 52 of 1954

S. C. 39—M. C. Kandy, 5,286

Culpable homicide—Provocation—Intoxication—Scope of its relevancy—Penal Code, s. 294, Exception 1.

When considering, in a prosecution for murder, whether the accused was deprived of the power of self-control by grave and sudden provocation, the jury must apply an objective test, i.e., whether in the particular case under consideration a reasonable or average man with the same background and in the circumstance of life as the accused would have been provoked into serious retaliation. The effect of this proposition is that the intoxication of the accused is not to be regarded as affecting the gravity of the provocation offered, and should only be taken into account, together with the idiosyncrasies of health and temperament, when the jury determine subjectively whether or not the accused lost his self-control under the stress of the provocation.

The King v. Punchirala (1924) 25 N. L. R. 458, overruled.

APPEAL against a conviction in a trial before the Supreme Court.

G. E. Chitty, with *L. F. Ekanayake*, *A. S. Vanigasooriyar* and *Daya Perera*, for the accused appellant.

H. A. Wijemanne, Crown Counsel, with *V. S. A. Pullenayagam* and *E. H. C. Jayetileke*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 21, 1954. Rose C.J.—

The principal matter that we have to consider is whether the law is correctly stated in a passage from the charge of the learned trial Judge dealing with the exception of grave and sudden provocation. The passage in question appears at page 11 of the charge and reads as follows:

"Mr. Carthigesu, I wish you to follow this carefully, because I am deliberately directing the Jury in a sense which I know is not the sense in which the matter is understood sometimes, and that there is authority in favour of your view. Now gentlemen, by provocation is meant anything which a reasonable man is entitled to resent. Provocation, as I said, must be sudden, and provocation must be grave. Grave provocation would be provocation that can cause a reasonable man, a man of ordinary sense and prudence and temper of the same class of life or station in life as the accused, to lose his power of self-control. It is quite possible that an act which may not cause a sober man to lose his self-control may cause a drunken man to lose his self-control.

2——J. N. B 42470–1,592 (2/55)

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Once you are satisfied that provocation was grave and that it would be grave provocation to a reasonable man, then in considering whether this particular accused lost his self-control as a result of that provocation you should take into account the circumstance that he was drunk, if you are satisfied that he was drunk. But if you are considering whether the provocation was grave, it is not open to you to say, 'it is true that this act of the deceased man would not be grave provocation to a sober man but to a drunken man it would be'. You will not take into account the particular weakness of the accused when you are considering whether the provocation offered was grave. That question you will resolve by reference to an ordinary reasonable man, that is to a man who is sober."

The direction criticized in this appeal is that which expresses the proposition that in considering whether a particular episode contains the elements of grave and sudden provocation the jury must apply an objective test, i.e. whether in the particular case under consideration a reasonable or average man with the same background and in the same circumstance of life as the accused would have been provoked into serious retaliation. The effect of this proposition is that the intoxication of the accused is not to be regarded as affecting the gravity of the provocation offered, and should only be taken into account, together with the idiosyncrasies of health and temperament, when the jury determine subjectively whether or not the accused was acting under the stress of the provocation. The matter has been considered in the English Courts, not of course in reference to Section 294 of the Ceylon Penal Code but in the context of the English Law which, however, in the matter which we are considering, would appear to be not dissimilar, in the recent case of *Bedder v. Director of Public Prosecutions.* [1]

In that case it was held by the House of Lords in a judgment delivered by Lord Simonds L.C. that the test to be applied in determining whether there had been provocation sufficient to reduce the homicide from murder to manslaughter was that of the effect of the alleged provocation on the mind of a reasonable man; and in applying this test the hypothetical reasonable man did not have to be invested notionally with the physical peculiarities of the accused. In the course of his speech at page 803 Lord Simonds quotes with approval a passage from the speech of Lord Simon in *Holmes v. Director of Public Prosecutions* [2]: "If, on the other hand, the case is one in which the view might fairly be taken (*a*) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (*b*) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict", and goes on to say, "The argument, as I understood it, for the appellant was that the jury, in considering the reaction of the hypothetical reasonable man to the acts of provocation, must not only place him in the circumstances in which the accused was placed, but must also invest him with the personal physical peculiarities of the accused. Learned counsel, who

[1] (*1954*) *2 A. E. R. 801.* [2] (*1946*) *2 A. E. R. 124.*

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argued the case for the appellant with great ability, did not, I think, venture to say that he should be invested with mental or temperamental qualities which distinguished him from the reasonable man ; for this would have been directly in conflict with the passage from the recent decision of this House in *Mancini's case* which I have cited. But he urged that the reasonable man should be invested with the peculiar physical qualities of the accused, as in the present case with the characteristic of impotence, and the question should be asked : what would be the reaction of the impotent reasonable man in the circumstances ? For that proposition I know of no authority ; nor can I see any reason in it . . . . It was urged on your Lordships that the hypothetical reasonable man must be confronted with all the same circumstances as the accused, and that this could not be fairly done unless he was also invested with the peculiar characteristics of the accused. But this makes nonsense of the test. Its purpose is to invite the jury to consider the act of the accused by reference to a certain standard or form of conduct and with this object the 'reasonable' or the 'average' or the 'normal' man is invoked. If the reasonable man is then deprived in whole or in part of his reason, or the normal man endowed with abnormal characteristics, the test ceases to have any value. This is precisely the consideration which led this House in *Mancini's case* to say that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did ".

In relation to the question of intoxication of an accused the same principle was applied in the case of *R. v. McCarthy* [1] where it was held that unless a man is in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead him to attack another in a manner which no reasonable, sober man would do cannot be pleaded as provocation reducing the crime from murder to manslaughter if death results. In this case, of course, the jury had also to consider the question of whether the retaliation was in fact out of proportion to the provocation alleged. But on the matter which we are considering in the present case it is clear that the learned Judges of the Court of Criminal Appeal in England accepted and confirmed the principle that the existence of provocation had to be decided by the Jury objectively, whereas the question whether the accused was in fact provoked required subjective analysis.

Having regard to these high authorities it seems to us that there can be no doubt that the law was correctly stated by the learned trial Judge in the case now before us. It only remains to consider two local authorities which learned Counsel for the appellant in the course of his able argument suggested to us were to a contrary effect and should not lightly be disregarded.

To deal with the later case first, that of *The King v. Marshall Appuhamy* [2], it seems to us that there is in fact no real conflict between the view of the law therein stated and that which we propose to follow in the present matter. The headnote of this case states : "Intoxication which falls short of the degree of intoxication contemplated by Section 78 of the Penal Code could be considered in dealing with the question whether a man's suscep-

[1] *(1954) 2 A. E. R. 262.* [2] *(1949) 51 N. L. R. 140.*

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tibility to provocation was affected by intoxication" and in a passage at page 142, from which presumably the headnote is taken, Wijeyewardene C.J. says: "The Judge appears to have expressed himself in such a way as to give the impression to the jury that any intoxication falling short of the degree of intoxication contemplated by Section 78 of the Penal Code should not be considered in dealing with the question whether a man's susceptibility to provocation was affected by intoxication". The judgment then proceeds to express disagreement with that view.

So stated, we see no reason to dissent from the position there taken up as it does not conflict with the view which we have set out above that the question of intoxication, when it is insufficient to affect intent, comes properly to be considered when the jury is answering the question whether the accused was in fact provoked by provocation which has been objectively established.

The second case, *The King v. Punchirala* [1], might be held to give rise to difficulty. In his judgment at page 461, Bertram C.J. refers with approval to the case of *R. v. Thomas* [2] where Baron Park (incorrectly in the judgment described as Jervis C.J.) said as follows: "So drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober". Moreover, at page 463 a passage from Stroud's book on Mens Rea is cited with approval. The first sentence reads: "Where an act of violence, with which a prisoner is charged, has ensued upon some provocation or aggression of such a kind that, if sufficient in point of degree, it would suffice to relieve or modify his responsibility for the act in question, the fact that he was drunk may be taken into consideration by the jury".

Surprisingly, however, Bertram C.J. proceeds as follows: "It appears, therefore, that we should hold that the word 'grave' is not an absolute but a relative term, and that in determining whether in any particular case the provocation received was grave, the Court or Jury may take into account the intoxication of the person receiving it". With great respect to the learned Chief Justice, we feel that we have no alternative but to say that this passage incorrectly states the law. For the reasons that we have already given, the true position would seem to be that the intoxication of the accused in such a case as is contemplated in *King v. Punchirala* only becomes relevant for the consideration of the jury when they are considering the question whether the accused was in fact provoked by provocation which would, in the opinion of the jury, have provoked a normal or average reasonable man.

We therefore regard the learned Judge's summing-up in the case under appeal as being unexceptionable. Moreover, there is nothing in the record to indicate that a reasonable jury could properly have come to any other conclusion than to convict the appellant of murder.

For these reasons the appeal is dismissed and the conviction affirmed.

Appeal dismissed.

[1] (*1924*) *25 N. L. R. 458.*

[2] (*1837*) *7 C. & P. 817.*

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1954 *Present :* **Nagalingam S.P.J.**

P. SARNELIS APPUHAMY, Appellant, *and* H. V. RAM ISWARA, Respondent

S. C. 75—C. R. Colombo, 40,917

Condictio indebiti—*Auction sale of immovable property—Notarial fees—Exorbitant sum charged—Payment made under mistake of fact—Remedy of purchaser.*

A purchaser at a public auction of immovable property is entitled to sue a notary for the refund of exorbitant fees paid under a mistake of fact to the notary for attesting the conditions of sale. The obligation in such a case arises out of quasi-contract.

APPEAL from a judgment of the Court of Requests, Colombo.

After a public auction of immovable property had been concluded, the purchaser was presented a bill by the auctioneer setting out the amount due from him. The purchaser, without scanning the bill, paid the full amount, assuming that he had been charged reasonable sums under the various heads set out in the bill. On the following day he was informed by his clerk that he had been charged no less than a sum of Rs. 500 as notarial fee for attesting the conditions of sale. In the present action he sought to recover what he regarded as the unconscionable excess of the notarial fee charged.

H. W. Jayewardene, with *P. Ranasinghe*, for the plaintiff appellant.

H. W. Tambiah, with *S. Sharvananda* and *H. L. de Silva*, for the defendant respondent.

Cur. adv. vult.

December 15, 1954. NAGALINGAM S.P.J.—

This appeal involves a question of some importance relating to the rights and obligations of a purchaser at a public auction of immovable property in regard to the notarial fees payable by him for having the conditions of sale attested.

The appellant was declared the purchaser of certain premises which were put up for sale by public auction at the instance of the owner by a firm of auctioneers, and at the sale the appellant was declared the purchaser thereof at or for the price of Rs. 90,000.

That the auctioneer did, before the commencement of the sale, read out the conditions of sale, P1, is common ground. Of those conditions only two need be noticed. One is that where the purchase price exceeds a sum of Rs. 100, the purchaser should pay one-tenth of the purchase amount to the auctioneer at the conclusion of the sale; the other is

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that the purchaser should also pay to the auctioneer his commission fixed at 2½ per cent. and all advertisement and other charges " as also the notary's fees and value of stamps for conditions of sale, the costs of drawing conditions and the clerk's fee ".

The auctioneer's evidence is that before the auction the conditions of sale were read out " and the charges were left on the table for the would be purchasers to see ". But he significantly adds that at that stage not only could he not specify the one-tenth of the purchase money, the reason for which is obvious, but also the amount of the notary's fee, the reason not being so obvious in this case. He amplified this evidence under re-examination and expressly stated that if a purchaser saw him before the sale he would not have been able to tell him what the notary's fees would amount to. He again makes an enigmatic statement that he would not have found out from the notary either. Why he could not have found out he does not say. He however says that " *after the sale whatever the notary asks I pay* ".

On the auctioneer's evidence it is difficult to resist the conclusion that prior to the commencement of the auction he had no knowledge of what fee the notary would charge to attest the conditions of sale and consequently no would-be purchaser could have obtained that information even if he had made inquiries directed to that end.

The plaintiff's case is that after the sale had been concluded he was presented a bill setting out the amount due from him, which it is admitted contained the several items such as 1/10th purchase money, auctioneer's commission, advertisement charges, notary's fees, &c., but the plaintiff says that he did not scan the bill for one reason that he had no knowledge of the English language, for another, that he assumed that he would be charged reasonable amounts under the various heads set out therein. He adds that he asked the auctioneer what the amount of the bill was and on being informed it was Rs. 12,086·50, he drew out a cheque for that amount and handed it to the auctioneer. On the following day he gave the bill to his clerk to make the necessary entries in his books of account, when he was informed and became aware for the first time that he had been charged no less than a sum of Rs. 500 as notary's fees for attesting the conditions of sale. Promptly, he says, he came to his proctor in Colombo and entrusted the matter to him asking him to take steps to recover what he regarded as the unconscionable excess of the notary's fees charged.

Mr. Vandersmagt who conducted the sale and Mr. McHeyzer, another auctioneer of standing, both expressed the view that a sum of Rs. 500 for attesting the conditions of sale in question they considered exorbitant. The learned Commissioner has accepted that evidence and though learned Counsel for the respondent has sought to challenge the finding of the Commissioner that a sum of Rs. 500 was in fact exorbitant, no adequate grounds have been adduced for differing from the view taken by the learned Commissioner.

The appellant, with a view to confer jurisdiction on the Court of Requests, claimed a refund of only Rs. 300 while he has averred in his plaint that a sum of Rs. 157·50 would be more than a reasonable fee

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for the notary and that under the Notaries Ordinance the notary would have been entitled to much less. When the appellant came to Court his case was that he paid the sum of Rs. 500 on account of notary's fees under protest. That averment the plaintiff at no time sought to substantiate. In fact his case was, as set out earlier, that in ignorance of the fact that he was charged as much as Rs. 500 and assuming that he had only been charged a reasonable figure for the notary's services, he paid that amount which was included in the total amount of the bill. The learned Commissioner does not reject the evidence of the plaintiff but has taken the view that " if the plaintiff chose to pay the bill like a Duke without scrutinising the items, he has only to blame himself ".

I do not think that there is any principle of law which precludes the plaintiff from recovering money paid under these circumstances ; on the other hand, I think ample authority may be found for the contrary proposition. First and foremost is the principle of Roman Dutch Law that where money has been paid under reasonable error of fact to a person not entitled, an action lies for its recovery [1]. Grotius deals with the topic under the broad heading that one person should not enrich himself at the expense of another and states that under this head falls : " the recovery of what one has ignorantly paid as a debt without being really indebted " (*condictio indebiti*). Nathan[2], dealing with what is or what is not a reasonable mistake, says, " reasonable ignorance is as a general rule *ignorance of what has been done by another* or of the existence of a state of things which is of such a kind that a very careful man may labour under it. In the case of such ignorance the *burden of proof lies upon the person who denies it,* who must show the full knowledge of the party alleging ignorance. This is in full accordance with the general principle that reasonable ignorance of fact, or mistake as to fact, excuses the ignorant or mistaken party from performance of a contract or after he has already performed it, entitles him to relief ". Can it be said that where a man does not scrutinize a bill presented to him because he assumes that in accordance with the normal standards of professional propriety a reasonable amount would have been charged as fee and pays it that he is exposing himself to the criticism that he has committed an unreasonable error of fact? The standard to be applied is set out by Voet and is to be found in the note to the passage already cited from Nathan :

> " An ordinarily careful person . . . . is not required to make too scrupulous an investigation with reference to a fact not immediately apparent and will in case of a mistake be entitled to relief. "

The case of the plaintiff is not different from that of a guest at a hotel who pays a bill presented to him without entering upon a detailed scrutiny, for conduct of such nature, it is unnecessary to say, would bring him down in people's estimation ; but where later on examination of the bill he finds either the total or some of the items are incorrect, and claims a rectification of the bill and a refund of any excess paid by him, I do not think that opinion could be divided on the question whether he was

[1] *Lee, Introduction to Roman Dutch Law, 4th ed., page 346.*
[2] *Common Law of South Africa, 1st ed., Vol. II, p. 560, section 774.*

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guilty of a lack of reasonable diligence, and all will be agreed that such conduct is above criticism. The conduct of the plaintiff is no different from that of the hotel guest. His behaviour is not different from that of any other reasonably prudent and honourable man. I do not think the law requires that when a man deals with another that it should be on the footing that the man with whom he deals is other than an honourable man. I am therefore of the opinion that on these facts the plaintiff is entitled to succeed.

Learned Counsel for the respondent however raised the question as to whether it was competent for the plaintiff to sue the defendant or whether the plaintiff's rights were not in fact to be pursued against the owner who had put up the property for sale. In support of that proposition the case of *Ismail v. Ratnapala* [1] has been cited. That is a case where an action was instituted by a purchaser at an auction sale against the refund of the commission paid to him after the sale had been set aside by Court on the ground of misdescription of the property. It was held there that the action did not lie against the auctioneer, who was entitled to retain the fee paid for services rendered by him, but as the sale proved abortive the purchaser had to look to the person at whose instance the property had been put up for sale and to him alone. That proposition, I do not think, can be doubted, but it has no application to the facts of the present case. This is not a case where the claim is for the recovery of the legitimate fee charged by a notary on the basis of damages sustained in consequence of the sale proving abortive—but the action here is to recover what was improperly charged and paid under a reasonable error, the sale itself being a valid one. I need only add that this action is not based upon a breach of a contract entered into between the plaintiff and the defendant but, as sufficiently indicated already, it is based upon the very wide principle of obligations arising out of quasi-contracts.

Another line of argument put forward on behalf of the respondent was that as the notary had been employed by the owner of the property and as by the conditions of sale already referred to the purchaser agreed to pay the notary's fees and as the owner had agreed to pay to the notary Rs. 500 for attesting conditions of sale, the plaintiff was properly charged that sum.

First of all, in regard to the question of fact as to whether there was a promise by the owner of the property to pay the defendant a sum of Rs. 500, I entertain grave doubts though the learned Commissioner has answered this question in the affirmative. The owner, it is true, gave evidence and categorically stated that he had agreed to pay Rs. 500. It is not pretended that the notary examined the title or prepared an abstract of title for the benefit of the intending purchasers, or that he searched the encumbrances or that he even drew up the conditions of sale. The conditions of sale, according to the auctioneer, had been prepared by him in his own office. Those conditions consist of a printed form. The only task the notary had to perform was to explain the conditions, which had already been explained by the auctioneer at the commencement of the sale, attest the signature and prepare the attestation required under the Notaries Ordinance. The conditions of sale

[1] (1920) 22 N. L. R. 374.

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were not even sent for registration. In these circumstances, it would be straining one's sense of propriety and fairness to accept the evidence of the owner of the property that he had agreed to pay such a large sum as Rs. 500 for attesting the conditions of sale. The defendant himself gave no such evidence. The owner's evidence, if examined, reveals that, according to him, he had not only agreed to pay the notary Rs. 500 but had also instructed the auctioneer to recover that amount and pay to the notary. The auctioneer, on the other hand, who was cross-examined in detail on behalf of the defendant, was not put a single question suggesting that the owner had given such instructions. On the other hand, his evidence, as stated earlier, completely destroys that suggestion for, according to him, he could not have informed the purchasers before the conclusion of the sale what the notary's fees were going to be.

I have therefore reluctantly come to the conclusion that the evidence of the owner on this point should be rejected, but the position nevertheless requires examination on the assumption that there was such an agreement between the owner and the notary. It has not been suggested—and indeed the contrary is established—that any intending purchaser was informed that a sum of Rs. 500 would be charged by way of notary's fees.

In these circumstances, one might even go further and say, as learned Counsel for the respondent was forced to admit, that at the conclusion of a sale there would be nothing to prevent a dishonest owner from making a secret gain by announcing that he had agreed to pay some fabulous figure to the notary by way of his fees. One answer to that is that the purchaser would dispute that amount and the sale may fall through. Another answer would be that if the purchaser agreed to pay, there will be nothing more to be said about it.

It seems to me, however, that where a sum which would not ordinarily be regarded as a fair charge on the part of a notary is intended to be claimed, such amount should be stated before the commencement of the sale and the purchasers apprised as to the extent of their liability in regard to those fees ; in fact it would be far more satisfactory if the notary's fees were in all cases announced—the reason for the contrary practice that the sale may not go through appears to me to be unsound. Had it been established that at the conclusion of the sale it was pointedly brought to the notice of the plaintiff that he was being charged Rs. 500 as notary's fee and thereafter he proceeded to complete the transaction, without protest, there can be little doubt that he would be bound by the payment he made. But the circumstances here are different. It was on the reasonable hypothesis that the amounts charged were in accordance with the usual and normal rates adopted by the members of the profession and in ignorance of the fact that he was being called upon to pay a sum of Rs. 500 that the plaintiff gave the cheque inclusive of that sum to the auctioneer. The condition that the purchaser was to pay the notarial fees cannot mean, in the absence of the amount being specified, anything more than that the purchaser would have to pay only a reasonable amount, if not indeed the fee prescribed by the Notaries Ordinance.

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In these circumstances there can be little doubt that the plaintiff has made out his case. I would therefore set aside the judgment of the learned Commissioner and enter judgment for the plaintiff as prayed for with costs both of appeal and in the lower Court.

Appeal allowed.

1953 *Present :* **Rose C.J. and Swan J.**

S. A. SUPPIAH, Appellant, *and* R. SIVARAJAH *et al.*, Respondents

S. C. (Inty.) 108–109—D. C. Nuwara Eliya, 2,995 and 2,996

Civil Procedure Code—Execution of money decree—Judgment-debtor's right in a pending action—Liability to seizure and sale—Section 218.

The right, title and interest of a person in a pending action can be seized and sold under section 218 of the Civil Procedure Code in execution of a decree entered against him.

APPEALS from two orders of the District Court, Nuwara Eliya.

E. B. Wikramanayake, Q.C., with *D. J. Tampoe*, for the appellant (1st defendant in 2,995 and 2nd defendant in 2,996).

P. Somatilakam, with *S. Sharvananda*, for both respondents.

Cur. adv. vult.

January 27, 1953. SWAN J.—

It was agreed that these two appeals should be consolidated. The 1st respondent is the execution-creditor in case No. 2,995 in which he had obtained judgment against the appellant and certain others for the recovery of Rs. 8,000 interest and costs. The 2nd respondent is the execution-creditor in case No. 2,996 in which he had obtained judgment against the appellant and certain others for the recovery of Rs. 1,845, interest and costs. On their respective writs the respondents seized the right, title and interest of the appellant in Case No. 3,181 D.C. Nuwara Eliya, in which the appellant sought to obtain a declaration against the persons he sued that he was entitled to a one-fourth share of the Tivoli Theatre with its plant and machinery, and asked for an accounting of his share of the profits. In

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one case the seizure was made as though the property seized was movable, in the other on the basis that it was immovable. I am of the opinion that it was movable property ; but the mode of seizure is immaterial. The fact that it was seized as immovable property, which mode of seizure is the more elaborate, does not invalidate the seizure. It certainly does not affect the question at issue which is whether the property was liable to seizure. Mr. Wikramanayake also contended that the seizure was bad because it was a re-issue of the writs, and no notice was served on the appellant as required by Section 349 of the Civil Procedure Code. That point seems to have been abandoned in the lower Court. In any event I would follow the ruling in *Silva v. Kavanihamy* [1] and hold that failure to serve notice was only an irregularity that would not invalidate the seizure. The only substantial objection that the appellant could have taken would have been that on the previous levy the respondents had failed to exercise due diligence to procure complete satisfaction of their decrees. Such failure was not even suggested in the Court below or before us.

I shall now deal with the main point taken by Mr. Wikramanayake—Was the appellant's right, title and interest in D. C. 3,181 seizable ? Section 218 of the Civil Procedure Code states that the judgment-creditor " has the power to seize and sell, or realize in money all saleable property movable or immovable belonging to the judgment-debtor, or over which he has a disposing power which he may exercise for this own benefit, whether the same be held by or in the name of the judgment-debtor, or by another person in trust for him or on his behalf ".

The Section then proceeds to state what property is not liable to seizure or sale. The property seized in these cases does not come under any item of excepted property. But Mr. Wikramanayake contends that it is not liable to seizure and sale. The simple question is whether it is property over which the judgment-debtor has a disposing power. I would unhesitatingly answer that question in the affirmative.

Voet 18.4.9 (see Berwick pages 79 and 96) says that a right of action may be sold not only with the consent of the debtor but against his will and in spite of his resistance . . . . whether the right of action be absolute, or due at a future date, or suspended by a condition. In *Pless Pol v. de Soysa* [2] it was held that the right of a person in a pending action is assignable. I do not think anybody could challenge the proposition that what is assignable is also saleable. In *Powell v. Perera* [3] it was held that a party's rights in a pending action could be seized and sold against him. In that case it was sought to distinguish *Pless Pol v. de Soyza* [2] but Garvin J. brushed aside that contention remarking :— " That a debt is saleable within the meaning of section 218 of the Civil Procedure Code is beyond all question and I am unable to see that it ceases to be saleable immediately an action is instituted for its recovery."

I would dismiss the appeals with costs.

ROSE C.J.—I agree.

Appeals dismissed.

[1] *(1948) 50 N. L. R. 52.*

[2] *(1907) 10 N. L. R. 252.*

[3] *(1927) 9 C. L. Rec. 50.*

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1954 *Present :* **Gratiaen J. and Gunasekara J.**

M. S. FERNANDO, Appellant, *and* THE QUEEN, Respondent

S. C. 82—D. C. (Criminal) Balapitiya, 309

Motor vehicle—Negligent driving—Definition of term " driving "—Penal Code, s. 298.

A person who is merely steering a motor vehicle while it is being towed by another motor vehicle is not " driving " it and therefore cannot be convicted under section 298 of the Penal Code upon an indictment charging him with causing death by an act of negligent driving.

APPEAL from a judgment of the District Court, Balapitiya.

M. M. Kumarakulasingham, with *A. C. M. Uvais*, for the accused appellant.

A. E. Keuneman, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 10, 1954. GUNASEKARA J.—

The appellant, who was the first accused in this case, was tried before the District Court of Balapitiya upon an indictment charging him with having committed an offence punishable under section 298 of the Penal Code, in that he—

" being the driver of bus No. IC 990 did cause the death of one Wanigamuni Appusingho of Totagamuwa by doing one or more of the following negligent acts, not amounting to culpable homicide, to wit—

(*a*) by driving the said bus without keeping a proper lookout,

(*b*) by driving the said bus without due care and precaution,

(*c*) by driving the said bus without reasonable consideration for other users of the road,

(*d*) by driving the said bus without giving adequate warning to other users of the road of its approach."

He was convicted and sentenced to a fine of Rs. 250 or one month's rigorous imprisonment in default of payment of the fine. (The second accused who was charged with abetment was acquitted.) At the close of the argument in appeal we set aside the conviction of the appellant and stated that we would give our reasons later.

The accident occurred at about 4.45 p.m. on the 18th May, 1952, on the main road from Colombo to Galle. The road at this place was 21

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feet wide from turf edge to turf edge, and 16 feet of the width was tarred and metalled. According to the evidence accepted by the district judge, the deceased Appu Singho was walking on the wrong side of the road along the unmetalled area, which was 3½ feet wide, and had just stepped on to the macadam without looking behind him when he was knocked down from behind by the bus in question and thrown some distance forward. This bus, a heavy six-wheeled vehicle, was being towed by a smaller one, at the end of a chain 17½ feet long, and steered by the appellant. The towing bus (which was driven by the second accused) had just passed the deceased when he took a step or two to the right and was run over. A pedestrian who had seen the accident, Gabriel Silva, shouted that a man had been run over, and the buses stopped. The appellant's bus came to rest with its left front wheel on the deceased man's face. Apparently it had also collided with the towing bus, for it was later found that the two buses had suffered some damage which indicated a collision between the right front portion of the appellant's bus and the left and middle rear portion of the other one. Some of the people who came up (about ten to fifteen of them according to one witness) pushed the appellant's bus clear of the deceased, but he must have been dead already for his head and face were crushed. An inspector of police arrived immediately afterwards and held an investigation.

The conviction of the appellant is based upon a finding that he had steered his bus so near the left edge of the road as to occupy the unmetalled area (so that the deceased was already in the track of the approaching bus before he stepped on to the metalled portion) and that he had failed to sound his horn when he approached the deceased. The prosecution led the evidence of five persons who claimed to have seen the accident. The appellant did not give evidence and no witnesses were called for the defence. According to four of the five eye-witnesses called by the Crown the towing bus was driven along the middle of the road and the other followed on the left-hand side. The fifth witness, a woman named Senehamy, gave no evidence on this point, as to the portion of the road along which the vehicles travelled. Only one witness, Jayaneris, stated that any portion of the appellant's bus was on the unmetalled area before the accident. "The small bus came in front along the middle of the road," he said, "and the big bus came along *a little to the edge of the road* on the land side". Then, apparently in reply to a further question from the prosecuting counsel in examination in chief, he said "The left front wheel of the big bus was coming along the clay portion of the road". Gabriel Silva only described the towed bus as travelling "on the land side", that is to say, on the left of the road. Another witness, Kalusingho, stated that "the smaller bus, which came in front came along the middle of the road and the larger bus came along the land edge of the road", but he did not say that any part of it was on the unmetalled area. According to the other witness, too, a woman named Seelin Nona who had been walking with Senehamy 7 or 8 fathoms behind the deceased on the same side of the road when the two buses overtook and passed them, "the small bus went along the middle of the road and the other bus went along the edge of the road"; but obviously, not so near the very edge as to leave her and her

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companion no room for themselves on the side of the road. The effect of the evidence of four of these witnesses appears to have been misapprehended by the learned judge, for he says, in his judgment :

> " All the witnesses have stated that the front bus was driven towards the centre of the road while the towed bus was coming on the extreme edge. The photographs produced clearly show that at the time these photographs were taken that the left front wheel and the left rear wheel of the bus IC 990 were out of the tarred portion and they were on the clay portion."

The photographs that are referred to show the two buses and the body of the deceased man in the position in which the inspector of police found them. The near-side wheels of the appellant's bus, which was 7′ 4″ wide, were on the unmetalled portion of the road 1′ 6″ from edge of the macadam and 2′ from the turf edge on the left-hand side. The towing bus, which was about 8′ in front of it was well on the macadamized portion of the road, with its left rear wheel 4′ and front wheel 4′ 6″ from the left edge of the macadam. The width of this bus was 7′, so that it was practically on the middle of the road. The deceased's body lay between the two buses with the upper part of it on the unmetalled area and the lower portion, from the waist downwards, on the macadam. The learned judge holds that these photographs " show that the towed vehicle had been driven on the very extreme edge of the road as stated by the prosecution witnesses " ; and also that " the position of the towed vehicle clearly shows that it was being driven on the very extreme edge of the road, thus proving a danger to pedestrians who may happen to be on the road-side ". These findings clearly involve a misdirection as to the bearing of the evidence about the position in which the appellant's bus was when the inspector of police arrived. That was the position into which it happened to be pushed by a crowd of ten to fifteen persons from the position in which it had come to rest after it had knocked down the deceased, travelled some distance beyond the point of impact, and collided with the towing bus. It seems manifest that the position in which the inspector found the bus cannot indicate at what distance from the extreme edge of the road it was travelling at the time when it knocked down the deceased man.

The finding upon which the conviction was based was the result of a misdirection as to the effect and bearing of the evidence, and the conviction is therefore bad.

It was also contended for the appellant that, far from proving that he had done the negligent act of driving the bus in the manner described in the indictment, the Crown had failed to prove that he drove the bus at all ; for, according to the evidence for the prosecution, he had merely steered a vehicle in tow that was disabled and incapable of being driven. In support of this view the learned counsel for the appellant cited the case of *Wallace v. Major*[1], where it was held that a person steering a disabled motor lorry while it was being towed was not " driving " it and therefore could not be convicted under section 11 of the Road Traffic

[1] [*1946*] *1 K. B. 473.*

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Act, 1930 (20 and 21 Geo. 5, C. 43), of the offence of driving a motor vehicle in a manner which was dangerous to the public. The same contention was advanced at the trial but the learned district judge rejected it. He held that *Wallace v. Major* " can be distinguished, for the present charge is not under the Motor Traffic Act but under section 298 of the Penal Code ", and that though the appellant has been described in the indictment as the driver of the bus in question " the definition of the word ' driver ' in the indictment should not be given a restricted interpretation ". The learned judge was " satisfied that, due to the faulty steering of the first accused the rear bus had been driven on the extreme edge of the road and it knocked down this unfortunate man ".

The decision in *Wallace v. Major*, however, did not turn on any technical definition but on the question whether a person who merely steers a disabled motor vehicle in tow can be said to " drive " it, in the ordinary acceptation of that term ; and that is precisely the question that arose for the learned judge's decision in the present case. " In my judgment," said Lord Goddard C.J. in *Wallace v. Major*, " it is impossible to say that a person who is merely steering a vehicle which is being drawn by another vehicle is driving that vehicle. No doubt he is controlling it to some extent ; no doubt he is doing many things which a driver would have to do ; but before he can be convicted of being a person driving a motor car in a dangerous manner, it must, it seems to me, be shown that he is at least driving it ; that is to say, making the vehicle go ". It is true that, unlike in the case of the offence of dangerous driving under the English Road Traffic Act of 1930 or our Motor Traffic Act of 1951, driving a motor vehicle is not a necessary ingredient of the offence of causing death by a negligent act punishable under section 298 of the Penal Code ; but the negligent act alleged in the indictment in the present case is an act of negligent driving, and it was therefore necessary for the prosecution to prove such an act by the appellant before he could be convicted without amendment of the indictment. The prosecution failed to prove that the appellant was driving the bus, " that is to say, making the vehicle go ".

It was contended by the learned crown counsel that if the acts proved to have been done by the appellant did not amount to driving the bus, there had only been an error in the indictment in the description of the act as " driving " instead of " steering ". He urged that it was not shown that the error had occasioned a failure of justice, and that therefore the conviction should not be set aside on the ground that the averment of driving had not been proved. That was, however, a material averment, and it can hardly be said that when the Crown adduced no proof of it and the indictment had not been amended the appellant should have given evidence or called witnesses for the purpose of defending himself against the unamended charge as though it had been amended. He was entitled to a finding that the Crown had failed to prove the negligent act that was alleged against him, and not to be convicted upon the footing that he had committed a different act unless the

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indictment was first amended and he was given an opportunity of dealing with the charge in its amended form. There has thus been a failure of justice.

For these reasons we quashed the conviction and set aside the sentence passed on the appellant. In our opinion the evidence in the case was not such as to warrant an order for a new trial.

GRATIAEN J.—I agree.

Conviction quashed.

1953 *Present :* **Nagalingam A.C.J.**

E. DON SEEMON, Appellant, *and* H. DIAS (S. I. Police), Respondent

S. C. 1160—M. C. Colombo, 32,000

Excise Ordinance (Cap. 42)—Possession of excisable article—Difference between s. 43 (a) and s. 44—Misjoinder of charges.

The charge against the accused was that he had in his possession seven bottles of unlawfully manufactured arrack in breach of section 43 (*a*) of the Excise Ordinance, but the penal section under which the offence was punishable was stated to be section 44 of the Ordinance.

Held, that sections 43 (*a*) and 44 created two distinct and separate offences, and that the reference to these two sections in respect of one and the same charge had the effect of a joinder of two separate charges.

APPEAL from a judgment of the Magistrate's Court, Colombo.

C. S. Barr Kumarakulasinghe, with *Malcolm Perera*, for the accused appellant.

A. C. de Zoysa, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 26, 1953. NAGALINGAM A.C.J.—

The question in this appeal is whether there is a misjoinder of charges which is said to arise in this way : The charge was that the appellant had in his possession seven bottles of unlawfully manufactured arrack in breach

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of section 43 (*a*) of the Excise Ordinance, but the penal section under which the offence was punishable was stated to be section 44 of the Ordinance. It will be seen on a reference to section 43 that that section itself prescribes the penalty for an offence committed thereunder.

Both before the learned Magistrate and me it has been contended on behalf of the appellant that sections 43 (*a*) and 44 create two distinct and separate offences, and that the reference to these two sections in respect of one and the same charge has the effect of a joinder of two separate charges. It is true that under both sections 43 (*a*) and 44 possession of an excisable article is punishable but the nature and the circumstances of possession are different under the two sections. If the two sections referred to possession of an excisable article of an identical character and under identical conditions, it must then necessarily follow that there has been unnecessary repetition on the part of the legislature, an inference which would not lightly be drawn unless there is no escape from such a conclusion.

It seems to me, however, that the two provisions are intended to govern two separate categories of cases. Section 43 penalises an act which is done in contravention of the provisions of the Ordinance or of any rule made thereunder, that is to say, an act done in the excess or contrary to what is permitted to be done by the Ordinance, such, for instance, as the possession by a person of more than two bottles of lawfully manufactured arrack. A perusal of the earlier sections 9 to 31 would show that they permit the importation, exportation, possession, and so on, of various classes of excisable article, subject to the conditions either express or implied therein, and section 43 prescribes the penalty where a person contravenes those provisions or any rule, licence or permit made or issued thereunder, while section 44 does not punish a contravention of the provisions of the Ordinance but penalises an act which it regards as an offence in itself.

I have not lost sight of the fact that section 44 has the qualifying words " without lawful authority " but those words are not intended to indicate that any authority is granted to any person under the Ordinance to possess an excisable article of the nature referred to therein, but rather to confer immunity on a person such as a carrier or a customs officer who may in the exercise of his calling or of his duties have possession of such prohibited excisable article. It is also to be noted that section 44 deals with the offence of possession alone. Possession of unlawfully manufactured excisable articles as, for instance, pot arrack, cannot be punished under section 43 as it is not an offence which is in contravention of any provision of the Ordinance other than section 44 itself.

I am therefore of opinion that section 43 cannot be said to extend to cases of possession of unlawfully manufactured arrack. The contention, therefore, advanced on behalf of the appellant is entitled to succeed.

The next question for consideration is whether an amendment of the charge should be permitted at this stage. The point was expressly raised by the defence, and it was open to the prosecutor or even to the Magistrate when the point was taken to have amended the charge and to have recalled the witnesses so as to enable them to be cross-examined as required

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by law. But where the prosecutor, relying upon his view of the propriety of the charge, has made no such application before the Magistrate, I do not think I should accede to any such application at this stage, for the result of granting such an application would be to remit the case to the learned Magistrate for a fresh trial, which I think would be unsatisfactory in the circumstances.

I therefore set aside the conviction and acquit the accused.

Appeal allowed.

1954 *Present :* **Sansoni J.**

B. S. COORAY *et al.*, Appellants, *and* DIAS (S. I. Police), Respondent

S. C. 105-106—M. C. Colombo South, 42,527

Joinder of accused—" Same transaction "—Criminal Procedure Code, ss. 148 (1) (b), 184, 187 (1)—Excise Ordinance (Cap. 42), ss. 17, 43 (g), 44.

When two or more persons are accused of different offences committed in the same transaction within the meaning of section 184 of the Criminal Procedure Code, it is not necessary that the charge must expressly state that the offences were committed in the same transaction.

But where the charge is framed by Court under section 187 (1) of the Criminal Procedure Code without any prior evidence that the offences were committed in the course of the same transaction and exactly in terms of a police report which does not contain even an accusation that the offences were so connected, an accused person cannot be convicted of the offences if the evidence led at the trial does not prove that the offences were committed in the course of the same transaction.

APPEAL from a judgment of the Magistrate's Court, Colombo South.

First accused was charged with selling arrack in breach of section 17 of the Excise Ordinance. In the same proceedings first and second accused were charged with unlawful possession of arrack, punishable under section 44 of the Excise Ordinance. The trial court entered convictions on both the counts.

S. B. Lekamge, for the accused appellants.

V. S. A. Pullenayagam, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 1, 1954. SANSONI J.—

A report under section 148 (1) (*b*) of the Criminal Procedure Code (Cap. 16) was filed in the Magistrate's Court by a Sub-Inspector of Police on 25th June, 1952, in the following terms :—" I, P. D. P. A. Liyanage,

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H. Q. S. I. Police, Mirihana, in terms of section 148 (1) (*b*) of the Criminal Procedure Code (Chapter 16) hereby report to the Court that :—(1) B. Simon Cooray of No. 70/1, Station Road, Nugegoda, (2) N. A. Jayasinghe of No. 70/1, Station Road, Nugegoda, did on the 16th day of June, 1952, at Nugegoda within the jurisdiction of this Court the above-named 1st accused did in contravention of section 17 of the Excise Ordinance (Chapter 42) sell to A. Wijegunawardene of Nugegoda an excisable article to wit : Arrack, without a licence granted in that behalf by the Government Agent and thereby committed an offence punishable under section 43 (*g*) of the Excise Ordinance (Chapter 42) of the R. L. E. (2) At the same time and place aforesaid the above-named 1st and 2nd accused did have in their possession an Excisable Article to wit : about ½ bottle (8 drams) of unlawfully manufactured arrack without lawful authority and thereby committed an offence punishable under section 44 of the Excise Ordinance (Chapter 42) of the R. L. E.". The two accused were present in Court at the time on Police Bail and the Magistrate framed charges against them under section 187 (1) of the Code in terms which are exactly similar to those appearing in the report. The accused severally pleaded " Not guilty " and the trial eventually took place on 11th May, 1953, one counsel appearing for both accused.

It appeared from the evidence of the prosecution witnesses that a decoy was sent by a Sub-Inspector of Police to the 1st accused's hotel with instructions to buy arrack. The Sub-Inspector shortly afterwards followed him to the hotel through the back door. They saw the 1st accused seated on a bed in a room, and the 2nd accused standing near that bed ; the decoy was standing there with a glass containing arrack in his hand, and there was a bottle containing arrack on a teapoy in the room. Under the bed was found another bottle containing arrack. The defence evidence was to the effect that there was no sale, that the bottle alleged to have been under the bed was not in fact there, that the decoy never entered the premises, and that the Police Officers entered the room and assaulted the 1st accused. The 2nd accused admitted that he lived in that hotel but he denied that he was in the room at that particular time. It was proved by analysis that the bottle on the teapoy contained Government Arrack while the bottle under the bed contained unlawfully manufactured arrack. It was also proved by production of the householder's list that the chief occupant of these premises is the 1st accused. Among the names of 14 other occupants in that list was the name of the 2nd accused who was described as a servant of the 1st accused.

The Magistrate accepted the evidence of the prosecution witnesses which also proved that the one rupee note which had been given to the decoy by the Sub-Inspector prior to the decoy going to this hotel was found in the 1st accused's waist. The decoy's evidence was to the effect that the 1st accused had sold him the arrack which was in the glass.

The Magistrate convicted the 1st accused on the charge of sale, and both accused on the charge of possession of the bottle of arrack found under the bed. His reason for convicting both accused of possession was that they were in joint possession of that bottle. It seems to me

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that as the 1st accused was the chief occupier of the premises it is he alone who, in the circumstances of this case, can be said to have been in possession of the bottle which was found under the bed on which he was seated. Crown Counsel, quite rightly in my opinion, did not seek to support the conviction of the 2nd accused and he should have been acquitted.

The appellants' counsel did not challenge the Magistrate's findings of fact but he submitted that the conviction could not stand because of the irregularity of the charge framed, which thereby rendered the proceedings invalid. He submitted (1) that there was no allegation that the two offences were committed in the course of the same transaction, and for this submission he relied on section 184 of the Code; (2) that there was no justification for the charges of sale and possession being joined inasmuch as they could not be said to have been committed in the course of the same transaction. I think the answer to the first submission is to be found in section 184 itself. The section refers to cases "when more persons than one are *accused* of jointly committing the same offences or of different offences committed in the same transaction", and provides that "they may be *charged* and tried together or separately as the Court thinks fit". The words "accused" and "charged" clearly do not mean the same thing. Illustration (*a*) reads "A and B are accused of the same murder. A and B may be indicted and tried together for the murder". The other illustrations to this section also make this distinction clear.

In the case of *Emperor v. Datto Hanmant Shahapurker* [1], Batty J. said:— "Section 239 (which corresponds to section 184 of the Ceylon Code) admits of the joint trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction within the meaning of section 239. It is not necessary that the charge should contain the statement as to the transaction being one and the same. It is the tenor of the accusation and not the wording of the charge that must be considered the test". The Privy Council in the case of *Choukhani v. King Emperor* [2] expressly approved of the judgment of Batty J., and I might add that in the case decided by the Privy Council there was no statement in the charge as to the transaction being the same, and no criticism was made regarding this omission. I gather from the judgment of Hearne J. in the case of *The King v. Sunderam* [3] that the learned Judge took the same view. Lord Wright says in the Privy Council judgment:—"The clause (that is, section 239 of the Indian Code) deals with three matters: accusation, charge, trial". The first objection must therefore be deemed unsound.

I turn now to the second objection taken by the appellants' counsel. As I have said, the proceedings started with a report filed under section 148 (1) (*b*), and upon that report the Magistrate framed the charge under section 187 (1). A similar course would be taken in India by a Magistrate

[1] *I. L. R. 30 Bombay 49.*

[2] *(1938) L. J. P. C. 35.*

[3] *(1943) 44 N. L. R. 227, at page 230.*

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in warrant cases, where he would frame a charge under section 254. When such a procedure is adopted by the Magistrate, and he is clearly acting regularly in so doing, he does not necessarily record evidence bearing on the circumstances under which the different offences were committed. If it turns out later that the offences were not committed in the course of the same transaction where the accusation in the report was that they did, would the joinder of the charges be irregular ? I think not. Take again a case where a Magistrate records evidence prior to framing the charge and he forms the opinion that several offences may be joined in the charge as forming one transaction. It may later transpire at the trial that the offences were not committed in the course of one transaction. " The opinion of the Magistrate may be wrong in law as to there being a same transaction, or the evidence which led him to think *prima facie* that this condition existed may be insufficient or may eventually be falsified " (*per* Lord Wright). Even then the proceedings would not be illegal or invalid, for the relevant point of time is that of the accusation and not of the eventual verdict, but if there is prejudice or embarrassment caused to the accused this Court will interfere and quash the proceedings. But in this particular case which I have now to decide there was not, in the report under section 148 (1) (*b*), even an accusation that the two offences were committed in the course of the same transaction, nor was any evidence led prior to the framing of the charge from which the Magistrate could have formed the opinion, even wrongly, that the two offences were so connected.

The joinder of the two offences can, therefore, be justified only if the evidence led at the trial proved that they were committed in the course of the same transaction : if it did not, the infringement of section 184 would constitute an illegality as distinguished from an irregularity. In my opinion the two offences should not have been joined in one charge. There is no connection whatever between them because the 2nd accused had nothing to do with the sale. " We think the foundation for the procedure in that section is the association of two persons concurring from start to finish to attain the same end ", said Batty J. in the judgment I have already referred to. In *Gopal Raghunath v. Emperor*[1] Baker J. said :—" So long as the accusation against all the accused persons is that they carried out a single scheme by successive acts, the necessary ingredients of a charge regarding the one transaction would be fulfilled ". Wijeyewardene J. in *Jonklaas v. Somadasa*[2] where an examination of section 184 was necessary, said " In discussing the meaning of this word (transaction) in the corresponding sections of the Indian Code of Criminal Procedure the High Courts of India have held that the substantial test for determining whether several offences are committed in the same transaction is to ascertain whether they are so related to one another in point of purpose or as cause and effect or as principal and subsidiary acts as to constitute one continuous action ".

I would therefore allow the appeal of the 1st accused also and quash the proceedings.

Appeals allowed.

[1] (*1929*) *A. I. R. Bombay 128.* [2] (*1942*) *43 N. L. R. 284.*

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1953 *Present :* **Swan J.**

D. E. F. FERNANDO, Appellant, *and* E. L. GOONEWARDENE (Excise Inspector), Respondent

S. C. 855—M. C. Panadure, 22,497

Excise Ordinance (*Cap. 42*)—*Section 55— Is a Vedarala a " medical practitioner " ?— Medical Practitioners Ordinance* (*Cap. 90*), *ss. 35, 40.*

Where, in a prosecution under the Excise Ordinance, the accused, who was a Vedarala, pleaded that as a " medical practitioner " he was entitled to rely on the provisions of section 55 of that Ordinance—

Held, that a Vedarala was not a " medical practitioner " within the meaning of that term in section 55 of the Excise Ordinance.

Amarasekera v. Lebbe (1914) 17 N. L. R. 321, followed.

APPEAL from a judgment of the Magistrate's Court, Panadure.

H. W. Jayewardene, for the accused appellant.

N. Tittawella, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 9, 1953. SWAN J.—

The appellant was charged with having without a licence from the Government Agent, W. P., (1) manufactured an excisable article, (2) established and worked a brewery to manufacture an excisable article, (3) possessed materials, utensils, implements and apparatus for the purpose of manufacturing an excisable article, (4) bottled an excisable article for sale, (5) possessed an excisable article and (6) kept and exposed for sale an excisable article in breach of Sections 14 (*a*), 14 (*d*), 14 (*e*), 14 (*f*), 44 and 17 of the Excise Ordinance—offences punishable under Sections 43 (*b*), 43 (*e*), 43 (*f*), 43 (*h*), 44 and 43 (*g*), of the said Ordinance. He was found guilty after trial and sentenced to pay fines amounting to Rs. 400.

The offending liquor was a preparation called " Kamasan Jeewaneeya " which on analysis was found to contain 3 to 3·7 % alcohol. The facts were not denied, but it was contended on behalf of the appellant that he was entitled to prepare and sell this stuff as it was a medicinal preparation,

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and that he was a medical practitioner within the meaning of that word as used in Section 55 of the Excise Ordinance. This creates an exemption in respect of bona fide medicated articles. The Section reads as follows :—

> " Nothing in the foregoing provisions of this Ordinance applies to the import, manufacture, possession, sale or supply of any bona fide medicated article for medicinal purposes by medical practitioners, chemists, druggists, pharmacists, apothecaries or keepers of dispensaries ; but the Governor may by notification prohibit throughout the Island or within any local area the import, manufacture, possession, supply, or sale of any such article either absolutely or except under such conditions as he may prescribe, and the provisions of this Ordinance shall thereafter apply to any article so prohibited. "

The learned Magistrate held that the appellant who is a vederala within the accepted meaning of that word did not act bona fide in the preparation of this so-called medicated article. I am unable to confirm the learned Magistrate's conclusion on this point. The evidence, in my opinion, proves the bona fide of the appellant. It was admitted by one of the prosecution witnesses that he was a vederala in practice for at least 12 years. In his evidence the appellant stated that he prepared this concoction according to an old prescription, and that he used yeast as a preservative. Unfortunately the learned Magistrate apparently drawing on his own knowledge thought that yeast was not a preservative but a basis or nucleus of alcoholic fermentation. The evidence also proved that the appellant had carried on the manufacture and sale of this medicated preparation quite openly for a number of years. In the circumstances I would hold that the learned Magistrate could not and should not have said that this " Kamasan Jeewaneeya " was not a bona fide medicated article. But can the accused claim exemption under Section 55 ? That is the crucial question which, however, the Magistrate did not consider.

Section 35 of the Medical Practitioners Ordinance (Cap. 90) provides :—

> " In any written law, whether passed or made before or after the commencement of this Ordinance, the words ' legally qualified medical practitioner ' or ' duly qualified medical practitioner ' or ' registered medical practitioner ' or any words importing a person recognised by law as a practitioner in medicine or surgery shall be construed as meaning a medical practitioner registered under this Ordinance."

It will be observed that a vederala does not come within the ambit of the term " medical practitioner ". Mr. Jayawardene, however, contends that under Section 40 a vederala can claim to be a " medical practitioner ". I do not think so. That Section only makes a concession in favour of vederalas. As the side note says it provides a " saving for vederalas ". If the Section is reproduced the point becomes obvious. I shall therefore do so.

> " Nothing in this Ordinance shall make it unlawful for a vederala to practise medicine or surgery according to the indigenous or ayurvedic systems or prevent him from recovering his charges for services rendered or medicine or goods supplied by him in the course of his practice. "

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There is a case in point. In *Amarasekera v. Lebbe* [1] Wood Renton A.C.J. and Pereira J. (Sampayo J. dissenting) held that a vederala was not a " medical practitioner " within the meaning of that term as used in Section 55 of the Excise Ordinance. At that time the Medical Practitioners Ordinance No. 2 of 1905 was in force. Section 9 of that Ordinance provided as follows :—

> " The words ' legally qualified medical practitioner ', or ' duly qualified medical practitioner ', or any words importing a person recognized at law as a practitioner in medicine or surgery, where used in any Ordinance or regulation, shall be construed to mean a practitioner registered under this Ordinance. "

The conviction is affirmed but in as much as I take the view that the appellant was acting bona fide in the preparation and sale of this medicated article I think a nominal punishment is sufficient. I would therefore reduce the sentences to Rs. 25 on count 1 in default 2 weeks' simple imprisonment—Rs. 15 on each of counts 2, 3, 4, 5 and 6 in default one week's simple imprisonment. Subject to this variation the appeal is dismissed.

Sentence reduced.

[1] *(1914) 17 N. L. R. 321.*

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1954 *Present:* **Nagalingam S.P.J. and Fernando A.J.**

W. AGNES PERERA, Appellant, *and* W. EDWARD PERERA *et al.*, Respondents

S. C. 94—D. C. (Inty.) Colombo, 6,099/P

Co-owner—Right to build on the common land—Order for demolition of building—Propriety of seeking it in partition action.

In a partition action, the Court is entitled to order the demolition of a building constructed by a co-owner contrary to the protests of the other co-owners and in violation of their rights as co-owners.

Where a co-owner puts up a building on the common land, he cannot compel any of his co-owners to take over such buildings and pay compensation.

APPEAL from an order of the District Court, Colombo.

The appellant, a co-owner, had put up a building on the common land in violation of the rights of the other co-owners to have an adequate road frontage to enable them also to put up buildings on the portion of the land which, it was common ground, was the most valuable part as a building site.

H. V. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, and *D. R. P. Goonetilleke*, for the 1st defendant appellant.

N. E. Weerasooria, Q.C., with *Vernon Wijetunge* and *S. Sharvananda*, for the plaintiff respondent.

Cur. adv. vult.

December 10, 1954. NAGALINGAM S.P.J.—

The main point for decision on this appeal is whether an order for demolition of a building constructed by one co-owner contrary to and in spite of the protests of another co-owner can be legally made in an action for partition. Learned Counsel for the 1st defendant-appellant contends that where one co-owner builds or is alleged to have built in defiance of the protests of another co-owner, the remedy of the latter co-owner is to institute an action for an injunction to prohibit the continuance of the building and, if necessary, for a mandatory order to compel the demolition of the structure or any part thereof that may have been put up, but not to commence an action under the Partition Ordinance. No authority however for this proposition has been cited and there is nothing in the writings of Roman Dutch Jurists to support this view. I should have thought that a partition action would be the most appropriate form of

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proceedings to determine all the questions that arise in connection with an allegation that one co-owner has wrongfully put up buildings infringing the rights of the other co-owners.

Any building put up on common property by a co-owner accedes to the soil and itself becomes common, but of course the co-owner who put up the building is entitled to the use and enjoyment of it until such time as common ownership is put an end to ; and in fact at a division of common property the co-owner who has put up a building, though erected contrary to the wishes of the other co-owners, is entitled to be allotted that building if he can satisfy the Court that having regard to the nature, extent and amenities available in respect of the land, he could not be said to have violated the rights of his co-owners by erecting the structure.

It is obvious that such a question as whether the co-owner who has put up the building without the consent of his co-owners should be permitted to retain it or not in appropriate circumstances cannot be as conveniently determined in a proceeding which has for its object the grant either of a prohibitory injunction or a mandatory order as in a partition action.

The absence of judicial opinion on this question may be ascribed to the view that the proposition being so evidently patent the matter has never before received judicial attention. But there is a case which may be regarded as deciding the converse of the proposition contended for on behalf of the appellant. That is the case of *de Silva v. Caraneris*.[1] That was a case where one co-owner brought an action for declaration of title for his undivided shares and for an injunction against the defendant co-owner restraining him from building on the common land. In granting the injunction, Shaw J. expressed the view that where a co-owner meets with opposition in putting up a building on the common land "his proper method would be to apply for a partition of the land when he would be able to do whatever he likes with the portion allotted to him ",—a view which fully recognises the suitability of partition actions for settling disputes arising between co-owners even in regard to their right to build on the common land.

I am of opinion that the learned Judge exercised his jurisdiction properly in these proceedings in adjudicating upon the rights of parties in regard to the building put up by the 1st defendant-appellant in opposition to the wishes of her co-owners.

During the course of the argument, in view of the very substantial nature of the building that has been put up I was inclined to uphold the submission on behalf of the appellant that as she was not unwilling that while building No. 3 in the plan may be allotted to her, order might be made allotting buildings Nos. 1 or 2, or both, to her co-owners subject to the latter paying her compensation as the quantum of such compensation would not be so heavy as if lot 3 had been allotted to them ; we postponed delivering judgment in the hope that the parties might arrive at a settlement on the footing of that submission, but the parties have not been able to compose their differences. It therefore becomes necessary to decide the rights of parties on the basis of legal considerations.

[1] *(1918) 1 Ceylon Law Recorder 28.*

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I think it is settled law that where a co-owner puts up or becomes solely entitled to a building on the common land, he cannot compel any of his co-owners to take over such buildings and pay compensation to him for it.

Building No. 1 was allotted to the 1st defendant under an earlier partition decree and she is the owner of it. Building No. 2 was erected by her not only without protests on the part of the plaintiff and the 2nd defendant, but also without violating, it may be said, the rights of the other co-owners. The direction of the learned District Judge that these buildings should be allotted to her at the partition is unobjectionable. In this view it is easy to see that in putting up building No. 3, the 1st defendant has, as has been found by the learned District Judge—a finding which has not been challenged on appeal—committed a flagrant invasion of the undoubted rights of her co-owners to have if not a proportionate, at least an adequate, in so far as circumstances will permit, road frontage along the main thoroughfare, to enable them as well to put up one or more buildings on the portion of the land which, it is common ground, is the most valuable part as a building site.

In this view of the matter, it cannot be said that the order of the learned District Judge, which is in conformity with the principles laid down in the cases of *Silva v. Silva*, [1] *Muthaliph v. Munsoor et al.*, [2] and *Perera v. Podisingho*, [3] is liable to be disturbed. The judgment of the learned District Judge is therefore affirmed and the appeal is dismissed with costs.

FERNANDO A.J.—I agree.

Appeal dismissed.

1954 *Present :* **Nagalingam S.P.J. and Fernando A.J.**

K. CHARLES APPUHAMY, Appellant, *and* T. B. ABEYESEKERA, Respondent

S. C. 406—D. C. Kandy, M. R. 5,051

Rent Restriction Act—Applicability to "lease" of a business.

Where a business of the nature of a hotel and tea kiosk was "leased" by A to B and, under the contract, A gave over to B the mangement, control and conduct of the business for a term of years—

Held, that at the end of the specified period B was not entitled to the protection of the Rent Restriction Act in regard to the premises in which the business was carried on.

[1] (*1906*) *9 N. L. R. 114.* [2] (*1937*) *39 N. L. R. 316.*

[3] (*1946*) *47 N. L. R. 347.*

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APPEAL from a judgment of the District Court, Kandy.

H. V. Perera, Q.C., with *N. E. Weerasooria, Q.C.*, and *W. D. Gunasekera*, for the defendant appellant.

H. W. Jayewardene, Q.C., with *P. Somatilakam*, for the plaintiff respondent.

Cur. adv. vult.

November 8, 1954. NAGALINGAM S.P.J.—

A novel point is raised in this case and it is said to be *res integra*. The plaintiff by a document P1 of 1950, which is expressed on the face of it to be an indenture of lease, " let, demised and leased " unto one Edwin Silva " the Hotel and Tea kiosk known and registered as the Kandy Restaurant " together with all the equipment for a term of three years commencing from the 1st January, 1950, at a monthly rental of Rs. 380.

Edwin Silva by deed P2 of 1950, with the consent of the plaintiff, assigned all his rights, title and interest in and to the indenture of lease P1 to the defendant. The period of lease provided under the " indenture of lease ", P1 of 1950, expired on the 31st December, 1952, and the plaintiff claimed delivery of the " Hotel and the Tea kiosk ". The defendant denied the plaintiff's claim and has taken up the position that as the business had been carried on in certain premises bearing assessment No. 39, Brownrigg Street, Kandy, to which the provisions of the Rent Restriction Act apply and as the possession of the premises too had been delivered to him by virtue of the documents P1 and P2, he is entitled to claim the protection given by the said Act to a tenant as against his landlord.

The question therefore resolves itself into a determination as to whether the relationship created between the plaintiff and the defendant by virtue of the deeds P1 and P2 is one of letting and hiring of immovable property as contended for by the defendant or whether the delivery of possession of the immovable property was ancillary to the delivery of possession of the business of the Hotel and Tea kiosk. It is to be observed that the mere affixing of a label to a transaction by the parties or by their legal advisers does not control or govern the true nature of the rights and liabilities created which have to be determined by an examination of the terms and conditions of the instrument itself. Though the document P1 is described as an indenture of lease it is not a lease in the true sense of the term, for a lease relates to the letting and hiring of immovable property.

If one examines the document P1 one would seek in vain to gather from the document any letting and hiring of any immovable property—much less of 39, Brownrigg Street, Kandy, where the business was carried on ; but on the other hand what is " leased " is the Hotel and Tea kiosk known and registered as the Kandy Restaurant. That the parties did not regard the transaction that they entered into or the instrument recording such transaction as one of a lease of immovable property is manifest from the circumstance that there is no description given of any

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immovable property. But on the other hand a full description is given of the various fittings, equipment and furniture of the business, and one of the principal covenants to be observed on the part of the "lessee" is stated to be "to manage and control the said hotel and business in a proper manner" and to yield up, surrender and deliver the said business known as the Kandy Restaurant and all the movables therein described at the expiration or sooner determination of the term of the "lease". It is abundantly clear therefore that the document itself is no lease and definitely not a lease of any immovable property.

It is however contended on behalf of the defendant-appellant that under the document P1 the lessee was required to permit one Perera who was carrying on the business of oilman stores in a part of the premises No. 39, Brownrigg Street, to carry on that business there, and to permit the lessor to use and occupy a room in the upstairs of the said premises and those requirements indicate that there was in truth a letting of the entirety of the building No. 39, Brownrigg Street.

Further, it is said that *de facto* possession of the premises having been given and the quantum of rent payable in respect of the premises in accordance with the provisions of the Rent Restriction Act, viz., Rs. 130 a month having been taken into computation in fixing the amount of "rent" of Rs. 380 a month payable by the lessee under P1, all the essential elements necessary to constitute a letting and hiring of immovable property have been established. I do not think this argument is sound. A simple illustration will suffice to demonstrate the fallacy underlying it. Take, for example, the case of a guest who is charged a composite sum for board and lodging by a hotel-keeper; if it can be shown, as indeed it easily can be, that in arriving at the figure the guest is charged, the hotel-keeper took separately into account the following items:—

(*a*) Rent for bed room,
(*b*) Hire of furniture, crockery and cutlery,
(*c*) Cost of food,
(*d*) Charges for service,

can it be said that the guest becomes a tenant of the room and that the term "guest" is a misnomer in his case? Obviously, the answer is "No".

In the absence of any words of assurance of premises bearing No. 39, Brownrigg Street, to the lessee under P1, the covenant that the lessee should permit certain persons to carry on and use part of the premises would at best lead to the inference that the lessee had some interest in the immovable property but *non constat* that such interest is a lease or an interest in the nature of a lease. Indeed, the document P1 should properly have been described as Articles of Agreement entered into between the two parties whereby one party gave over the management, control and conduct of the business for a term of years to the other party subject to the stipulations contained in the document P1.

It is however necessary to ascertain what is the nature of the interest in the immovable property that has been recognized as having been vested in the lessee under P1 by the instrument itself. Any business, if it is to be conveyed as a going concern, excepting that of a hawker or a

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pedlar, must ordinarily have a place of business and when the management of a business is handed over, particularly a business of the nature of a Hotel and Tea kiosk, it is impossible to imagine that possession of the place where the business is carried on could be withheld. A business of a Hotel and Tea kiosk does not merely consist of the equipment but must necessarily include the building where the beds and bedding are kept, the dining room where the tables and chairs at which customers are served with meals and refreshments are kept, and also of the goodwill attaching to such business which may be the most valuable part of the whole concern, namely, the name of the business and the situation of the premises where the business is carried on, for, as is well known, a reputed name as well as a favourable site, both attract custom.

On a proper reading of the document P1, it is impossible to resist the conclusion that the transaction entered into between the parties was one not of letting any immovable property for the purpose of enabling one party to carry on a business, nor the letting of the building to that party with the option to him to carry on or not the business previously carried on there, but of placing the "lessee" in charge of a business that had been and was being carried on for the sole purpose of its being continued as a going concern and with a view to its being delivered back as such going concern together with the goodwill and the improvements and advantages gained or accrued thereto in the meantime ; and as ancillary to the object which the parties had in contemplation it was that possession of the premises was delivered. The defendant's position was no more than that of a licensee and is far removed from that of a tenant.

There is another matter to which I should advert before concluding my judgment. The basis for the defendant's claim to remain in occupation of the premises is that "he is unable to vacate the said premises till he finds suitable alternative accommodation *for his business*". This I consider to be a most extraordinary claim. The defendant was never the owner of the business. The business undoubtedly was that of the plaintiff. He, the defendant, had been placed in charge of the business to be run by him, for his benefit no doubt, but for the limited period of the unexpired term stipulated in the document P1. But that term has expired and I cannot see how he can be permitted to claim the business as his own. If the business is not his, and he has no business of his own, then the foundation of his claim "that he cannot vacate the premises till he finds suitable accommodation for his business" vanishes. Probably the defendant does not realise that by the claim put forward by him he is exposing himself to the charge that he is making an attempt to betray the trust placed on him and to perpetrate a fraud on the plaintiff.

In these circumstances I do not think that it could properly be said that there was a letting of immovable property to which the provisions of the Rent Restriction Act apply. I am therefore of opinion that the judgment of the learned District Judge is right and that the appeal should be dismissed with costs.

FERNANDO A.J.—I agree.

Appeal dismissed.

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1955 *Present :* **Gratiaen J. and Sansoni J.**

B. A. J. APPUHAMY, Appellant, *and* B. S. SILVA *et al.*, Respondents

S. C. 34—D. C. Kurunegala, 4,087

Kandyan Law—Child born in diga *marriage—Death intestate and issueless—Inheritance*—Stare decisis.

When a Kandyan child born in a *diga* marriage dies intestate and without issue, his interests in immovable property inherited from his deceased mother (who had herself inherited the property from her father because, in spite of her *diga* marriage, she had for one reason or another not forfeited her rights of succession) pass absolutely to his father.

Chelliah v. Kuttapitiya Tea and Rubber Co. Ltd. (1932) 34 N. L. R. 89, followed.
Bisona v. Janya (1948) 41 C. L. W. 40, not followed.

It is undesirable to disturb a long-established ruling on any question of law affecting rights of succession.

APPEAL from a judgment of the District Court, Kurunegala.

Cyril E. S. Perera, Q.C., with *S. W. Jayasuriya*, and *T. B. Dissanayake*, for the plaintiff appellant.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the 1st and 2nd defendants respondents.

Cur. adv. vult.

January 26, 1955. GRATIAEN J.—

In *Chelliah v. Kuttapitiya Tea and Rubber Co., Ltd.*[1] this Court was called upon to consider the correctness of the proposition that when a Kandyan child born in a *diga* marriage dies intestate and without issue, his interests in immovable property inherited from his deceased mother (who had herself inherited the property from her father because, in spite of her *diga* marriage, she had for one reason or another not forfeited her rights of succession) pass absolutely to his father. Garvin J. and Jayawardene J. pointed out that the balance of judicial decision supported this proposition which, right or wrong, ought therefore not to be disturbed. As far as we are aware, this ruling has ever since 1932 been regarded as having settled the law.

It is true that in *Bisona v. Janga*[2] Basnayake J., sitting alone, took the view that in the circumstances referred to the father would inherit only a life-interest in his child's estate. His attention does not appear, however, to have been directed to the ruling in *Chelliah v. Kuttapitiya Tea and Rubber Co., Ltd.* (supra) ; he certainly makes no reference to it in his judgment.

[1] (*1932*) *34 N. L. R. 89.* [2] (*1948*) *41 C. L. W. 40.*

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It may well be correct to say, as Garvin J. himself seems to have thought, that the view preferred by Basnayake J. is more in keeping with the spirit of the Kandyan Law. But a single Judge is powerless to over-rule an earlier decision (not made *per incuriam*) of a Bench of two Judges of this Court. Indeed, my brother and I, sitting together, are equally powerless, and we must therefore decline the invitation to review the question as if it were *res integra*. Nor do we consider it appropriate to request my Lord the Chief Justice to revive the controversy by referring the matter at this late stage for an authoritative pronouncement by a collective Court constituted under Section 51 of the Courts Ordinance. It is not at all desirable to disturb a long-established ruling on any question affecting rights of succession. As Bertram C.J. pointed out in a similar situation, " there should be a fixed rule rather than one varied from time to time " —*Nanduwa v. Punchirala* [1]. A reversal of the earlier decisions which were pronounced in 1922 to have settled the controversy once and for all would gravely prejudice the property-rights of many persons who are not parties to the immediate litigation. In such cases, the salutary rule of *stare decisis* is specially compelling.

The learned District Judge of Kurunegala was perfectly correct in applying to the facts of this case the ruling in *Chelliah v. Kuttapitiya Tea and Rubber Co. Ltd.* (supra). I would therefore dismiss the appeal with costs.

SANSONI J.—I agree.

Appeal dismissed.

1955 *Present :* **Gratiaen J.**

ATTORNEY-GENERAL, Appellant, *and* UPLANDS BUS COMPANY, LTD., Respondent

S. C. 1,111—M. C. Nuwara Eliya, 9,859

Wages Boards Ordinance, No. 27 of 1941—Section 39 (1)— Prosecutions thereunder—Time-limit—Section 28 of amending Act No. 5 of 1953—Retrospective effect—Interpretation Ordinance, s. 6 (3).

Section 28 of the Wages Boards (Amendment) Act No. 5 of 1953, which alters the time-limit for prosecutions from one year to two years in regard to offences punishable under section 39 (1) of the Wages Boards Ordinance No. 27 of 1941, applies not only to prosecutions for offences committed after the amending Act No. 5 of 1953 passed into law, but also to prosecutions for earlier offences other than those which had already become barred by limitation under the provisions of the principal Ordinance.

[1] *(1922) 24 N. L R. 249.*

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APPEAL from a judgment of the Magistrate's Court, Nuwara Eliya.

H. A. Wijemanne, Crown Counsel, with *Cecil Jayetileke*, Crown Counsel, for the complainant appellant.

Izzadeen Mohamed, with *C. Jayasinghe*, for the accused respondent.

Cur. adv. vult.

January 21, 1955. GRATIAEN J.—

This is an appeal by the Attorney-General against an order of the learned Magistrate of N'Eliya upholding *in limine* an objection that criminal proceedings instituted against the respondent for the alleged commission of three offences punishable under Section 39 (1) of the Wages Boards Ordinance No. 27 of 1941 (hereinafter called " the principal Ordinance ") were barred by limitation.

The offences in question were allegedly committed on 10th July, 1952, but the prosecution was not initiated until 20th April, 1954. Section 54 (*b*) of the principal Ordinance, in the form in which it stood on 10th July, 1952, had prohibited the institution of proceedings for any offence under the Ordinance except within one year of the date of its commission. On 27th February 1953, however,—that is to say, before the expiry of one year from 10th July, 1952—Parliament enacted Section 28 of the Wages Boards (Amendment) Act, No. 5 of 1953, extending the period of limitation to two years. It follows that, if the amending Act applies to these proceedings, they were instituted well within the time-limit prescribed by law. If, on the other hand, the case is still governed by Section 54 (*b*) of the principal Ordinance in its original form, the respondent had ceased to be liable to prosecution before these proceedings commenced.

The learned Magistrate held that Section 28 of the amending Act was not retrospective in operation and that the prosecution of the respondent was therefore belated. The learned Magistrate appears to have had in mind the principle that subsequent legislation is presumed not to affect rights acquired under any earlier repealed law—*vide* Section 6 (3) of the Interpretation Ordinance.

I agree with learned Crown Counsel that section 6 (3) of the Interpretation Ordinance has no application to the facts of this case. The position would without doubt have been different if the period of limitation had been extended only after the expiry of one year after the date on which the respondent is alleged to have committed these offences. In that event, the language of the amending Act would not have sufficed to withdraw the immunity from prosecution which the respondent already enjoyed. But we are here concerned with an amending Act which is merely procedural in its scope and which came into operation at a time when the respondent was still liable to be prosecuted. The ruling in *R. v. Chandradharma* [1] is precisely in point. Section 28 applies not only to prosecutions for offences committed after the amending Act passed into

[1] *(1905) 2 K.B. 335.*

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law, but also to prosecutions (for earlier offences) other than those which had already become barred by limitation under the provisions of the principal Ordinance.

I allow the appeal and hold that the respondent was prematurely discharged. The record must now be returned to the lower court with a direction that the trial of the respondent should proceed *de novo* according to law.

Appeal allowed.

1954 *Present :* **De Silva J. and Fernando A.J.**

M. GITHOHAMY *et al.*, Appellants, *and* E. R. KARANAGODA *et al.* Respondents

S. C. 69 (Inty.)—D. C. Colombo, 5,889 P.

Co-owners—Amicable partition—Plan made by a co-owner—Its value as evidence of divided possession—Prescription—Ouster.

A plan made at the instance of a co-owner purporting to cause a division of the common land of which the other co-owners apparently had no notice does not form the basis of divided possession. Exclusive possession on the footing of such a plan does not terminate the co-ownership of the land, and no presumption of an ouster can be inferred from such possession.

"When a land is amicably partitioned among the co-owners it is usual to execute cross deeds among themselves or at least that all the co-owners should sign the plan of partition."

APPEAL from a judgment of the District Court, Colombo.

Sir Lalitha Rajapakse, Q.C., with *G. D. C. Weerasinghe*, for the 2nd and 3rd defendants appellants.

Ivor Misso, for the plaintiffs respondents.

N. E. Weerasooria, Q.C., with *Ivor Misso* and *S. W. Walpita*, for the 1st defendant respondent.

Cur. adv. vult.

December 21, 1954. DE SILVA J.—

This is an appeal from the judgment of the Additional District Judge, Colombo, in a partition action. The 1st plaintiff who is a minor appearing by his next-friend the 2nd plaintiff instituted this action for the partition

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of the land called lot B of Delgahawatte in extent 2 roods, 17·12 perches and depicted in plan No. 1034 marked X. The devolution of title was set out in the plaint in the following manner. By right of purchase on deed P1 of 1891 Sadiris became the owner of the subject matter of this action. He by deed P3 dated 24.8.1908 sold it to Maraya Tennekoon who by deed P4 of 1911 sold it to Podihamy and she by deed P6 of 1927 transferred the same to Sumanawathie who died leaving as her heirs her husband Richard and one child Edmund the 1st plaintiff, a minor. Richard by deed 1D4 of 1940 sold his half share to the 1st defendant. Githohamy, the 2nd defendant and her son Reginald the 3rd defendant intervened in the action and stated that the corpus sought to be partitioned was an undivided portion of a larger land in extent about 1 acre, of which they claimed undivided shares. According to them the larger land of 1 acre originally belonged to Don Lewis by right of purchase on deed 2D1 of 1886. Don Lewis was married in community of property to one Ilona Alwis who died leaving as her heirs her husband and 2 children, namely the 2nd defendant and Peiris. Thereafter Don Lewis contracted a marriage with Caralina and he died leaving as his heirs his widow Caralina and the 2 children already mentioned. Accordingly, each of the two children became entitled to 3/8 share while the widow got $\frac{1}{4}$ share. Peiris by deed 2D6 of 1910 conveyed an undivided half of half to Alwis the husband of the 2nd defendant. Thereafter Peiris died unmarried and his balance rights, that is to say, $\frac{1}{8}$ share devolved on his sister the second defendant. Alwis died leaving as his heirs his widow the 2nd defendant and 8 children the 3rd and 5th to 11th defendants. Caralina sold her rights on P1 to Sadiris whose interests have now devolved on the 1st plaintiff and the 1st defendant in equal shares. Thus according to the contesting defendants the 2nd, 3rd and 5th to 11th defendants are jointly entitled to a $\frac{3}{4}$ share of the larger land while the balance $\frac{1}{4}$ belongs to the 1st plaintiff and the 1st defendant. At the trial the plaintiff and the 1st defendant conceded that the larger land belonged to Don Lewis the father of the 2nd defendant. The plaintiff and the 1st defendant, however, contended that on P1 Caralina had conveyed a half share of the larger land and that her successors in title exclusively possessed lot B in lieu of the undivided half share conveyed on P1 and had acquired a prescriptive title to lot B. The learned District Judge accepted that position and ordered a decree for partition allotting half share each to the plaintiff and the 1st defendant. The claim of the contesting defendants was dismissed and they have now appealed from this judgment.

The plaintiffs produced plan P2 dated 13th July, 1908. The land shown in this plan is identical with the corpus sought to be partitioned. In P2 the western boundary is shown as " Lot A the other one-half portion of the same land". In regard to the plan P2 the learned District Judge commented, " The plaintiffs are relying strongly on the plan P2 of 1908, which shows that on that date when the plan was made and the partition carried out Sadiris claimed lot B depicted in that plan, and on the face of the plan it is quite clear that there was an actual partition of the land of 1 acre into 2 halves ". Sir Lalitha Rajapakse who appeared for the appellants argued that the learned District Judge had misdirected himself in holding that a partition of the land was effected on the date appearing on this plan. If I

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may say so, with respect, there is substance in Sir Lalitha's contention. It is true that evidence has been led on behalf of the plaintiff's and the 1st defendant to prove that Podihamy and her successors in title were in exclusive possession of lot B. Apart from the plan P2 there is no other evidence to show that the land in fact was partitioned on the occasion the plan P2 was prepared. The preparation of a plan for a portion is one thing while the partitioning of a land is another. If one co-owner gets a plan prepared for a portion of the land it does not mean that the land has been partitioned. There is no evidence whatsoever to show that the co-owners other than Sadiris acquiesced in the preparation of this plan nor is there any evidence that those co-owners were aware that such a plan had been prepared. The fact that Peiris in the year 1910 conveyed on 2D6 an undivided $\frac{1}{4}$ share of the larger land establishes, beyond doubt, that, at least he, did not recognize the partition which is alleged to have taken place 2 years earlier. It is conceded that Sadiris and his successors in title made plantations and built houses on lot B while they did not exercise such rights over the remaining portion of the land. There is no evidence in regard to the plantations standing on the portion to the west of lot B. According to the surveyor all the plantations on lot B are 40 years and under, in age. That is not disputed. The age of these plantations clearly shows that they were made after Caralina had executed the deed P1 of 1891. A co-owner who makes a plantation on the undivided land is entitled to take the entire produce of that plantation until the co-ownership is put an end to by a decree of the Court or mutual agreement. Similarly a co-owner who erects a building on the land held in common is entitled to possess it until the land is partitioned. Therefore even if Sadiris and his successors in title appropriated the produce of all the trees standing on lot B and possessed the buildings put up by them on it that itself is insufficient to give them a prescriptive title to lot B. Sadiris obviously entered the land as a co-owner. Therefore in the absence of other cogent evidence his possession of lot B as well as that of his successors in title must be referable to co-ownership. The possession of a co-owner would not become adverse to the rights of the other co-owners until there is an act of ouster or something equivalent to ouster. In the absence of ouster possession of one co-owner ensures to the benefit of other co-owners. It was so held by the Privy Council in *Corea v. Iseris Appuhamy*[1]. It is true that ouster can be presumed from exclusive possession in special circumstances as was decided in the case of *Tillekeratne v. Bastian*[2]. The special circumstance which was recognized in that case was the fact that the co-owner who claimed a prescriptive title was proved to have excavated valuable plumbago on the land during a lengthy period of time. Such excavation of plumbago during a protracted period would naturally diminish the value of the land. Therefore if the other co-owners did not protest when the land was being possessed in a manner hat its value would be considerably diminished, it is fair to presume an ouster, but if a co-owner only takes the natural produce of the trees for a long time no such presumption would arise. Sadiris and his successors in title have executed a large number of deeds for lot B. There is no evidence nor is there any reason to think that the other co-owners were

[1] *(1911) 15 N. L. R. 65.*

[2] *(1918) 21 N. L. R. 12.*

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aware that such documents were being executed. In *Kobbekadduwa v. Seneviratne*[1], it was held that the mere fact that a co-owner who was in occupation of the common property purported to execute deeds for a long period on the basis that he was the sole owner, did not lead to the presumption of an ouster in the absence of evidence that the other co-owners had knowledge of the transactions.

When a land is amicably partitioned among the co-owners it is usual to execute cross deeds among themselves or at least that all the co-owners should sign the plan of partition. Neither of these methods has been followed in respect of this land. Evidence was led on behalf of the plaintiffs and the 1st defendant to establish that there was a wire fence separating lot B from the remaining portion of this land. The contesting defendants denied the existence of any such fence. Admittedly, there was no such fence when the surveyor went to the land in the year 1950. According to the plaintiffs' witness Wilmot this fence was intact up to 4 years prior to his giving evidence. He gave evidence in February 1953. It was however suggested to the 2nd defendant in cross-examination that this fence was pulled down in the year 1943. It is rather strange that if the fence was pulled down that there was no complaint to the Police or the headman. The evidence of the existence of this fence appears to be very meagre. Even if such a fence did exist it is possible that it was erected either for the convenience of possession or for raising a plantation. The house No. 1 was built by the 3rd defendant. He says he built it 16 or 17 years ago, whereas the 1st defendant in his evidence stated that it was built 5 years ago. The 1st defendant gave this evidence in February 1953. But before the surveyor in October, 1950, the 1st defendant has stated that this house was built 8 years prior to that. It is clear that the 1st defendant has made an attempt to reduce the age of this house while the contesting defendants tried to make it a little older than what it actually is. That observation would apply also to house No. 6 which belongs to the 6th defendant. It would appear that both these buildings were constructed over 10 years ago, because according to the evidence of the 3rd defendant, a building permit from the District Engineer became necessary about 10 years ago to put up new buildings. The 3rd defendant says that at the time he constructed house No. 1 no such building permit was necessary. If houses 1 and 6 were built within the last 10 years the plaintiffs and the 1st defendant could have proved it by the production of certified copies of the building applications made to the District Engineers. No such documents have been produced. The Counsel for the 1st defendant asked the 3rd defendant in cross-examination whether he gave a writing in regard to the house he had put up. The 3rd defendant denied that he gave any such document. If is rather strange that the writing was not produced by the 1st defendant if in fact he obtained one from the 3rd defendant. Again, the 1st defendant claims to have paid Rs. 125 to the 6th defendant about the year 1950 as compensation for house No. 6. But the 1st defendant did not think it necessary to obtain a writing in support of this transaction although by that time the 2nd defendant and her children were challenging

[1] *(1951) 53 N. L. R. 354.*

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the claims of the 1st plaintiff and the 1st defendant. This story is difficult to believe. The 6th defendant is still in possession of house No. 6 through a lessee. The evidence of the 1st defendant that houses 1 and 6 were erected with his permission is unsupported and should not have been accepted.

Peiris by deed 2 D 6 transferred a half of half share to his brother-in-law. The learned District Judge observes that this deed suggests that regardless or ignorant of his legal right to $\frac{3}{8}$ share, Peiris looked upon himself as the owner of only $\frac{1}{4}$ share and conceded a $\frac{1}{2}$ share to his step-mother. This inference is not warranted. It does often happen that a co-owner sells a lesser share than what he is entitled to. In such event it is not necessary to state expressly in the deed that he reserves to himself his balance rights.

It is clear that the possession of lot B by Sadiris and his successors in title, even if it was exclusive, which is doubtful, was not based on an amicable partition of the land. The evidence of exclusive possession led in the case is insufficient to confer a prescriptive title to lot B on the 1st plaintiff and the 1st defendant. Therefore the larger land of 1 acre must be held to be owned in common by the heirs and successors in title of Don Lewis.

Accordingly I allow the appeal and dismiss the plaintiff's action. The 1st plaintiff and the 1st defendant will pay the costs of the 2nd and 3rd defendants of this appeal and in the Court below.

FERNANDO A.J.—I agree.

Appeal allowed.

1954 *Present* : **Gunasekara J.**

ATTORNEY GENERAL, Appellant, *and* T. H. ALWISAPPU, Respondent

S. C. 1,343—M. C. Galle, 6,135

Land Development Ordinance (Cap. 320)—Prosecution thereunder—Right of forest officer to institute it—Sections 3–6, 168 (2)—Criminal Procedure Code. 148 (1) (b).

There is nothing in the Land Development Ordinance to prevent a range forest officer from availing himself of the provision of section 148 (1) (*b*) of the Criminal Procedure Code in order to institute a prosecution for an offence punishable under that Ordinance.

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APPEAL from a judgment of the Magistrate's Court, Galle.

A. E. Keuneman, Crown Counsel, for the Attorney-General.

No appearance for the accused respondent.

Cur. adv. vult.

August 27, 1954. GUNASEKARA J.—

The Attorney-General appeals against an order made by the magistrate of Galle discharging the respondent who was charged before him with an offence punishable under section 168 (2) of the Land Development Ordinance (Cap. 320).

A written report to the effect that the respondent had committed such an offence on the 22nd May, 1952, was made to the magistrate by a range forest officer on the 29th July, 1952. It purported to be made in terms of section 148 (1) (*b*) of the Criminal Procedure Code, and the magistrate ordered the issue of a summons to the respondent. The summons was issued on the 12th August and served on the respondent, and he appeared in obedience to it on the 21st August. On that day the statement of the particulars of the offence contained in the summons was read to the respondent as the charge, and he pleaded not guilty. The trial was postponed to the 5th November. The respondent failed to appear on that day and a warrant was issued for his arrest. He surrendered to the court on the 10th December and the magistrate ordered that the case should be " called " on the 18th December.

In the meantime, on the 25th October, 1952, the range forest officer had submitted to the magistrate a second report, which too purported to be a report in terms of section 148 (1) (*b*) of the Criminal Procedure Code. He described it in a covering letter as an amended plaint. On the 18th December the respondent was again charged and he pleaded not guilty. The record of that day's proceedings reads :

" Accd : T. H. Alwisappu—pt.
Vide fresh plaint filed on 25.10.52.
Charged from Ss.
' I am not guilty '
Trial for 12.3—Cite prosecution witnesses.
Warned to appear. "

The summons from which the respondent was charged on this day could only have been the one that was issued on the 12th August, 1952, for no other summons had been issued.

When the case was taken up for trial on the 12th March, 1953, a proctor appearing for the respondent submitted that a forest officer had no

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authority "to take any proceedings under the Land Development Ordinance". The learned magistrate heard argument on the question so raised and made order discharging the respondent.

The Land Development Ordinance assigns to various officers various powers, functions and duties, but none of these relate to the institution of prosecutions. The ground on which the learned magistrate discharged the respondent is that "under sections 3–6 of the Land Development Ordinance only such officers as are contemplated therein can institute proceedings under the Land Development Ordinance", and a range forest officer is not one of them. But the institution of a prosecution is not a proceeding under this ordinance. It is a proceeding under the Criminal Procedure Code, even though the offence alleged is a contravention of a provision of the Land Development Ordinance. The Criminal Procedure Code provides that proceedings in a magistrate's court shall be instituted in one of the ways prescribed in section 148 (1) of that Code, and there is nothing in the Land Development Ordinance that qualifies this provision. The proceedings in the present case were instituted in the way prescribed by section 148 (1) (*b*) of the Code, namely by a written report being made to the magistrate by a public officer to the effect that an offence had been committed, which the magistrate's court had jurisdiction to try. In my opinion, therefore, the order of discharge was wrongly made.

This circumstance however, cannot conclude the question whether the appeal should be allowed. The charge to which the respondent pleaded and in respect of which the order was made was that on the 22nd May, 1952 he did (in the words of the summons) "break up for cultivation and encroach (*sic*) about 2½ acres and erect a building in the Crown land called the Kottawa-Kombola Reserve" and that he thereby committed an offence punishable under section 168 (2) of the Land Development Ordinance. The allegation contained in what the range forest officer described as an amended plaint was that the respondent committed an offence punishable under section 168 of the Ordinance by doing certain acts "after the mapping out survey of 1950 and thereafter", and not "on the 22nd May, 1952", as alleged in the summons, and that what he did was to "clear, break up for cultivation, cultivate, erect a building or structure, fell or otherwise destroy trees standing, otherwise encroach on" the crown land in question and that he was continuing "to do such acts". The prosecution made no application for amendment of the charge, and there was no evidence before the magistrate upon which he could base an order for amendment. But the filing of a fresh report on the 25th October, 1952 (which alleged against the respondent a wider range of activity over a longer period of time than was alleged in the charge to which he had pleaded) indicates that the prosecution themselves desired that the respondent should not be tried on that charge. In these circumstances I do not think that there is sufficient ground for setting aside the order of discharge.

The appeal is dismissed.

Appeal dismissed.

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1954 *Present :* **Sansoni J.**

B. H. WILLIAM, Appellant, *and* COMMISSIONER OF INCOME TAX, Respondent

S. C. 343 with Application 468—M. C. Colombo, 249

Income tax—Proceedings for recovery before Magistrate—Power of Magistrate to grant an adjournment—Certificate of Commissioner—Necessary particulars—Income Tax Ordinance (Cap. 188), ss. 76 (5), 80 (1) and (2).

Acting under section 80 (1) of the Income Tax Ordinance the Commissioner of Income Tax issued a certificate to a Magistrate certifying that a person had made default in payment of income tax. The total tax in default and the sums added for non-payment under section 76 (5) were mentioned as particulars at the foot of the certificate. When the assessee appeared before the Magistrate his application for an adjournment was refused on the ground that an appeal against the assessment was pending.

Held, that under section 80 (2) of the Income Tax Ordinance the power of a Magistrate to grant an adjournment was restricted and could not be exercised in a case where an appeal against the assessment had been filed.

Held further, that the particulars given in the certificate of the Commissioner were sufficient. Even if they were not sufficient, the Magistrate had jurisdiction in his discretion to order further particulars to be furnished.

APPEAL, with application in revision, from an order of the Magistrate's Court, Colombo.

H. V. Perera, Q.C., with *W. D. Gunasekera* and *W. P. N. de Silva*, for the appellant-petitioner.

Vincent Thamotheram, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 2, 1954. SANSONI J.—

The Commissioner of Income Tax issued a certificate to the Magistrate, Colombo, certifying that the present petitioner has made default in payment of Rs. 536,499·98 cts. being income tax due from him. The following particulars appear at the foot of the certificate :

	Rs.	*c.*
Total Tax in default ..	447,084	98
Sums added for non-payment under section 76 (5), Cap. 188 ..	89,415	0
	536,499	98

The petitioner was summoned to appear in Court on 10.3.54. He appeared and the Magistrate directed the case to be called on 25.3.54. having made the entry " Appeal pending ". On 25.3.54 the Magistrate

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made the order : " As respondent has appealed he is not entitled to adjournment under section 80 (2). So the respondent should pay this amount. Payment on 31.3.54. ". The petition of appeal against this order was filed on 26.3.54, but as there was no right of appeal papers were later filed to have this order revised. Two points were urged against the order : firstly, that the Magistrate was wrong in supposing that he had no discretion to adjourn the matter : secondly, that the certificate did not comply with the provisions of section 80 (1), Cap. 188, because there were no particulars of the tax in default. In regard to the first submission, the general principle is well established that an adjournment or refusal of an adjournment is a matter which prima facie is entirely within the discretion of a judge. A court has an inherent power to direct that any matter which comes before it should stand over for a period if the Court thinks that that is the proper way to deal with the matter. Romer, L.J., referred to this principle in the case of *In re Yates Settlement Trust* [1]. But having regard to the terms of section 80 (2) of the Income Tax Ordinance which in terms deals with the question of adjourning a matter such as this, I am doubtful whether the discretion to adjourn, which is ordinarily vested in a Magistrate, is not limited in such a case. Section 80 (2) empowers the Magistrate to adjourn such a matter " for not more than thirty days to enable such person to submit to the Commissioner his objection to the tax ", but this is a power conferred only in a case where no appeal against the assessment has been filed. This provision seems to me by implication to divest the Magistrate of a discretion to adjourn the matter in other cases or for any longer period. The matter is of secondary importance in the present proceedings because the petitioner has, by filing an appeal, obtained very much more time than any judge would have granted him even if he had a discretion in the matter.

In regard to the second submission, the relevant portion of section 80 (1) reads :—

> " Where the Commissioner is of opinion in any case that recovery of tax in default by seizure and sale is impracticable or inexpedient, or where the full amount of the tax has not been recovered by seizure and sale, he may issue a certificate containing particulars of such tax and the name and last known place of business or residence of the defaulter to a Magistrate having jurisdiction in the division in which such place is situate."

The provisions of section 76 (5) are also relevant. They read :—

> " Where any tax is in default, the Commissioner may in his discretion order that a sum or sums not exceeding twenty per centum in all of the amount in default shall be added to the tax and recovered therewith."

It was submitted that the particulars required to be specified in the certificate were not merely particulars of the actual tax and the penalty separately, but particulars about the actual tax itself, such as, the year for which it was due, and where it was due in respect of more than one

[1] *(1954) 1 W. L. R. 564.*

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year, then the particular amount due for each year. Now it seems to me that when the Commissioner acting under section 76 (5) adds a sum or sums, the entire amount may be recovered in one proceeding under section 80 (1), and the amount to be so recovered is the " tax in default ". The sum so added is thus also recoverable as " tax in default ", the actual tax apart from this penalty not forming the only permissible subject of the certificate. It follows then that " particulars of such tax " could be particulars specifying separately the actual tax and the penalty. In this view of the matter it could be said that the certificate under consideration does contain particulars.

But I also take the view that the question of the sufficiency or otherwise of the particulars contained in a certificate is not a fundamental matter affecting the jurisdiction of the Magistrate. I regard it rather as a matter which the defaulter should raise when he is summoned and asked to show cause. If he is taken by surprise through want of sufficient particulars, he should say so at that stage, and I have no doubt that in such a case the Magistrate has jurisdiction in his discretion to order further particulars to be furnished. Such cases will probably be rare, for there would have been earlier proceedings, to which the defaulter would have been a party, and it is only at the final stage that a certificate under section 80 (1) is issued. Since the petitioner made no complaint regarding the adequacy of the particulars in the certificate under consideration he must be taken to have been well satisfied with them.

I see no reason to interfere with the order of the Magistrate. The petitioner has already obtained far too much time and the Magistrate will take the necessary action to recover the amount in default.

Appeal and Application dismissed.

1954 *Present :* **Sansoni J.**

C. S. ARUMUGAM, Appellant, *and* A. VIJAYARATNAM (Inspector of Police) *et al.*, Respondents

S. C. 701—M. C. Jaffna, No. 2 (Extradition)

Extradition—Foreign warrant—Form of endorsement—Same warrant cannot be executed twice—Fugitive Offenders Act, 1881, ss. 3, 13, 14, 26.

A warrant is sufficiently endorsed for the purpose of compliance with sections 13 and 26 of the Fugitive Offenders Act if it bears the mere signature of the authority endorsing ; the endorsement need not be specifically directed to the police officers or other officials entitled to execute the warrant.

Once a warrant has been executed, no further action can be taken on it. If, therefore, an offender arrested under it is discharged on the ground that there is not enough proof that it was issued by a person having lawful authority to issue it, he cannot be arrested again on the same warrant even if the officer executing it establishes that it was issued by lawful authority.

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APPEAL from an order of the Magistrate's Court, Jaffna.

E. R. S. R. Coomaraswamy, with *E. B. Vannithamby* and *Daya Perera*, for the appellant.

Douglas Jansze, Acting Solicitor-General, with *Sam. Wijesinha*, Crown Counsel, for the respondents.

Cur. adv. vult.

August 6, 1954. SANSONI J.—

The appellant, who has also filed an application for revision, is dissatisfied with an order of the Magistrate of Jaffna directing that he be handed over to an Inspector of Police of the Federation of Malaya for removal to Malaya. This officer first gave evidence before the Magistrate on 23rd April, 1954, after the appellant had been arrested. That arrest was upon a warrant issued by the Magistrate of Penang, sitting at George Town, and endorsed on 22nd April, 1954, by the Magistrate of Jaffna. The offence alleged to have been committed by the appellant is criminal breach of trust of 12,000 dollars while acting as an agent. After inquiry the Magistrate of Jaffna on 9th May, 1954, discharged the appellant as he was not satisfied that the warrant had been issued by a person having lawful authority to issue it. If the Magistrate had paid heed to section 14 of the Fugitive Offenders Act, 1881, he would have required proof of this important element before he endorsed the warrant—see *Kandasamy v. Bandaranayake* [1]. The far-reaching consequences of his failure to do so will presently appear.

Subsequently a copy of the warrant, which had also been signed by the Magistrate of Penang and which the Inspector of Police had brought with him, was placed before the Magistrate of Jaffna who endorsed that copy on 24th May, 1954. The appellant was arrested again and produced before the Magistrate. After inquiry the order now appealed from was made as the Inspector was then in a position to establish that the Magistrate of Penang had lawful authority to issue the warrant.

The appellant's counsel raised several grounds of objection to the order but I intend to deal with only the two most substantial objections raised:—

(1) That the warrant had been executed once, after the first endorsement, and no further action could be taken on it.

(2) That the warrant was not properly endorsed.

As regards the second objection, it was submitted that merely signing on the back of the warrant under the words "warrant endorsed for execution within the jurisdiction of this Court", was not a sufficient compliance with sections 13 and 26 of the Act which deal with the backing of warrants.

[1] (*1947*) *48 N. L. R. 449.*

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It will be noted that section 3, like section 13, stipulates that a warrant should be endorsed " in manner provided by this Act ", and section 26 particularises how a warrant should be endorsed. It was held by de Villiers, J.P., and Bristowe, J., in *R. v. Robertson* [1] that a warrant is sufficiently endorsed by the mere signature of the authority endorsing, and that the endorsement need not be specifically directed to the police officers or other officials entitled to execute the warrant. I therefor hold that the objection to the form of endorsement must fail.

But the first objection seems to me to be fatal to the validity of the arrest, and it is directly supported by authority. I refer to the case of *Jackson v. Attorney-General* [2]. In that case a warrant was issued by the Magistrate in the Cape Colony for the arrest of an accused who was in the Transvaal. The warrant was endorsed by the Magistrate in the Transvaal, before whom the accused was later arrested and produced. He was discharged for want of sufficient proof of identity but was again arrested on the same warrant. By that time the officer who arrested the accused led evidence to prove the accused's identity and the Magistrate ordered the accused's removal to the Cape Colony. The accused thereupon appealed. On appeal it was argued that once the appellant had been discharged from arrest under the warrant in question he could not be re-arrested under the same warrant. It was held by a Bench of three Judges consisting of Innes, C.J., Solomon, J., and Bristowe, J., that once the order of discharge had been made the warrant ceased to be of force in the Transvaal. Innes, C.J., in considering the effect of the first order of discharge, said : " When that had been done it seems to me the warrant ceased to be of any force in the Transvaal, whatever virtue, if any, it still retained in the Cape Colony. It had been fully used here ; it had served its purpose. The man had been brought up and discharged ; and for any purpose within the Transvaal the warrant in my opinion was dead ". Bristowe, J., who put the matter a little differently, said :—" Here the original warrant was issued by the Resident Magistrate of Aberdeen, Cape Colony. But a warrant issued in Cape Colony does not run in the Transvaal. In order that it may do so it requires to be indorsed, under sec. 13, by a Transvaal magistrate. That indorsement is an authority to apprehend the person charged within the jurisdiction of the indorsing magistrate, and to bring him before a magistrate in the Transvaal. And the function of the magistrate before whom the person is then brought is to decide whether or not he should be surrendered to the Cape Colony authorities. The authority by which such surrender ultimately takes place is not the warrant issued in Cape Colony, nor is it the indorsement of the magistrate here ; but it is the order made by the magistrate before whom the person charged is brought. In this case the accused was brought before the magistrate, who considered the case, and decided that he was not the person referred to in the Cape Colony warrant. Instead of remanding the case (as he might have done, but apparently was not asked to do) he discharged the prisoner. The case therefore seems to me to stand on exactly the same footing as if the applicant had been arrested on a charge of having committed an offence in this country, tried by the Court, and discharged. That being so, it seems to me that the warrant is at an end, and there can be no rearrest upon it. "

[1] (*1912*) *T. P. D. 10.* [2] (*1910*) *Transvaal Law Reports.*

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I have cited these passages from the judgments in that case because they seem to me to meet a submission of the learned Acting Solicitor-General who supported the order appealed against. One argument he raised was that as the warrant in the present case had not been fully executed it could not be said to be dead. But this was one of the grounds urged in support of the Extradition Order in the case cited, and it was rejected for reasons with which I am in respectful agreement.

Another submission was that there were actually two warrants issued in this case, each separate document being a separate warrant. It was sought to distinguish the South African case on this ground. I cannot agree with this submission. It appears from the proceedings that the Magistrate of Penang signed three separate writings, all of them bearing the same date and worded in exactly the same terms. All three, in my opinion, constituted one and only one warrant. It may well be that if one copy was lost or mislaid another copy could have been acted upon. But I reject the submission that where an arrest which has been effected upon one copy is held to be invalid the accused will be liable to rearrest upon another copy. The Act itself contemplates the issue and endorsement of only *one* warrant for the apprehension of a person accused of an offence, and nowhere in the Act is it even suggested that several warrants can be issued or indorsed for the arrest of a single accused. Moreover, it seems contrary to principle that an accused who has been arrested on a warrant and discharged by order of a Magistrate should, without fresh proceedings being taken for the issue of a second warrant, be liable to rearrest upon what is in reality the same warrant.

I would therefore allow this appeal and order that the appellant be discharged from these proceedings.

Appeal allowed.

1954 *Present :* **Fernando A.J.**

W. L. A. DEP *et al.*, Petitioners, *and* P. NAGARATNAM, Respondent

S. C. 249—Application in Revision in C. R. Colombo, 32,445

Jurisdiction—Court acting beyond its powers—Consent of parties—Validity of compromise—Rent Restriction Act, No. 29 of 1948, s. 13.

Although parties cannot by agreement give the Courts jurisdiction which the Legislature has enacted that they are not to have, nevertheless a compromise after action which is advantageous to a party and secured to him by a decree subsequently entered of consent is not void as offending the prohibition against waiver. A sub-tenant, therefore, who, after a decree has been entered against the tenant, consents to be bound by it upon conditions advantageous to himself and embodied in the decree by adjustment, cannot subsequently resist enforcement of the decree on the ground that it is invalid for lack of jurisdiction. The sub-tenant, in such a case, forfeits by waiver the protection of section 13 of the Rent Restriction Act.

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APPLICATION to revise an order of the Court of Requests, Colombo.

L. G. Weeramantry, for the 2nd, 3rd and 4th defendants petitioners.

P. Somatilakam, for the plaintiff respondent.

Cur. adv. vult.

July 27, 1954. FERNANDO A.J.—

This is an application in revision in respect of an order of the learned Commissioner of Requests directing the issue of writ for the ejectment of the petitioners from certain residential premises in the city of Colombo. The plaintiff respondent had in 1951 instituted an action for the ejectment of his tenant one B. W. Nicholas on the ground that the latter had sub-let the premises (without plaintiff's consent) in contravention of s. 9 of the Rent Restriction Act to the present petitioners who however were not made parties to the action. The learned Commissioner dismissed that action on the ground that the sub-letting was not proved, but on appeal against his order a decree was entered *by this Court* for the ejectment of Nicholas. When the plaintiff sought to enforce that decree he was resisted by the present petitioners, and after some inquiry into their objections, a settlement was arrived at in June 1952 by which the petitioners agreed to be bound by the decree and were permitted to remain in occupation *paying damages* for each month, and by which writ of ejectment was not to issue until 31st December 1953. The decree was adjusted in terms of the settlement, which was honoured by the plaintiff during its period of operation. On 31st December 1953 (when the sands had all but run out), the petitioners moved for a stay of execution of the decree. The learned Commissioner on 9th April 1954, made order refusing the stay of execution and allowing the issue of writ, and the present application is for the revision of that order.

Counsel for the petitioners makes the following submissions in support of his application :—

1. The decree entered *by this Court* was a nullity for the reason that s. 13 of the Rent Restriction Act had the effect, on the facts of the case, of depriving this Court of jurisdiction to enter decree for the ejectment of Nicholas, and the Commissioner should not therefore have issued writ in execution of that decree. (It is unnecessary to set out the facts on which this contention is based.)

2. The decree being a nullity, the subsequent adjustment in terms of the settlement of June 1952 was itself a nullity and not binding on the petitioners.

3. In consenting that writ may be issued after December 1953, the petitioners had waived the protection of s. 13 of the Rent Restriction Act, but that protection could not have been effectively waived, even by consent.

In view of the opinion I have formed upon the last of these submissions, it is unnecessary to decide the interesting and perhaps difficult questions which arise upon Counsel's other propositions, even if there be substance in them.

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Counsel relied in the main on the following observations in the judgment of a bench of five Judges in the case of *Ibrahim Saibo v. Mansoor* [1]: —" S. 13 says ' no action or proceedings for ejectment of the tenant of any premises to which this Act applies shall be instituted in or entertained by any Court unless the Board, on the application of the landlord, has in writing authorised the institution of such action or proceedings' except in certain specified cases. Any decree entered in an action in which such authority, being necessary, has not been obtained would be a nullity because a Court acting without such authority would be acting without jurisdiction. It has to be noted that it is not competent for a defendant to contract out of such a requirement or by waiver tacit or express to obviate the necessity for compliance with it. There may be other cases where there is a failure of jurisdiction. Such pleas would be open to a sub-tenant in an inquiry under s. 327 or in a separate action brought against him.

Something more has to be said about the statutory protection given by the Act to a tenant and of which a sub-tenant may avail himself. A tenant can never contract out of the protection afforded. It follows from this that he can at any moment recall a promise to surrender possession ".

I am, with much respect, in entire agreement with those observations concerning the nature and scope of the protection afforded to tenants and sub-tenants by the Rent Restriction Act, but I find nothing in them which casts any doubt upon the correctness of the decision in the earlier case of *Nugera v. Richardson* [2]. There, after the plaint was filed, the defendant (whether in waiver or ignorance of his right to protection) agreed to a compromise by which he was enabled to continue in possession for a considerable period ; and Gratiaen J. forcefully resisted his attempt on the approach of " D-Day " to have the agreed decree set aside on the ground of lack of jurisdiction. The principle to be derived from these judgments (read together) is that " while parties cannot by agreement give the Courts jurisdiction which the Legislature has enacted that they are not to have ", nevertheless a compromise after action which is advantageous to a party and secured to him by a decree subsequently entered of consent is not void as offending the prohibition against waiver. *A fortiori*, a person who, *after a decree has been entered*, consents to be bound by it upon conditions advantageous to himself and embodied in the decree by adjustment, cannot subsequently resist enforcement of the decree on the score that it is invalid. The petitioners in this case had ample opportunity in June 1952 to dispute the validity of the decree entered by this Court, if indeed it could have been successfully challenged as a nullity. They chose instead to have a favourable arrangement embodied in the decree and have enjoyed the fruits of that arrangement for longer than the stipulated period, and they have thereby forfeited the protection of the statute. Moreover, their agreement in the settlement to pay *damages* during the period of permitted occupation was an admission of the fact that they were trespassers, an admission which now estops them from claiming the protection which the statute affords to those in lawful occupation.

The application is refused with costs.

Application refused.

[1] *(1953) 54 N. L. R. 217 at p. 224.*

[2] *(1949) 51 N. L. R. 116.*

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1954 *Present :* **Gratiaen J. and Fernando A.J.**

W. D. BAIYA, Appellant, *and* K. D. A. KARUNASEKERA, Respondent

S. C. 92—D. C. Kurunegala, 5,662 L

Vendor and purchaser—Sale of immovable property—Tender of price by purchaser—Sufficiency of guarantee that is reasonably adequate—"Escrow"—Proviso (3) to s. 92 of Evidence Ordinance.

In the absence of an agreement on the point, a purchaser of immovable property would make a sufficient tender of the purchase price if he offers security which effectively guarantees payment of the price immediately upon the vendor's complete fulfilment of his reciprocal obligations.

Held further, that a deed may be delivered on a condition that it is not to be operative until some event happens or some condition is performed. In such a case it is until then an escrow only.

APPEAL from a judgment of the District Court, Kurunegala.

Certain immovable property had been sold to the defendant subject to an express agreement that the defendant should in turn sell it to the plaintiff for Rs. 4,200 within a stated period. As plaintiff did not possess the money to buy the property he successfully negotiated with the Agricultural and Industrial Credit Corporation to raise a loan on the property for Rs. 5,000 by mortgaging it to the Corporation immediately on the defendant signing a conveyance of the property in his favour. The intention was that Rs. 4,200 out of the loan should be applied towards the consideration for the sale. Defendant, however, refused to affix his signature to the transfer of the property unless he received the purchase price at or before the time of the signature. The plaintiff thereupon instituted the present action asking for a decree ordering the defendant to convey the property to him.

H. V. Perera, Q.C., with *N. C. J. Rustomjee*, for the plaintiff appellant.

N. K. Choksy, Q.C., with *C. E. S. Perera, Q.C.*, and *T. B. Dissanayake*, for the defendant respondent.

Cur. adv. vult.

July 20, 1954. GRATIAEN J.—

The plaintiff had sold three allotments of land to two persons named Don Dharmadasa Gunasekera and Don Lewis Perera in 1945. He was anxious to re-acquire the properties, but did not possess the means to do so. He succeeded, however, in persuading the defendant to purchase them for the time being from Perera and Gunasekera (by P1 dated 4th November, 1946), subject to an express condition that the defendant should in turn sell them to the plaintiff for Rs. 4,200 at any time before 4th November, 1949.

J. N. B 43185 – 1592 (3/55)

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The plaintiff was very energetic in his endeavours to place himself in a position to exercise this option in his favour. Certain proceedings between the parties were initiated before the Debt Conciliation Board, but I agree with Mr. Choksy that a settlement arrived at in January, 1948, before that tribunal has not materially altered the legal rights or obligations of the parties under P1. What is important, however, is that shortly afterwards, in pursuance of that settlement, the plaintiff successfully negotiated with the Agricultural and Industrial Credit Corporation to raise a loan on the properties for Rs. 5,000 by mortgaging them to the Corporation immediately on the defendant signing a conveyance in his favour in terms of P1. The intention was that Rs. 4,200 out of the loan should be applied towards the consideration required to settle the defendant's claim. The defendant agreed to co-operate in implementing this arrangement which provided a practicable solution to the plaintiff's problem without derogating from the defendant's contractual rights.

The Corporation was precluded by statute from handing over the amount of the promised loan until the defendant's deed of transfer in favour of the plaintiff, and the plaintiff's primary mortgage in favour of the Corporation, had both been duly registered. It was therefore arranged that these two instruments should be signed, notarially attested, and forwarded for registration at the same time ; this arrangement, if implemented, would make it possible for the Corporation to pay a sum of Rs. 4,200 on the plaintiff's behalf to the defendant as soon as the registration of the transfer and the mortgage had been contemporaneously effected. Accordingly, the documents were prepared for signature and both parties were invited to attend a notary's office together on 25th January, 1949, in order to complete the transaction. Eventually, a deadlock arose because, although the defendant was still willing to implement the plan, he maintained that he was legally entitled to receive the purchase price at or before the time when he actually signed the transfer. The plaintiff denied that this was a correct interpretation of the defendant's rights under P1.

There were still several months to run before the expiry of the time-limit within which the plaintiff could exercise his option. Throughout this period the Corporation kept open its offer, in terms of the agreed plan, to hold a sum of Rs. 4,200 (out of the promised loan of Rs. 5,000) at the defendant's disposal pending contemporaneous execution and registration of the necessary instruments. The defendant, however, was adamant in his refusal to execute the transfer unless the consideration was paid to him "against signature". Alternative offers to deposit the money (pending registration) in Court or even with the defendant's own lawyer (who, it was suggested, should himself be responsible for attesting and attending to the registration of the documents) were also rejected.

The plaintiff thereupon instituted the present action in October, 1949, and asked for a decree ordering the defendant to convey the properties to the plaintiff in fulfilment of his obligation under P1. The foundation of his claim was that he had made a good and sufficient tender of the consideration within the stipulated time-limit.

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Upon the facts which I have set out, the question for our adjudication resolves itself into a question of law. The learned judge decided the issue in favour of the defendant and dismissed the plaintiff's action. He held that, upon a proper construction of the agreement of sale, the defendant was entitled to insist on payment of the consideration contemporaneously with the signing of the conveyance demanded by the plaintiff.

It is, of course, a sound proposition of law that a tender of payment is bad " if it is subject to conditions to which the (creditor) would have a right to object "—*Odendhal v. de Plessis* [1]. As to *the form of the tender*, the defendant was not averse to accepting in lieu of cash a cheque drawn in his favour by the Corporation. *His sole objection to the tender related to the point of time when the cheque was to be made available to him.*

A slight complication has no doubt arisen in the present case because, in order to obtain the funds to pay the purchase price, the plaintiff was under a necessity to mortgage the properties to the corporation. I shall consider at a later stage whether this complication had the effect of vitiating the tender. At the outset, however, I shall discuss the question *whether the defendant was justified in demanding payment of the consideration as soon as he had signed the transfer, and in refusing otherwise to proceed further with the implementation of the agreed plan.*

Fulfilment of the covenant to sell the properties on payment of Rs. 4,200 involved obligations on both sides. In the absence of an agreement fixing some other limit of time for payment of the consideration, the common rule law is that the payment of the purchase price and the effective passing of title from the vendor to the purchaser should take place *pari passu—Trichardt v. Muller* [2]. Where the parties to the contract are willing to co-operate with one another, the practical difficulty of synchronising the performance of reciprocal obligations presents no serious obstacles. *Voet 19.1.23.* discusses the situation which arises when, owing to mutual distrust or business caution, one party refuses to perform his obligations until the other's obligations have first been fulfilled. " Nothing else remains ", says the jurist, " but for both the thing sold (*if it be a movable*) and the promised price to be sequestered, and for the depositary to deliver the price to the vendor and the thing to the purchaser; *or that both parties give adequate security for fulfilment of the contract.* "

This principle of the Roman-Dutch law has also been applied by the South African Courts *where immovable property is the subject of a sale.* " The expedient which is resorted to in practice is quite reasonable; transfer is seldom or never passed into the name of the purchaser until some kind of guarantee is given, usually a bank guarantee, that the money will be paid "—*Trichardt's case* (*supra*) at p. 178. " When the rule (for simultaneous payment and delivery) cannot be strictly carried out, Voet says that some reasonable compromise may be adopted " —*ibid.* at p. 180.

This eminently sensible solution was approved by a very distinguished bench of judges in *Breytenbach v. Van Wijk* [3]. Wessels J., delivering the principal judgment, explained that the vendor was obliged to transfer

[1] (*1918*) *S. A. A. D. 475.* [2] (*1915*) *T. P. D. 175.*
[3] (*1923*) *S. A. A. D. 541.*

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his title if he was offered adequate security for the due fulfilment of the purchaser's part of the contract. "*Any guarantee that is reasonably sufficient*", he said, "*will meet the case*". The security or guarantee offered must of course be adequate; in addition, its availability for immediate realisation must not be delayed beyond the point of time when the vendor's contractual obligations have been completely discharged. In the present case, the adequacy of the security or guarantee offered (i.e., payment by the Corporation's cheque) is not disputed; the only question is whether the refusal to hand over the cheque *as soon as the transfer was signed and before it was even delivered*, constituted, in the circumstances of this case, a bad tender.

In this country the bare execution of a notarially attested conveyance of land represents only a partial fulfilment of the vendor's obligations under a binding agreement to sell immovable property. He must implement the agreement not only by executing an appropriate instrument in proper form, but also by taking certain other steps *effectively to transfer his title to the purchaser*. Under our law, the affixing of the vendor's signature to the conveyance does not automatically operate to pass title. *Delivery of the deed* is the minimum pre-requisite (as constituting constructive delivery of the land itself) to the creation of a title which is sufficient even to enable the purchaser to maintain an action to recover the property from "*a third party* in possession without, or under a weaker, title"—*Appuhamy v. Appuhamy* [1]. Berwick J. explained at p. 67 that in Ceylon "the notarial execution and the registration of the deed—formerly in Court and now with the Registrar of Lands—with delivery of the deed takes the place of the old Dutch symbolical delivery before the judge and registration of the proceedings among the acts of court; with the same result as in Holland, the principles being the same—viz., contract of sale *plus* symbolic delivery, equal to *dominium*, with the consequent right to sue in ejectment". *As against the vendor*, however, "the purchaser is not bound to accept the conveyance only; he is entitled to ask to be put in vacant possession"—*Ratwatte v. Dullewe* [2].

It is always a wise precaution to insert an express term in the agreement of sale unambiguously fixing the time for payment of the consideration. In that event, the agreement would precisely regulate the rights and obligations of the parties in this respect. If the contract is, however, silent on the point, a purchaser would make a sufficient tender of the consideration if he offers security which effectively guarantees payment of the consideration immediately upon the vendor's complete fulfilment of his reciprocal obligations. Provided, therefore, that the security offered is perfectly adequate to ensure the vendor's protection, he cannot justifiably refuse to fulfil his part of the contract unless he is assured of payment of the consideration before title has passed to the purchaser. In South Africa, apparently, the registration of the deed is a pre-requisite to the transfer of *dominium*. I do not say that this is also the law of Ceylon, but a binding agreement to "convey" immovable property is not fulfilled in this country by the mere affixing of a signature to a notarial conveyance. In the present case, the defendant had been invited, and

[1] (*1880*) *6 S. C. C. 61 F. B.* [2] (*1907*) *10 N. L. R. 304 F. B.*

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he had agreed, to pass *dominium* by delivery of a deed of transfer only after it had been duly attested and registered. In view of this agreement, the time fixed for delivery of the deed was also the proper time for the receipt of the purchase price.

For these reasons, the plaintiff's action would certainly have been maintainable if the Corporation had, on the plaintiff's behalf, guaranteed payment of the purchase price *as soon as the defendant's conveyance, duly registered, was actually delivered to the plaintiff.* Indeed, the plaintiff might well have demanded vacant possession as well before the money was released.

The only outstanding question is whether the additional condition imposed by the Corporation vitiated the tender—namely, that the plaintiff's contemporaneous mortgage in favour of the Corporation must also be registered before the money was finally released to the defendant.

The defendant would certainly have been justified in rejecting this condition if it was calculated to prejudice the defendant's rights or, alternatively, if its implementation would have resulted in the slightest postponement of the appropriate point of time for the receipt of the consideration (for instance, if the execution and due registration of both instruments could not have been virtually synchronised). But in truth there was no such risk. Both instruments had been prepared for signature in due form, and the arrangement agreed to by the defendant was that both parties should attend the notary's office at the same time ; that the signature to the mortgage should be taken immediately after the transfer was signed, and that both instruments should comtemporaneously be tendered for registration by the same attesting notary. In the result, the implementation of the agreed plan would have ensured that the defendant would receive the Corporation's cheque exactly as if the transaction had not been complicated by this special feature.

Mr. Choksy raised a pertinent question which I must not overlook. What, he asked, would be the position if the plaintiff refused to sign the mortgage after the transfer had been signed ? In that event (it was asked) would not the defendant have parted with his title to the land and also been deprived of his consideration ? The answer is that there was no legal or practical foundation for the entertainment of such fears. I have already explained that *the title could not have passed without delivery of the deed*, and it was implicit in the procedure agreed to that the deed should not be delivered to the plaintiff by the notary until after the contemporaneous registration of both instruments. In other words, the notary (selected by the defendant himself) was required in this particular case to perform the functions of the " depositary " recommended by Voet (*supra*). " A deed may be delivered on a condition that it is not to be operative until some event happens or some condition is performed. In such a case it is until then an escrow only "—*Macedo v. Strand* [1]. If, therefore, the plaintiff dishonestly backed out of the arrangement by refusing to sign the mortgage after the transfer had been signed, the entire transaction would have fallen through and the title would have continued to vest in the defendant. *Vide* also Proviso (3) to section 92 of the Evidence Ordinance and *Punchi Nilame v. Dingiri Etana* [2].

[1] *(1922) A.C. 330 at 337.* [2] *(1909) 1 Curr. L. R. 239.*

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In the particular circumstances of this case, the defendant wrongfully rejected in anticipation any form of tender or guarantee except payment before the title had effectively passed to the plaintiff in terms of the agreed plan. The plaintiff has therefore established his cause of action to claim a transfer of the properties in terms of the covenant contained in P 1.

Mr. H. V. Perera informed us at the conclusion of his argument that the plaintiff is now willing and able to deposit Rs. 4,200 unconditionally in Court, to be paid to the defendant upon the execution, attestation and delivery of the deed of transfer. I would therefore set aside the judgment under appeal in so far as it dismisses the plaintiff's action, and enter a decree in the following terms :—

(*a*) that the plaintiff be ordered to deposit a sum of Rs. 4,200 to the credit of this action within 14 days from the date on which this record is received in the lower Court, and that an order for payment be issued in favour of the defendant upon the execution and attestation of the deed of transfer hereinafter mentioned ;

(*b*) that, within 14 days from the date of such deposit, the defendant must execute a conveyance at the plaintiff's expense in favour of the plaintiff (in a form agreed upon or, in the absence of such agreement, in a form approved by the Court) of the properties described in the schedule to the deed P1 ;

(*c*) that if the defendant fails to comply with (*b*) above, the learned District Judge should take steps to have the approved conveyance signed by an officer of the Court in terms of the Civil Procedure Code.

There remains for consideration the defendant's claim in reconvention. It has been established that on 3rd March, 1950, i.e., *some months after the institution of this action*, the plaintiff, without due process of law, took forcible possession of two of the properties specified in the schedule to P1, and also refused to hand over a third property which he had previously occupied with the leave and licence of the defendant. This conduct was wholly unjustified, and the decree ordering him to pay damages to the defendant at the rate of Rs. 350 *per annum* must therefore be affirmed. The damages will be payable with effect from 3rd March, 1950, until the date of the conveyance ordered to be executed in terms of my judgment.

Should the plaintiff fail to deposit the consideration within the time stipulated in this decree the plaintiff's action will stand dismissed with costs in both courts, and the decree for ejectment in favour of the defendant will also be restored. In that event, the damages will be payable until the date on which the defendant is restored to possession of the properties. Subject to compliance with paragraph (*a*) of this decree, the defendant must pay to the plaintiff the costs of this appeal together with half the costs of the proceedings in the Court below.

FERNANDO A.J.—I agree.

Judgment set aside.

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1954 *Present :* **de Silva J.**

S. J. V. CHELVANAYAKAM, Petitioner, *and* S. NATESAN, Respondent

Election Petition No. 17 of 1952, Kankesanturai

Parliamentary election—Agency—Principles applicable—Proof of agency—Election offences—Degree of proof required.

In Parliamentary elections the relationship between a candidate and his agent is similar to that between master and servant. A candidate is liable for the corrupt acts of his agent, provided they were done within the scope of his authority, even though the candidate may have taken the precaution of warning the agent against such acts.

Agency may arise not only by express appointment but also may be implied from circumstances. But before the Court can infer agency from surrounding circumstances it must be satisfied that that is the only inference which can be drawn from the facts proved. The mere non-interference by a candidate with persons who on their own work for him is not sufficient to saddle him with the consequences of the corrupt acts of which he was ignorant.

Election offences must be strictly proved. The degree of proof required is the same as in a criminal charge.

ELECTION petition, Kankesanturai.

D. S. Jayawickreme, with *T. K. Curtis, G. T. Samarawickreme, Neville Samarakoon, K. Rajaratnam, G. Barr-Kumarakulasingham* and *G. Candappa*, for the petitioner.

E. G. Wikramanayake, Q.C., with *N. Nadarasa, T. W. Rajaratnam* and *S. Pasupathy*, for the respondent.

Cur. adv. vult.

July 3, 1954. DE SILVA J.—

In these proceedings Mr. Chelvanayakam, the Petitioner, seeks to have the election of Mr. Natesan, the Respondent, as Member of Parliament for the Kankesanturai constituency at the general election held in May, 1952, declared void. The nomination of candidates was on April 28, 1952, and the election was held on May 30, 1952. The counting of votes and the declaration of the results took place on the following day. It was found that the Respondent had secured 15,337 votes as against 11,571 votes obtained by the Petitioner. The Respondent was, therefore, declared elected by a majority of 3,666 votes. The total number of voters in the electorate was 38,434. The result of the election was published in the *Government Gazette* No. 10,405 dated 2nd June, 1952. The grounds on which the election is sought to be declared void are set out in paragraphs 3, 4, 5, 6 and 7 of the amended petition dated October 24, 1952, filed by the Petitioner. These paragraphs read as follows :

"3. Your Petitioner states that before and during the said election the said Respondent his agents and/or other persons with his knowledge and/or consent did make and publish false statements of fact

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in relation to the personal character and conduct of the Petitioner for the purpose of affecting the return of the Petitioner and that thereby a corrupt practice has been committed within the meaning of Section 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order in Council 1946.

4. Your Petitioner further states that the Respondent himself his agents and/or other persons with his knowledge and/or consent did print publish distribute and/or post up or cause to be printed published distributed and/or posted up advertisements hand-bills placards and posters which referred to the said election and which did not bear upon their face the names and addresses of their printers and/or publishers and thereby committed a corrupt practice within the meaning of Section 58 (1) (*c*) of the Ceylon (Parliamentary Elections) Order in Council 1946.

5. Your Petitioner further states that the corrupt practice of "undue influence" as defined by Section 56 of the Ceylon (Parliamentary Elections) Order in Council 1946 was committed in connection with the said election by the Respondent, his agents and/or by other persons with his knowledge and/or consent.

6. Your Petitioner further states that the Respondent himself his agents and other persons with his knowledge and/or consent did hire and/or borrow and/or use for the purpose of conveyance of electors to and from the poll vehicles which they knew that the owners thereof were prohibited by Sub-Section 3 of Section 67 of the Ceylon (Parliamentary Elections) Order in Council 1946 from letting lending or employing for the said purpose and thereby committed an illegal practice in connection with the said election.

7. The Petitioner further states that the Respondent abovenamed was guilty of a corrupt practice under Article 58 (1) (*f*) of the Ceylon (Parliamentary Elections) Order in council in that being a candidate and his own election agent he knowingly made declaration as to the election expenses required by Section 70 falsely."

Out of the 5 charges set out in the amended petition, some of the particulars of the charge set out in paragraph 6 relating to the use of prohibited vehicles were struck out, of mutual consent of parties, during the course of the trial, while the remainder were struck out by order of Court as there was not sufficient evidence in support of them. The trial, therefore, related to the remaining 4 charges.

A brief survey of the political history of the Kankesanturai constituency during a period of about 16 years immediately preceding this election and the part played by the Petitioner and the Respondent in the political and the social life of the country, with particular reference to the Jaffna Peninsula, is helpful in understanding some issues of fact which arise in this case. [His Lordship then made the proposed survey, and continued :—]

As the question of agency looms large in this case, it is necessary to consider the principles which govern the law of agency in Parliamentary

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elections. According to the ordinary law of agency, a person is not liable for the actions of a person whom he has not authorized, or even for the acts done outside the scope of the agent's authority. The election judges in England considered long ago that the ordinary law of agency was quite inadequate for the preservation of the purity and the freedom of elections. As democratic form of government is based on the authority of Parliament, it is obvious how necessary it is that the election of members of that body should be free from fraud and corruption. In order to achieve this object, it became necessary to give an extended meaning to the ordinary law of agency in the matter of elections, and the English election tribunals unhesitatingly did so. According to this extended meaning, a candidate " is responsible for the act of that agent in committing corruption, though he himself not only did not intend it or authorise it but even *bona fide* did his best to hinder it"—*Taunton Case*[1]. In elections the relationship between a candidate and his agent has been likened to that existing between the master and servant. A master is liable for the negligent act of his servant done within the scope of his employment, even though he may have taken the precaution of warning the servant against such negligence. In the *Boston Case*[2] Grove J. stated, " but with regard to election law, the matter goes a great deal farther, because a number of persons are employed for the purpose of promoting an election, who are not only not authorized to do corrupt acts, but who are expressly enjoined to abstain from doing them, nevertheless the law says, that if a man chooses to allow a number of people to go about canvassing for him, generally to support his candidature, to issue placards, to form a committee for his election, and to do things of that sort, he must, to use a colloquial expression, take the bad with the good ". A candidate, however, is liable for the corrupt acts of his agent, provided they were done within the scope of his authority. If a person is an agent of a candidate for a particular transaction only, the candidate would not be liable if that agent commits a corrupt act quite unrelated to the work entrusted to him. If, however, a person were appointed agent for canvassing generally and in the course of such canvassing he were to commit the acts of bribery or treating, the candidate would be liable. In the *Harwich Case*[3] Lush J. said, " If a person were appointed or accepted as agent for canvassing generally, and he were to bribe or treat any voter, the candidate would lose his seat. But if he was employed or accepted to canvass a particular class, as if a master were asked to canvass his workmen, and he went out of his way and bribed a person who was not his workman, the candidate would not be responsible, because this was not within the scope of his authority ".

Agency may arise by express appointment or it may be implied from circumstances. In the instant case there are no express appointments of agents. The Petitioner seeks to establish agency of certain persons from the surrounding circumstances. In the absence of express appointments as agents, the burden is cast on the Court to decide on circumstantial evidence whether or not the relationship between the candidate and another amounts to agency according to election law. If an act or a

[1] *1 O.' M. & H. 181, at p. 182.* [2] *2 O.' M. & H. 161, at p. 167.*

[3] *3 O.' M. & H. 61, at p. 70.*

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series of acts of a person relating to the election points to the irresistible conclusion that such person was engaged in the promotion of the candidature of the respondent to the latter's knowledge, or if the respondent subsequently having been made aware of such services accepted the same, the Court must not hesitate to draw the inference that the relationship between the parties amounted to agency. However, that evidence being circumstantial, the Court must be satisfied that that is the only inference which can be drawn from the facts proved. It has been held that the mere non-interference by a candidate with persons who on their own work for him is not sufficient to saddle him with the consequences of the corrupt acts of which he was ignorant—*Wigan Case* [1].

While it is true that the penal provisions of election law should be rigorously enforced in the public interest, it is equally essential that the election offences, the consequences of which are obviously very serious and far reaching, must be strictly proved. The degree of proof required is the same as in a criminal charge. In dealing with this matter, Martin B. said in the *Westminster Case* [2]—"The law is a stringent law, a harsh law, a hard law; it makes a man responsible who has directly forbidden a thing to be done, when that thing is done by a subordinate agent. It is in point of fact making the relation between a candidate and his agent the relation of master and servant, and not the relation of principal and agent. But I think I am justified when I am about to apply such a law in requiring to be satisfied beyond all reasonable doubt that the act of bribery was done, and that unless the proof is strong and cogent—I should say very strong and very cogent—it ought not to affect the seat of an honest and well intentioned man by the act of a third person". In the case of *Aluwihare v. Nanayakkara* [3] Basnayake J. stated, "The standard of proof required of a petitioner must therefore be higher than that required in a civil case, where a party must prove his case by a preponderance of evidence, and not lower than that required in the case of a criminal charge, viz., proof beyond reasonable doubt".

The concept of agency in election law is not capable of being precisely encompassed within the limits of a definition. Even if it was possible to do so, English Courts have deliberately refrained from doing it. In fact one Judge went so far as to say that it was dangerous to hazard a definition of agency in election law as unscrupulous candidates might devise a method of concealing illegal practices. Each case must be decided on the set of facts on which it is sought to establish agency. It is in the light of the principles referred to above that I proceed to consider the evidence on the various charges sought to be established.

I shall now proceed to deal with the specific charges in the order they appear in the amended election petition. [His Lordship then examined the evidence at length and, after holding that none of the charges was proved, concluded as follows :—]

All the charges therefore fail, and I accordingly determine the Respondent, Mr. S. Natesan, was duly elected as Member for the Kankesanturai Electoral District.

[1] *4 O.' M. & H. 10.*

[2] *1 O.' M. & H. 88 at pages 95 and 96.*

[3] *50 N. L. R. 529 at p. 533.*

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I hold that no corrupt or illegal practice which has to be reported in terms of Section 82 of the (Parliamentary Elections) Order Council of 1946, as amended by Act No. 19 of 1948, has been proved to have been committed.

This has been a very protracted trial which took 79 days. As many as 79 witnesses, 63 for the Petitioner and 16 for the Respondent, were examined. Although there were only 5 charges in the amended election petition, yet under each charge several specific cases of the offence involved in it were disclosed. The expenses incurred by the Respondent in resisting these charges must indeed have been very heavy. The Counsel's fees, batta of witnesses, most of whom had to come down from Jaffna, and the cost of obtaining certified copies of documents, translations, &c., must necessarily have involved heavy expenditure. In fixing costs those matters have to be taken into consideration.

I dismiss the election petition and order the Petitioner to pay as costs to the Respondent a sum of Rs. 40,000.

Before I conclude, it is my duty to acknowledge the great assistance given to the Court by Counsel—seniors and juniors alike—of both parties who conducted the case with great dignity and uniform courtesy.

Petition dismissed.

1953 *Present :* **Swan J.**

D. SIMON APPU, Appellant, *and* N. H. SOMAWATHIE, Respondent

S. C. 889—M. C. Walasmulla, 12,676

Maintenance—Order of court in favour of wife—Subsequent covenant in a deed of separation—Effect thereof on maintenance suit—Maintenance Ordinance, ss. 2, 5.

Where a married woman obtains an order for maintenance against her husband, a subsequent deed of separation between them puts an end, in effect, to the wife's rights and the husband's liability under the order. In such a case, the husband would be entitled to claim a cancellation of the order under section 5 of the Maintenance Ordinance.

Parupathipillai v. Arumugam (1944) 46 N. L. R. 35, not followed.

APPEAL from a judgment of the Magistrate's Court, Walasmulla.

H. W. Jayewardene, with *P. Ranasinghe*, for the defendant appellant.

Ivor Misso, with *B. E. de Silva*, for the applicant respondent.

Cur. adv. vult.

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December 7, 1953. SWAN J.—

In this case the applicant-respondent obtained an order for maintenance against her husband the defendant-appellant. The application was made in October, 1940. The defendant appearing on summons said that he was willing to take the applicant to his house in Polhenagedera. The applicant was willing to go with the defendant there, but apparently they could not live happily together. On 6. 10. 41 the applicant complained that the defendant's mother assaulted her and drove her out. On the 5th of January, 1942, after inquiry, the learned Magistrate ordered the defendant to pay the applicant maintenance at Rs. 3 ·50 per month as from the 1st February, 1942. On the 27th May, 1942, the applicant moved for a distress warrant for Rs. 14 being maintenance for four months. There being no property available for seizure warrant was issued for the arrest of the defendant. On 20. 9. 42 an open warrant was issued, but no steps were taken thereon. On 25. 2. 52 the applicant moved for a notice on the defendant who, she said, was at the time residing at Kirinda in Matara. As the defendant could not be found the court issued a warrant on him. This too could not be executed and on 6. 12. 52 the court ordered an open warrant to issue. On 18. 12. 52 the defendant surrendered to court and was ordered to give bail to appear on 16. 1. 53. On that day he produced a deed of separation entered into between himself and the applicant bearing No. 28760 and dated 23rd November, 1945 (marked D1). It was contended at the inquiry that the deed of separation terminated the defendant's liability to pay maintenance as ordered by the court. After inquiry the learned Magistrate held on the authority of *Parupathipillai v. Kandiah Arumugam* [1] that the agreement was not binding on the applicant. Giving the defendant credit for the sum of Rs. 100 paid under D1 he ordered distress warrant to issue for the balance due, namely Rs. 362.

In the case referred to above Jayetileke J. held that an agreement whereby an applicant who had an order of maintenance in her favour and to whom a large amount was due as arrears accepted a lump sum and waived all future claims for maintenance was contrary to public policy and should be set aside. The order was made of consent on 18. 11. 1937 that the defendant should pay maintenance at Rs. 6 per mensem. This was subsequently increased to Rs. 8. On 15. 4. 1943 the applicant moved for and obtained a distress warrant for Rs. 40 being arrears for 5 months. On 14. 5. 43 the parties appeared in court and the learned Magistrate made the following entry in the record :—

> " Distress warrant twice returned by Fiscal unexecuted as respondent is not possessed of any movable property. Demand made of him was not complied with. The respondent pays Rs. 200 in court. The applicant receives same *waiving all future claims for maintenance against the respondent.* The applicant signs the record. "

It may appear to have been an unfair bargain but in my opinion it put an end, in effect, to the applicant's rights and the defendant's liability under the order. If the applicant filed a fresh application there can be no question that the compromise of 14. 5. 53 would have been no defence.

[1] *(1944) 46 N. L. R. 35.*

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Let me now examine the authorities upon which the learned Judge based his conclusion in *Parupathipillai v. Kandiah Arumugam* [1]. The first case was that of *Madduma Hamy v. Kalu Appu* [2]. In that case Clarence J. observed that an agreement in writing by which a wife agreed to relieve her husband of the burden of maintaining her and their children was invalid. The charge was made under clause (3) sub-section (2) of Ordinance 4 of 1841 and was dismissed by the Police Magistrate. On appeal the order of dismissal was affirmed. In the course of his judgment Clarence J. said :—

> " Such an agreement as this, between husband and wife, is invalid ; but nevertheless, if the defendant has been induced to abstain from affording due support to the complainant and their children by a belief that this agreement exonerated him from liability so to do, he ought not to be criminally convicted on this charge. "

Nakamuthu v. Kanthan [3] was a case under the Maintenance Ordinance, 19 of 1889. There the defendant sought to escape liability by relying on an agreement whereby the applicant had accepted a sum of Rs. 50 as maintenance for herself and her child during their lifetime. Grenier A. J. described the agreement as an unconscionable bargain. Undoubtedly it was. It certainly could not defeat the application for maintenance.

In *Hinnihamy v. Gunawardene* [4] the applicant had obtained an order of maintenance for herself and five children. Subsequently the defendant applied to the Magistrate and obtained his sanction to pay the applicant a sum of Rs. 250 in full discharge of the maintenance payable by him. Sometime later the applicant applied again for an order of maintenance. The Magistrate who entertained that application took the view that the compromise did not relieve the defendant of his obligation and ordered him to pay. De Sampayo J. in affirming that order said :—

> " The Ordinance does not contemplate the settlement of a lump sum. It only provides for making a ' monthly allowance '. The payment of a lump sum may, of course, negative the basis of the application, namely, that the father neglects or refuses to maintain his children. But in such a case the money should be so settled as to ensure the continued maintenance of the children. But in this case the income to be derived from Rs. 250 is by no means sufficient to maintain five children. It was never invested or secured. The mother appears to have exhausted it and the children are presumably left once more without maintenance . . . . The appellant relies on the circumstances that the court had sanctioned the compromise in this, but I do not think it makes any material difference. "

What I wish to emphasize is that (1) it was a fresh application and (2) the original application was for the maintenance of illegitimate children. Regarding the latter there can be no question that a woman cannot by

[1] *(1944) 46 N.L.R. 35.*
[2] *(1880) 3 S. C. C. 132.*
[3] *(1908) 1 S. C. D. 48.*
[4] *(1921) 3 C. L. Rec. 161.*

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the acceptance of a lump sum compromise the claim for maintenance of her children legitimate or illegitimate. As regards the former I would say that in a fresh application entirely new matters arise for consideration and decision. I must, however, state that the point was taken that the applicant should not have filed another case but applied for relief in the first action. De Sampayo J. dealing with this submission said " that may be so ". With due deference to that most learned Judge I say that could not be so.

In *Hyman v. Hyman* [1] the House of Lords held that a wife who covenanted by a deed of separation not to take proceedings against her husband to allow her alimony or maintenance beyond the provision made for by the deed and thereafter obtained a decree for dissolution of the marriage on the ground of her husband's adultery was not precluded by her covenant from petitioning the court for permanent maintenance. It was entirely a question of the jurisdiction of the court, whether it could be ousted by the covenants in a deed of separation.

Referring to deeds of separation Lord Atkin said :—

" We have to deal with a separation deed, a class of document which has had a chequered career at law. Not recognized by the Ecclesiastical Courts, such contracts were enforced by the common law. Equity at first frowned. Lord Eldon doubted but enforced them. Finally they were fully recognized in equity . . . . Full effect has therefore to be given in all Courts to these contracts as to all other contracts. It seems not out of place to make this obvious reflection, for a perusal of some of the cases in the matrimonial courts seems to suggest that at times they are still looked at askance and enforced grudgingly. But there is no caste in contracts. Agreements for separation are formed, construed and dissolved, and to be enforced on precisely the same principles as any respectable commercial agreement of whose nature indeed they sometimes partake. As in other contracts stipulations will not be enforced which are illegal either as being opposed to positive law or public policy. But this is common attribute of all contracts, though we may recognize that the subject-matter of separation agreements may bring them more than others into relation with questions of public policy. "

The Roman Dutch Law recognizes the validity of deeds of separation. There are two cases in which our courts have considered agreements by spouses to live in separation. In *Mitcho Hamine v. Girigoris Appu* [2] Wood Renton J. said :—

" I do not think that there is anything contrary to public policy under our law in a husband and wife agreeing to live separately where they find that it is impossible for them to live happily together and, in my opinion, such a case comes under Section 5 of the Maintenance Ordinance 1889 . . . . "

[1] (*1929*) *A. C. 601.*

[2] (*1912*) *15 N. L. R. 191.*

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In *Silva v. Silva* [1] Pereira and Shaw JJ. held that an agreement between husband and wife for a separation *a mensa et thoro* and for payment by the husband to the wife of a monthly allowance was enforceable but that it was terminable at the will and option of either party.

The question to determine is the effect of such an agreement upon a suit for maintenance. If an order is made I would say that the defendant would be entitled to claim a cancellation of the order under Section 5 which provides :—

> " On proof that any wife in whose favour an order has been made under Section 2 is living in adultery, or that without sufficient reason she refuses to live with her husband, *or that they are living separately by mutual consent*, the Magistrate shall cancel the order. "

If no order has been made the fact that there exists a deed of separation which is being honoured by the husband would not oust the jurisdiction of the court to entertain the application and make an order. In deciding whether an order should be made the court would have to consider :—

(1) whether in fact the spouses are living apart by mutual consent. Authority for this proposition will be found in *Mitcho Hamine v. Girigoris Appu* [2] and *Maliappa Chetty v. Maliappa* [3].

(2) whether the provision made in the agreement is reasonable and adequate.

In *Hyman v. Hyman* [4] Lord Hailsham L.C. observed :—

> " It may very well be that when the facts come to be investigated, the Court will say that a sum of this magnitude, so secured, voluntarily accepted as a sufficient maintenance ten years ago, and faithfully paid ever since, is a sufficient provision, and that the Court will not deem it to be reasonable to order any further payment to be made."

As regards the point that arises for decision in this case I hold that the deed of separation extinguished the applicant's right and terminated the defendant's liability under the order made, and that the learned Magistrate should have given effect to it by refusing the applicant's application for a distress warrant. Acting on the principle that an order could be made *nunc pro tunc* he should have cancelled the order as from 3.11.1945 and directed the applicant to file a fresh application, if so advised.

Learned Counsel for the respondent contended that D1 was an unconscionable bargain. I do not think so. Assuming that on 3.11.1945 more money was due to the applicant under the order than she received under D1 it was perfectly legitimate for the defendant to pay and for her to accept a smaller sum in full settlement. As regards the waiver of future maintenance the fact that the parties decided to live in separation

[1] *(1914) 18 N. L. R. 26.*
[2] *(1912) 15 N.L.R. 191*
[3] *(1927) 29 N. L. R. 78.*
[4] *(1929) A. C. 601*

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by mutual consent as from that date is a good *causa* or consideration for the agreement which, however, would as laid down in *Silva v. Silva* [1] be terminable at the option of either party. Until so terminated it would be enforceable. In my opinion to allow the applicant to obtain payment for a period when she was living in separation from the defendant by mutual consent is without question unconscionable.

The only other matter that calls for comment is the fact that there was no formal cancellation of the order. In *Kadiravail Wadivel v. Sandanem* [2] where after an order was made the parties lived again together (which fact the court recorded) Akbar J. said that inasmuch as there was no cancellation of the order the applicant could enforce it. The point to note is that the applicant did not seek to obtain payment for the period during which she was living apart from her husband.

In this present case there was no cancellation of the order, but I do not think that could stand in the way of giving effect to the deed D1. It would be artificial to contend that because the order was not formally cancelled a right that had been extinguished could be revived and a liability that had been terminated could be enforced.

The order made by the learned Magistrate is set aside. The appellant will be entitled to the costs of this appeal.

Appeal allowed.

1954 *Present :* **de Silva J. and Sansoni J.**

H. L. WICKREMASINGHE, Appellant, *and* S. A. M. ABDUL RAHEEM, Respondent

S. C. 241—D. C. Colombo, 29,150M

Rent Restriction Act, No. 29 of 1948—Death of tenant—Continuance of tenancy—Section 18 (2)—Exclusive jurisdiction of Board of Review.

Where, on the death of a tenant, a person gives notice to the landlord, in terms of section 18 (2) of the Rent Restriction Act, stating that he proposes, in his status as a member of the household of the deceased tenant, to continue in occupation of the leased premises as the tenant thereof, the landlord must, if he objects to the status of such person to give the notice, make an application to the Rent Control Board under section 18 (3), and is not entitled to raise such objection in a court of law in an action to eject the person who claims to be the new tenant.

[1] *(1914) 18 N.L.R. 26.* [2] *(1929) 30 N. L. R. 351.*

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APPEAL from a judgment of the District Court, Colombo.

E. R. S. R. Coomaraswamy, with *Daya Perera*, for the plaintiff appellant.

No appearance for the defendant respondent.

M. Fernando, Crown Counsel, as *amicus curiae*, on notice.

Cur. adv. vult.

December 20, 1954. DE SILVA J.—

This appeal involves the interpretation of section 18 of the Rent Restriction Act of 1948 (herein referred to as the Act). This section reads :—

(1) Notwithstanding anything in any other law, but subject to any provision to the contrary in any written contract or agreement, the succeeding provisions of this section shall have effect in the event of the death of the tenant of any residential premises to which this Act applies.

(2) Any person who—

(*a*) is the surviving spouse or the child, parent brother or sister of the deceased tenant of the premises, or was a dependant of the deceased tenant of the premises immediately prior to his death ; and

(*b*) was a member of the household of the deceased tenant (whether in those premises or in any other premises) during the whole of the period of three months preceding his death,

shall be entitled to give written notice to the landlord, before the tenth day of the month succeeding that in which the death occurred, to the effect that he proposes to continue in occupation of the premises as tenant thereof ; and upon such written notice being given, such person shall, subject to any order of the Board as hereinafter provided, be deemed for the purposes of this Act to be the tenant of the premises with effect from the first day of such succeeding month, and the provisions of this Act shall apply accordingly.

(3) The landlord of the premises in relation to which any written notice is given under sub-section (2) by any person may make application to the Board for an order declaring that such person shall not be deemed as provided in that sub-section to be the tenant of the premises ; and the Board may make order accordingly if satisfied that such person is not entitled to give the notice for which provision is made by that sub-section.

(4) (Not material)

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The plaintiff is the owner of premises bearing assessment No. 371 situated at Dam Street, Colombo, and she let the same on a monthly tenancy at a rental of Rs. 108·50 to one S. A. Seyad Hamid, a Proctor practising in Colombo. Mr. Seyad Hamid who was an Indian died in India on December 24, 1951. Thereafter on 9.1.'52 his brother the defendant gave notice to the plaintiff, in terms of section 18 (2) of the Act, that he proposed to continue in occupation of the premises as tenant thereof. The plaintiff replied to this letter through her Proctor on 12.1.'52 expressing her unwillingness to accept the notice and also denying the right of the defendant to avail himself of the provisions of Section 18 (2). When subsequently the defendant forwarded the rent to the plaintiff she refused to accept it and instituted this action on 10.6.'52 to eject him and to recover damages at the rate of Rs. 108·50 on the ground that he was in wrongful and unlawful occupation of the premises. The defendant claimed that he was entitled to be regarded as the plaintiff's tenant as he had complied with the provisions of Section 18 (2) by giving the required notice. He also contended that in view of the failure on the part of the plaintiff to make an application to the Rent Control Board under section 18 (3) on receiving the notice he must be deemed to be the tenant of the premises. The learned District Judge upheld this contention and dismissed the plaintiff's action. This appeal is against that decision.

Mr. Coomaraswamy for the appellant argued that the learned District Judge had erred in holding that the Court had no jurisdiction to inquire into the question whether or not the presumption of tenancy contemplated by section 18 (2) arose on the required notice being given. As the defendant was not represented at the hearing of this appeal and on Mr. Coomaraswamy bringing to the notice of the Court that the point of law involved was one of some importance, the Attorney General was requested to allow Crown Counsel to appear as *amicus curiae*. Accordingly, Mr. M. Fernando, C.C., appeared at the hearing of the appeal and we have had the advantage of his assistance. The plaintiff's position is that the defendant was not a member of the household of her tenant Seyad Hamid. The learned District Judge held in favour of the plaintiff on that point. Mr. Coomaraswamy maintained that on that finding judgment should have been entered for the plaintiff.

Before notice can be given under sub-section (2) the two conditions specified in sub-section (1) must be satisfied, namely, that the tenant has died and the premises in question are residential premises within the meaning of the Act. They are conditions precedent and unless they exist the notice would be ineffective. Mr. Fernando, C.C., submitted that although it is competent for the Court to inquire whether these two conditions have been successfully established, yet the requirements under sub-section 2 (*a*) and (*b*) are within the exclusive purview of the Board. This submission, in my opinion, is correct. The words :—

" Such person shall, *subject to any order of the Board as hereinafter provided*, be deemed . . . . to be the tenant " appearing in sub-section (2)

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make it abundantly clear that the Board has the exclusive right to determine whether or not the person giving the notice is entitled to give that notice. This right cannot be exercised or shared by any other tribunal.

Sub-section (2) is one of many instances to be found in the Act where a statutory fiction has been created—in this case an artificial construction being given to the word "tenant". The sub-section also provides the only method by which the "tenant" so created can be divested of this artificial character, viz. :—by an order of the Board obtained on an application made to it by the landlord of the premises, as provided in sub-section (3). In this case no such application was made by the plaintiff and the defendant must therefore be considered the tenant of the premises, provided that conditions contained in sub-section (1) have been satisfied.

Sub-section (3) would appear to indicate that the function of the Board is restricted to the decision on matters contemplated by sub-section (2). It makes no reference to sub-section (1) and therefore the questions which arise under that sub-section would be matters within the jurisdiction of the Courts. Accordingly, as the learned District Judge held, the Court is not entitled to adjudicate on the question whether or not the defendant was a member of the household of the deceased tenant during the required period.

That the plaintiff's tenant Seyad Hamid died on December 24, 1951, is not denied. Mr. Coomaraswamy however contended that the premises in question are not residential premises. This is a matter which the Court is entitled to adjudicate upon. The learned District Judge has held in favour of the defendant on this point. It is true that Seyad Hamid had sub-let two rooms of his house to others to be used as offices. But he himself lived in the house and had his meals prepared there. He also had his office there. The fact that he sub-let two of the spare rooms for offices is not sufficient to hold that these are business premises. The evidence discloses that the premises were occupied mainly for the purpose of residence. Therefore within the meaning of the Act they are residential premises.

Mr. Coomaraswamy also contended that the notice given by the defendant under section 18 (2) was not valid as it did not set out that the defendant had been a member of the deceased tenant's household during the required period. This sub-section does not provide that the requirements under sub-section 2 (*a*) and (*b*) must be inserted in the notice although it is desirable that those particulars should be given. The notice given by the defendant states that he is the brother of the deceased tenant and that he proposes to continue in occupation in terms of section 18 (2) (*b*). In my view that is sufficient compliance with the provisions of sub-section (2).

Accordingly the appeal fails. I dismiss the appeal without costs.

SANSONI J.—I agree.

Appeal dismissed.

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1954 *Present :* **Gratiaen J. and Fernando A.J.**

MAWELLE DHAMMAVISUDDHI THERO *et al.*, Appellants, *and* KALAWANE DHAMMADASSI THERO, Respondent

S. C. 348—D. C. Colombo, 5,517

Buddhist ecclesiastical law—Vihara—Dedication—Failure of donors to nominate first incumbent—Resulting position in regard to incumbency—Right of incumbent to appoint successor.

A Vihara was dedicated in 1904 in the presence of a number of priests belonging to the Ramanna Nikaya. G, the most senior of the priests, accepted the dedication on behalf of the Sangha. At the time of the dedication no Viharadhipathy was expressly nominated by the donors.

Held, that, in the absence of an express nomination of a Viharadhipathy by the donors, there was nothing to counter the inference that the intention was to constitute G himself as the first incumbent. Even if G could not be regarded as the incumbent, the legal position was that the incumbency was vacant and, in that circumstance, the right to appoint to the vacant incumbency vested in the Chapter on whose behalf the Vihara was accepted, as in a case where the chain of pupilary succession was broken.

Held further, that a Viharadhipathy was not entitled to appoint as his successor a priest who was not his pupil.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *D. S. Jayawickreme*, for the defendants appellants.

No appearance for the plaintiff respondent.

Cur. adv. vult.

July 19, 1954. FERNANDO A.J.—

Plaintiff instituted this action for a declaration that he is the Viharadhipathy of the Rajapushparama Vihara at Galkissa. He alleged that the Vihara was dedicated in 1904 in the presence of a number of priests belonging to the Ramanna Nikaya, the most senior of whom was Matara Gnaninda Sabha who accepted the dedication on behalf of the Sangha. The plaintiff further alleged that one Kodagoda Upasena was the original Viharadhipathy and his own claim is based on pupilary succession to Upasena.

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The first questions for determination were whether Upasena was in fact appointed to be Viharadhipathy and if so whether the appointment was a lawful one. The learned District Judge has decided these questions in the plaintiff's favour and the present appeal is against that decision.

The evidence regarding the fact of Upasena's appointment is inconclusive and unsubstantial. The plaintiff who was present at the dedication ceremony in 1904 alleged that the appointment of Upasena as Viharadhipathy was made on the occasion of the dedication immediately after Gnaninda Sabha had accepted the gift of the Vihara on behalf of the Sangha. Plaintiff said in evidence " Matara Gnaninda Sabha asked my tutor priest to attend to all the religious ceremonies in this temple as he was staying close to this temple and therefore he appointed him as the Viharadhipathy of this temple. For the sake of the welfare of this temple he asked my tutor priest to attend to all the religious ceremonies ". The construction which the learned Judge has placed upon Gnaninda Sabha's conduct at the dedication is that he had no intention of himself becoming Viharadhipathy ; that his acceptance was symbolic both on behalf of the Sangha and of Upasena (who had attended to religious ceremonies at the Vihara before its dedication) ; and that it was therefore quite natural for Gnaninda Sabha immediately to call Upasena to the office of Viharadhipathy. This construction was in my opinion not justifiable. The dedication by the donor and the acceptance on behalf of the Sangha is one thing ; the nomination of the first incumbent is quite another. If the intention of the donors was that Upasena should be the first incumbent the nomination could well have come from them and not from Gnaninda Sabha, and in the absence of any evidence of nomination of Upasena (who was admittedly present at the ceremony) there is nothing to counter the inference that the intention was to constitute Gnaninda Sabha himself as the first incumbent. The passage from the plaintiff's evidence which I have cited above is itself more consistent with the view that Gnaninda Sabha immediately upon assumption of office authorised Upasena to act on his behalf. If the act of acceptance by Gnaninda Sabha did not also involve an acceptance by him of the office of Viharadhipathy, then, having regard to the absence of an express nomination by the donors, the legal position would in my opinion have been that there was yet no incumbent. That being so, the right to appoint to the vacant incumbency would have vested in the Chapter on whose behalf the Vihara was accepted as in a case where the chain of pupilary succession is broken. (*Dammaratna Unnanse v. Sumangala Unnanse* [1]). That right could have been exercised only by the Chapter after the observance of due formality and not by Gnaninda Sabha personally. All that can be assumed with safety is that Gnaninda Sabha must, in purporting to confer some authority on Upasena, have done so in the exercise of a lawful right. If he was himself the Viharadhipathy, he did have a right to delegate functions of management to Upasena ; if he was not, he had neither the right to appoint a Viharadhi-

[1] (1919) 21 N. L. R. 400.

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pathy nor the right to appoint an Adhikari. His act therefore was effective and lawful only on the basis that he had already accepted the incumbency for himself.

The plaintiff produced a document executed in 1914 by Upasena in which reference is made to several temples in which Upasena was interested and it is significant that he describes himself in the document as the Adhikari of those temples and not as the Viharadhipathy. The plaintiff's explanation that Upasena was opposed to the use of the term "Viharadhipathy" is unacceptable. He alleged that Upasena thought it an unbecoming title for a Mahanayake (as he then was), but I should have thought the expression "Adhikari" which merely means Manager to be even less becoming. It may have been possible for the plaintiff to contend that Gnaninda Sabha, having assumed the incumbency, immediately thereafter appointed a successor, but this contention was not available because Upasena was admittedly not a pupil of Gnaninda Sabha and was not therefore eligible to succeed. (*Dhammajoti v. Sobita* [1]).

For these reasons I am of opinion that the plaintiff has failed to prove that his alleged tutor Upasena lawfully became the incumbent of the Vihare, and the plaintiff's own claim through Upasena must therefore necessarily fail.

Even assuming however the correctness of the finding of the learned Judge that Upasena was the lawful incumbent, it is doubtful whether the plaintiff has successfully proved his right of succession to Upasena. The only sentence in his evidence relevant to this question was "I became the pupil of Kodagoda Upasena by my being ordained as an Upasampada about 57 years ago". His claim that Upasena was his tutor has not been substantiated by any documents. He refers to a declaration made by him for the purposes of the Buddhist Temporalities Ordinance of 1931 in which the name of his tutor is alleged to have been specified, but made no attempt to produce a copy of the declaration. Nor did he produce his ordination certificate from the Nikaya which would have been valuable evidence in support of his claim. Moreover, he admitted that he had been in Kandy for about 15 years prior to the Japanese raid in 1942 and there is little or no evidence of actual acts of management on his part.

Having regard to the failure of the plaintiff to establish his right in law to the incumbency and to the admitted fact that the Vihara is now possessed on behalf of the 1st defendant (who is a minor), it is unnecessary to consider the evidence led for the defence for the purpose of establishing the rights of the 1st defendant.

The appeal must be allowed and the plaintiff's action dismissed with costs in both Courts.

GRATIAEN J.—I agree.

Appeal allowed.

[1] *(1913) 16 N. L. R. 408.*

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1954 *Present :* **Rose C.J., Gratiaen J. and Sansoni J.**

In re S. M. C. DE SOYZA

In the matter of the Rule on Proctor S. M. C. de Soyza

Proctor—Suspension from office—Courts Ordinance, s. 17.

Proctor suspended from office for three years for issuing false certificates to certain persons enabling them to obtain Emergency or Identity Certificates.

RULE on a Proctor.

D. Jansze, Acting Solicitor-General, with *J. W. Subasinghe*, Crown Counsel, for the Attorney-General.

C. V. Ranawake, with *G. T. Samarawickreme* and *A. Nagendra*, for the respondent.

S. J. Kadirgamar, with *G. L. L. de Silva*, for the Law Society.

July 19, 1954. ROSE C.J.—

In this matter it is alleged that the respondent, who is a Proctor of the Supreme Court, issued on five separate occasions and to five separate persons certificates under regulations made under the Immigrants and Emigrants Act, No. 20 of 1948.

The respondent admits that in the case of these five persons he issued certificates to the effect that he had known them personally for a period of two years and that from his personal knowledge of them he could vouch for them as being fit and proper persons to receive Emergency or Identity Certificates. He further certified that to the best of his personal knowledge and belief the statements of the applicants and the declarations on the forms were true and that the applicants were citizens of Ceylon.

Now it is relevant to observe that that certificate, in order to be of any use to the person to whom it was issued, had to be signed by a limited class of persons, one of which is an Advocate or Proctor of the Supreme Court, and the certificates in question were signed by the respondent stating that he was a Proctor of the Supreme Court and a Commissioner for Oaths, and the certificates were also accompanied by a rubber stamp to the same effect.

Upon the respondent's own admission it seems to us to be clear, and it is not even seriously contended to the contrary by learned Counsel for the respondent, that he has brought himself within the purview of Section 17 of the Courts Ordinance, and it is merely a matter for us to consider what penalty should be imposed.

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It is obvious, and I hope it is unnecessary for us to stress, how entirely undesirable and improper it is for a professional man to issue certificates of this kind which he knows are false and are going to be acted upon by the authorities on the basis that they are true.

We have given careful consideration to the question as to whether we should not strike off the respondent from the Roll of Proctors. In the circumstances, however, and in regard to the number of years that he has practised, we think that justice would be done if we suspend him from the office of a Proctor of the Supreme Court for a period of three years.

The respondent will also pay the costs of these proceedings to the Attorney-General which we assess at Rs. 262·50.

GRATIAEN J.—I agree.

SANSONI J.—I agree.

Rule made absolute.

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1955 *Present :* **Nagalingam S.P.J. and Fernando A.J.**

KANDY OMNIBUS CO., LTD., Petitioner, *and* SILVERLINE BUS CO., LTD., *et al.*, Respondents

S. C. 672—Application to vacate an order allowing conditional leave to appeal to the Privy Council in S. C. Application No. 596 of 1952

Privy Council—Conditional leave to appeal—Grant in absence of respondent—Right of Court to vacate it subsequently—Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rule 22.

Where an application for conditional leave to appeal to the Privy Council is allowed in the absence of the party respondent the Court has power to vacate its order subsequently if the party respondent shows that he had no notice or knowledge of the application and that though he exercised due diligence in attempting to obtain information with regard to any such application, he failed to obtain any.

APPLICATION to vacate an order allowing conditional leave to appeal to the Privy Council.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy* and *G. B. Kumarakulasinghe*, for the petitioner.

H. W. Jayewardene, Q.C., with *G. T. Samaravickreme* and *D. R. P. Goonetilleke*, for the respondents.

Cur. adv. vult.

January 3, 1955. NAGALINGAM S.P.J.—

This is an application by the Kandy Omnibus Company Ltd., which will hereinafter be referred to as the petitioner, to vacate the order made by this Court on the 10th December, 1954, granting the respondents conditional leave to appeal to Her Majesty in Council.

The order sought to be taken in appeal to Her Majesty was made on the 12th November, and on the 15th November, 1954, the respondents gave notice to the petitioner of their intention to apply to this Court for conditional leave to appeal ; on the 6th December they filed their application which came for hearing on the 10th of December and the application was allowed in the absence of the petitioner.

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2—J. N. B 43580-1,597 (3/55)

The gravamen of the complaint of the petitioner is that he had no notice of the application made for conditional leave, that he gained no knowledge of the application and that though he exercised due diligence in attempting to obtain information with regard to any such application, he failed to obtain any and that the order made in his absence should in these circumstances be set aside and that he should be heard before conditional leave is granted to the respondents.

That in fact the respondents gave no notice to the petitioner of their filing the application for conditional leave is admitted.

The Proctor for the petitioner has filed an affidavit in which he sets out that " he inspected the records at the Registry up to the 6th December, 1954, daily, in order to ascertain whether an application was filed in the Supreme Court Registry ". The other averments in the affidavit make it clear that the reference to the daily inspections up to the 6th of December relate to inspections alleged to have been made by him from and after the 30th November, 1954—the date when he received instructions to act on behalf of the petitioner in regard to the application for conditional leave.

The Proctor further states that on the 7th and 8th of December he was ill and therefore could not have attended the Registry for investigation, that the 9th of December was a Public Holiday and the Registry was closed but that when he did examine the records on the 10th, he says, he discovered for the first time that the application had not only been made but conditional leave had also been granted on that date.

These averments undoubtedly have been made with a view to support the allegation in the petition of the petitioner that the application for conditional leave was registered on the 8th of December and that the application was on that very day directed to be listed on the 10th December and that the ignorance on the part of the Proctor and officers of the petitioner company as regards the application made by the respondents for conditional leave was not due to any neglect or default on their part but due to the extreme swiftness with which the application was dealt with.

Mr. Jayawardene for the respondents, however, challenges these averments and points that in truth and in fact the application for conditional leave was registered at the Registry on the 6th December and not on the 8th as alleged by the petitioner, and that if a perusal of the entries in the Register had been made on the 6th, the entry relating to the filing of the application could not but have been observed.

In order to reinforce his submission, he sought permission of Court to cross-examine the Proctor for the petitioner on his affidavit. This we refused.

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I think it is correct to state that applications of this nature are dealt with on the affidavits filed and ordinarily no cross-examination is permitted. The appellants, if they did want to challenge the affidavits filed on behalf of the petitioner, should at least have filed counter-affidavits themselves before making application for cross-examination.

I may say at once that the Register maintained at the Registry was consulted and it revealed that in fact the application for conditional leave had been registered on the 6th of December and the Deputy Registrar stated that the applications are tendered to him personally and that when he receives the applications he directly enters them in the Register. In view of these facts there can be little doubt that the statement of the petitioner that the application for conditional leave was registered on the 8th is incorrect in point of fact, but *non constat* that the affidavit of the Proctor that he inspected the Register on the 6th and the implied suggestion underlying that statement that he found no entry in the records of the Registry is itself incorrect. The time factor has to be taken into account before one can venture to express an opinion that the averment in the Proctor's affidavit is untrue. The facts are quite consistent with no entry having been made at the time the Proctor inspected the Registers on the 6th and the entry being made on that very day, after his inspection. That Proctor's statement therefore could not be characterised as being culpable, but that is not to say that the allegation in the petition that the application for conditional leave was registered on the 8th is incorrect. If, of course, one considers the allegation as being merely an inference from the facts set out in the affidavits, then no dishonesty need be imputed.

That an applicant for conditional leave is not bound to give notice to the respondent of the day on which the application would be made has been laid down by this Court in the case of *Pathmanathan v. Imperial Bank of India* [1]. Counsel were agreed that there is no provision either in the Appeals (Privy Councils) Ordinance (Cap. 85), or in the Rules framed thereunder requiring that even notice of the filing of the application should be given to the respondent. But, however, the practice followed hitherto has been as set out by me in the case of *De Silva v. Hirdarmani Ltd.* [2]:

> " the application for leave (conditional) is not disposed of excepting in the presence of or at least after proof that notice of the application has been given to the respondent and in practice the application itself is never disposed of in fact within 30 days of the date on which the judgment appealed from was delivered and there is always sufficient time for the respondent to get ready to show cause against the application after receipt of notice or the gaining of knowledge of the filing of the application . . . . "

In the present case the application for conditional leave was in fact disposed of before the expiry of thirty days from the date when the judgment appealed from was delivered.

[1] *(1937) 39 N. L. R. 103.* [2] *(1953) 55 N. L. R. 73.*

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I do not think that a party or his Proctor is expected to search the Register at the Registry every hour, or even every day. That will be an intolerable situation to place a party or his Proctor in. Ordinarily, I think at least thirty days from the date of judgment appealed against should be permitted to lapse before the application for conditional leave is listed for disposal. If such a course be adopted a Proctor who may not receive any information earlier would, by examining the Registry on the thirty-first day, be in a position to ascertain once for all and finally, whether an application has been made to Court in pursuance of the notice of intention to appeal.

In this case there is the affidavit sworn to by the Proctor for the petitioner which shows that he had as far as possible made every effort to acquaint himself of any application being made to Court, and, if, in the circumstances he has set out in his affidavit, he had failed to gain knowledge of the application, it cannot be said that his ignorance was due to any gross carelessness or culpable negligence on his part.

The question then arises whether, if there has been neither gross carelessness, nor culpable negligence on the part of the Proctor, and neither the petitioner company nor any of its officers had knowledge of the application for conditional leave made to the Court, in consequence whereof the petitioner company failed to enter appearance when the application for conditional leave came to be considered, this Court has the necessary powers vested in it to vacate an order granting conditional leave in the absence of the petitioner. It is not denied by Mr. Jayawardene that the petitioner had the right to be heard before conditional leave was granted. If so, I do not think that the powers of this Court are so restricted as to prevent it from doing justice as between the parties and making such order as may be necessary to reach that objective.

I would therefore vacate the order of this Court dated the 10th December, 1954, granting conditional leave to the respondents to appeal to Her Majesty in Council and direct that that application should be re-listed for argument.

The respondents will be entitled to the costs of this application as well as the costs incurred by them in regard to the application made by them on the 10th of December.

Before I part with this record, I desire to draw attention to an aspect which has passed through my mind on a consideration of the provisions of the Appeals (Privy Council) Ordinance. It seems to me that the Legislature did not intend to give the respondent to an appeal the right to be heard at the consideration of the application for conditional leave, but only at the stage when final leave is applied for,—vide Rule 22 of the Rules appended to the Ordinance; however, as there has been a *cursus curiae* of long standing to hear the respondent to the appeal on the

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consideration of the application for conditional leave and as Mr. Jayawardene has conceded that the respondent to an appeal has a right to be heard at that stage, I do not intend to pursue the matter further, especially as I have not had the benefit of any argument on the point.

FERNANDO A.J.—I agree.

Application allowed.

1954 *Present :* **Sansoni J.**

KANDY OMNIBUS CO., LTD., Petitioner, *and*
T. W. ROBERTS *et al.*, Respondents

S. C. 596—In the matter of an application for a mandate in the nature of a Writ of Certiorari *under section 42 of the Courts Ordinance (Cap. 6)*

Certiorari—*Petitioner must be a person aggrieved—Necessary parties—Delay—Jurisdiction—Acquiescence to patent want of jurisdiction—Difference in effect between patent and latent want of jurisdiction—Estoppel—Duty of applicant to disclose all material facts—Difference between judicial function and administrative function—Omnibus Service Licensing Ordinance, No. 47 of 1942, ss. 6 (2), 13 (4)—Motor Traffic Act, No. 14 of 1951, ss. 243 (1), 246 (1) (4) and (7)—Interpretation Ordinance (Cap. 2), s. 6 (3) (c).*

Although a person applying for a writ of *certiorari* is required to be a person aggrieved, it is sufficient if he has a substantial interest in the decision in respect of which the writ is sought.

Whether there has been unreasonable delay or not in making an application for a writ of *certiorari* depends on the circumstances of each case.

When an aggrieved party applies for *certiorari* in respect of an order made by a quasi-judicial body in a matter where it totally lacked jurisdiction, he is entitled to the writ as of right ; but where there was only a contingent want of jurisdiction, acquiescence or waiver or similar conduct would place even an aggrieved party in the same position as a stranger and the grant of relief is discretionary. It is only in the latter case that the applicant is bound to make a full and fair disclosure of all material facts.

The petitioner and the 4th to 9th respondents respectively were the holders of certain road service licences issued by the Commissioner of Motor Transport under the Omnibus Service Licensing Ordinance, No. 47 of 1942. In consequence of certain complaints made by the petitioner to the Commissioner to the effect that the 4th to 9th respondents were picking up and setting down passengers within the Municipal Limits of Kandy to the prejudice of the petitioner, the Commissioner, after holding due inquiry, made order under section 6 (2) of Ordinance No. 47 of 1942, that the conditions attached to the licences of the 4th to 9th respondents should be varied so as to debar them from picking up and setting down passengers within the Municipal Limits of Kandy.

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The 4th to 9th respondents appealed to the Tribunal of Appeal against the Commissioner's decision. All the appeals were heard together and on the 10th October, 1952, the Tribunal of Appeal reversed the decision of the Commissioner. Thereupon the present application for a writ of *certiorari* was filed by the petitioner on the 22nd December, 1952, stating that the Tribunal of Appeal consisting of the 1st to 3rd respondents had no jurisdiction to hear the appeals in question after Ordinance No. 47 of 1942 was repealed by the Motor Traffic Act, No. 14 of 1951, which came into operation on the 1st September, 1951.

Held, (i) that the Tribunal of Appeal had a duty to act as a quasi-judicial, and not purely administrative, body and was, therefore, subject to *certiorari* if it acted in excess, or usurpation, of jurisdiction.

(ii) that the Tribunal was competent to hear only appeals preferred against a decision granting or refusing an application for a road service licence, but not against a decision of the Commissioner varying the conditions attached to a licence. The Tribunal suffered, therefore, from a total and patent want of jurisdiction over the subject-matter of the appeal. As this was a case of total want of jurisdiction and not a case of irregularity or want of contingent jurisdiction, the fact that the petitioner had waived objection to the jurisdiction of the Tribunal and taken part in the proceedings thereafter could not disentitle him, despite his acquiescence, to object later that the order made by the Tribunal was void.

(iii) that the petitioner was sufficiently aggrieved by the order of the Tribunal to entitle him to apply for a writ of *certiorari*. It was not necessary that he should have had a statutory right to appear either before the Commissioner or the Tribunal.

(iv) that the failure to make the Commissioner a party was not fatal to the application.

(v) That the joinder of the 4th to 9th respondents in one application for *certiorari* was not improper, although they had shown cause separately and filed separate applications before the Tribunal.

(vi) that the interval of about two months in filing the application for *certiorari* did not constitute unreasonable delay, as the case involved many difficult questions of law which could only be considered after an exhaustive examination of the relevant statutes and numerous precedents.

APPLICATION for a writ of *certiorari* to quash certain proceedings of the Tribunal of Appeal constituted under the Motor Car Ordinance, No. 45 of 1938.

H. V. Perera, Q.C., with *E. G. Wikramanayake, Q.C.*, *E. R. S. R. Coomaraswamy* and *L. Mututantri*, for the petitioner.

H. W. Jayewardene, Q.C., with *G. T. Samarawickreme*, *D. R. P. Goonetilleke* and *J. N. Arumugam*, for the 4th and 5th respondents.

H. W. Tambiah, with *R. A. Kannangara* and *V. Ratnasabapathy*, for the 6th respondent.

S. Nadesan, Q.C., with *K. Shinya*, for the 7th, 8th and 9th respondents.

Cur. adv. vult.

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November 12, 1954. SANSONI J.—

The petitioner has applied for a writ of *Certiorari* to quash certain proceedings of the Tribunal of Appeal constituted under the Motor Car Ordinance No. 45 of 1938 and consisting of the 1st, 2nd and 3rd respondents, and to quash the order made by the said Tribunal on 10th October, 1952. The matter arises in the following way : The petitioner and the 4th to 9th respondents respectively were the holders of certain road service licences issued by the Commissioner of Motor Transport under the Omnibus Service Licensing Ordinance, No. 47 of 1942. In consequence of certain complaints made by the petitioner to the Commissioner to the effect that the 4th to 9th respondents were picking up and setting down passengers within the Municipal Limits of Kandy to the prejudice of the petitioner, an inquiry was held by the Commissioner into those complaints. The petitioner and the 4th to 7th and 9th respondents took part in the inquiry. The Commissioner thereafter served a notice on the 4th to 9th respondents under section 6 (2), Ordinance No. 47 of 1942, requesting them to show cause, if any, why a condition should not be attached to their road service licences to the effect that the same passenger should not be picked up and set down within the Municipal Limits of Kandy. Certain objections were put forward by the respondents. The Commissioner thereafter made order imposing the condition he had proposed to impose. He notified them of this condition and called upon them to transmit their licences to him to enable him to insert that condition in their licences.

The respondents concerned appealed to the Tribunal of Appeal against the Commissioner's decision. The petitioner and the 4th to 9th respondents were represented by counsel before the tribunal which heard all the appeals together between 18th November, 1950, and 4th October, 1952. On 10th October, 1952, it made order setting aside the Commissioner's order and directing that the licences of the 4th to 9th respondents be renewed as before without the condition imposed by the Commissioner. The present application was filed on 22nd December 1952. The ground on which it is based is that the 1st to 3rd respondents had no jurisdiction to continue to hear the appeals in question after Ordinance No. 47 of 1942 was repealed by the Motor Traffic Act, No. 14 of 1951, which came into operation on 1st September, 1951. It is the petitioner's case that the Tribunal of Appeal consisting of the 1st to 3rd respondents which was appointed thereafter was competent to hear only appeals preferred against a decision granting or refusing an application for a road service licence, but not against the decision varying the conditions attached to a licence.

Mr. Jayewardene who appeared for the 4th and 5th respondents raised certain preliminary objections which were argued before the petitioner's case was heard. The preliminary objections were :

(1) the petitioner has no status to make this application.

(2) the failure to make the Commissioner a party is fatal to the application.

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(3) 4th to 9th respondents have been wrongly joined together in one application.

(4) there was unreasonable delay in filing this application.

(5) the petitioner acquiesced in the proceedings before the Tribunal and is therefore disentitled to make this application.

(6) the application is lacking in bona fides.

(7) the Tribunal of Appeal did not act as a quasi-judicial body and therefore Certiorari does not lie.

I shall now deal with these objections in the above order.

(1) The short point is whether the petitioner is a person aggrieved by the order of the Tribunal. It was submitted by Mr. Jayewardene that the petitioner had no legal right to be heard by the tribunal, it was not a necessary party to the appeal proceedings before the Tribunal, and was merely one of a number of persons who made representations to the Commissioner and supported the variation of the conditions of the licences; though the petitioner may have been affected financially by the non-imposition of the new conditions, and therefore was the prime mover in the initiation of proceedings to have that condition imposed, that would not make it a person aggrieved. Mr. Perera, on the other hand, contended that the petitioner was the only party aggrieved by the Tribunal's order; it had been affected financially since its business was being taken away through the acts of the 4th to 9th respondents in picking up and setting down passengers in Kandy town, and had therefore made representations to the Commissioner to intervene and impose the condition on the respondent's licences; it had attended the preliminary inquiry held by the Commissioner and also the proceedings before the Tribunal, and made its representations at such proceedings. One of the earlier cases on this question as to who is a person aggrieved in this sense is *R. v. Justices of Surrey*[1] which was a case dealing with an application for Certiorari. Blackburn, J., there quoted Lord Ellenborough, C.J., who said in *R. v. Taunton St Mary*[2], " Certainly a person does not answer to the character of a person grieved who is only in common with the rest of the subjects inconvenienced by the nuisance; but here it appears that those persons have by reason of their local situation, a peculiar grievance of their own ". The learned Judge then decided that the applicant for the Certiorari was, by reason of his residence in the neighbourhood of the highways concerned in that case, which the justices had certified were unnecessary, a person aggrieved. The petitioner in these proceedings is much more directly affected by the Tribunal's order than the applicant in that case was by the justices' certificate. Lord Ellenborough, C.J., also said in the judgment cited that the petitioner in that case had "a peculiar grievance beyond that which affects the public at large", which was another way of defining

[1] *(1870) 39 L. J. M. C., 145.* [2] *105 E. R. 685.*

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the test to be applied. In a later case, *R. v. Groom*[1], Lord Alverstone, C.J., speaking of the sense in which persons applying for a writ of Certiorari are required to be persons aggrieved said : " It is sufficient if they have a real interest in the decision of the justices ". Mr. Jayewardene stressed the fact that the petitioner had no legal right to appear either before the Commissioner or the Tribunal. But I do not think that this is a necessary condition. It cannot be denied that the petitioner is the person who is most affected by the order of the Tribunal, for he is directly prejudiced by the removal of the condition from the respondent's licences, a condition which was inserted at the petitioner's instance and for its benefit. If there had been a statutory requirement that the petitioner should be heard by the Tribunal that would no doubt have strengthened the petitioner's position, but I have not been referred to any authority which makes this an essential requirement. The decision of the Court of Appeal in *R. v. Nicholson*[2] and *R. v. Justices of Surrey*[3] indicate the contrary. The applicants for the writ in the former case were held not to be persons aggrieved because they " failed to show that they have a real practical grievance " and for that reason their application was dismissed. This case was followed in *R. v. Richmond Confirming Authority*[4] which was also a case of Certiorari. The applicant there was a rival licensee and it was on this ground, and for the reason that he had a substantial interest in the subject matter, that his application succeeded.

(2) Is the Commissioner a necessary party to the proceedings ? It must be remembered that the present application is to quash the order of the Tribunal made on an appeal against the decision of the Commissioner. Mr. Jayewardene urged that the Commissioner made the order, he could have supported it before the Tribunal, and was entitled to be heard by the Tribunal for that purpose. But once the Tribunal has made its order the Commissioner's decision is superseded by that of the Tribunal and in an application such as this, which challenges the validity of the Tribunal's decision, I cannot see what interest the Commissioner has. Certainly he has no interest such as the 4th to 9th respondents have. They would be adversely affected if the Tribunal's order is set aside, and it is for that reason that they are necessary parties. The Commissioner, however, will not be adversely affected if the petitioner succeeds ; on the contrary, his order will be restored : while if the petitioner fails, matters will lie where they were before this application was filed and the Commissioner will be in no worse position. Nor do I see what the omission of the Commissioner to state a case for the opinion of this Court has to do with this question. Presumably he chose deliberately not to take that course.

(3) Mr. Jayewardene submitted that as the 4th to 9th respondents showed cause separately and filed separate appeals before the Tribunal, there should have been six separate applications filed by the petitioner for Certiorari. I think he recognised the difficulty caused by only one order

[1] (*1901*) *2 K. B. 157.*
[2] (*1899*) *68 L. J. Q. B. 1,034.*
[3] (*1870*) *39 L. J. M. C., 145.*
[4] (*1921*) *90 L. J. K. B. 413.*

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having been made by the Tribunal in respect of all the appeals, which were consolidated and heard together. Mr. Perera pertinently asked whether the objection of non-joinder would not have been raised if he had made 6 separate applications against each of the 4th to 9th respondents leaving out the other five parties affected by each application. It was not suggested that any prejudice whatever has been caused by the respondents having been joined together.

(4) Whether there has been unreasonable delay or not is largely a matter of opinion and depends on the circumstances of each case. When a case involves many difficult questions of law which can only be considered after an exhaustive examination of the relevant statutes and numerous precedents, I hardly think that an interval of about two months, such as we have here, is an unreasonably long time.

(5) The arguments on the objection based on acquiescence by the petitioner in the proceedings before the Tribunal occupied a great deal of time and they have very considerably assisted me in arriving at a decision. The objection itself arises for consideration because on 27th October, 1951, counsel then appearing for the present petitioner suggested that it was doubtful whether the Tribunal had any jurisdiction to hear the particular appeal because the new Act No. 14 of 1951 provided for only certain appeals filed under the Ordinance No. 47 of 1942 to continue to be heard. On the next date, however, the petitioner's counsel withdrew his objection and the hearing of the appeal continued. It is argued for the respondents that the petitioner is not now entitled to be heard on the question of lack of jurisdiction, having waived its objection to the jurisdiction of the Tribunal and taken part in the proceedings thereafter. Mr. Perera for the petitioner contended that this is a case of total want of jurisdiction and not a case of want of contingent jurisdiction : he submitted that it is apparent on the face of the proceedings that the Tribunal had no jurisdiction to deal with this appeal, and where such defect of jurisdiction is patent, acquiescence in the jurisdiction exercised by the Tribunal does not disentitle the party acquiescing to come in later and object that the order made by it is void. He relied on the following passage in Spencer Bower on Estoppel by Representation (1923) page 187 : " Even the most plain and express contract or consent, *a fortiori*, therefore, any mere conduct or inaction or acquiescence of a party litigant from which a representation may be implied such as to give rise to an estoppel, cannot confer judicial authority on any of His Majesty's subjects not already invested with such authority by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal. Any such attempt to create or enlarge jurisdiction is in effect the appointment of an officer of the judiciary by a subject, and, as such, constitutes a manifest usurpation of the Royal prerogative, or (in the old phraseology) ' contempt of the Crown ', just as much as if a subject were to purport to appoint an officer of the Executive or of the Legislature ". He submitted that it is only in a case of want of contingent jurisdiction that a party can preclude himself, by such conduct as taking part in the proceedings, from objecting to the jurisdiction at a later stage.

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The earliest of the many cases cited, dealing with a similar point, is *R. v. Committee men for South Holland Drainage* [1]. It was, to quote the summary of the case given by Spencer Bower, " a statutory compensation case, in which the claimant moved for a certiorari to quash the proceedings on four grounds, (1) that he had not received the prescribed 40 days' notice to treat for the company, (2) that the jury had ordered a fence to be erected, besides awarding compensation, which they had no statutory jurisdiction to do, (3) that the estate was copyhold, and the jury had not awarded compensation to the lord, as required by the statute, and (4) that he held the right of his wife, and no compensation had, as required by the statute, been awarded to her ; but it was held that he barred himself from the right to complain on any of these grounds, and had waived all four objections—the first, by his conduct in requesting the inquisition to be held at a date too early to admit of the 40 days having expired ; the second, by his conduct in assenting to the erection of the fence, and discussing with the company the amount of compensation on the footing that this was to be done ; the third, by his express representation to the company that the land was freehold ; and the fourth, by a like representation that it was absolutely his own ". The next case cited was *R. v. Manchester and Leeds Railway Co.*, [2] which was a similar case where the claimant was held to have waived the statutory requirements as to notice to treat. Lord Denman, C.J., who had also decided the earlier case said : " But it is clear that we must exercise a discretion as to granting a Certiorari. The conduct of the party applying may be such as to preclude him from being entitled to it. On a recent occasion we would not allow a party to take advantage of a defect on the face of the inquisition which arose from his having himself requested that the provisions of the Act should be deviated from ". A good deal of the argument concerned the exact meaning of this passage, which is in substance repeated in later decisions. For example, in *R. v. Justices of Surrey* (*supra*), Blackburn, J., said : " Where the party grieved has by his conduct precluded himself from taking an objection, the Court will not permit him to make it, as in *The Queen v. The South Holland Drainage Committee.* In other cases where the application is by the party grieved, so as to answer the same purpose as a writ of error, we think that it ought to be treated, like a writ of error, as *ex debito justitiae* ". Another case where a party was held to have precluded himself by his conduct from applying for a writ was *R. v. Justices of Salop* [3]. The statute concerned in that case provided that the jurisdiction of the justices could be ousted by a party disputing the validity of a rate which he had not paid. When the party was summoned before the justices no objection to their jurisdiction was taken, and witnesses were called and cross-examined. At a later stage of the inquiry objections to the validity of the rate were submitted. In deciding that the party was not entitled to a Certiorari Crompton J. said : " I think that it was the intention of the statute that the person disputing the validity of the rate should at once give notice to that effect to the justices, not that he should first lead the justices to decide the question and then dispute

[1] *112 E. R. 901.* [2] *112 E. R. 895.*

[3] *121 E. R. 146.*

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their jurisdiction to decide it". This case was followed in *Cordery v. Greaves* [1] where a Magistrate made an order on a dispute between the secretary of a friendly society and the representative of a member of the society, although the rules of the society provided that such a dispute should be decided by arbitrators. The rules were put in evidence but the Magistrate's attention was not called to the particular rule. The Court of Queen's Bench refused the writ of Certiorari on the ground that the Magistrate was misled by this omission. It was strongly urged by Mr. Jayawardene that in addition to these cases *R. v. Williams* [2] was also a clear authority for the view that a party who takes part in proceedings cannot later object to their validity. In that case the applicant for Certiorari was convicted of selling bread other than by weight. One of the justices who had sat on the Bench was concerned in the business of a baker, and therefore disqualified by Statute from acting as a justice in such a case. In his affidavit applying for the writ the applicant did not state that at the time of the hearing he was ignorant of the facts disqualifying the particular justice. The Court held that Certiorari should not be granted. Channel, J., said "It is a rule of practice not to grant a writ of Certiorari where the applicant does not negative knowledge of the fact constituting the disqualification when he was before the Court below. That rule has been established on good grounds. It does not depend on whether the decision of the justices was void or voidable. If an objection to a conviction is taken by a member of the public, the granting of the writ by the Court is discretionary ; but if it is taken by a party aggrieved, then a Certiorari ought to be granted *ex debito justitiae ;* but even in that case if the applicant has by his conduct precluded himself from taking the objection, the Court will not permit him to take it. The authority for the exception where an applicant has so precluded himself is *R. v. South Holland Drainage Committee* which is referred to by Mr. Justice Blackburn in *R. v. Surrey Justices*. Where therefore a party aggrieved has by his conduct precluded himself from taking an objection, the Court has a discretion". Rowlatt, J., agreeing said, "If (the applicant) is a party aggrieved *R. v. Surrey Justices* shows that he can debar himself from taking this objection. The affidavits do not show that he was unaware of the disqualification of the Justice on the hearing of the summons". Atkin, J., said, "There is a rule that the applicant must satisfy the Court that he has not by his conduct precluded himself from applying for a Certiorari, and the present applicant has not done so".

Now what is the *ratio decidendi* of these cases? I think it is the rule enunciated by Mr. Spencer Bower in his book at page 187 where he says, in continuation of what I have already quoted: "Where it is merely a question of irregularity of procedure, or of a defect in 'contingent' jurisdiction, or non-compliance with statutory conditions precedent to the validity of a step in the litigation, of such a character that, if one of the parties be allowed to waive, or by conduct or inaction to estop himself from setting up, such irregularity or want of 'contingent' jurisdiction or non-compliance, no new jurisdiction is thereby impliedly created, and no existing jurisdiction is thereby impliedly extended beyond its existing

[1] *20 L. T. 972.*

[2] *(1914) 83 L. J. K. B. 538.*

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boundaries, the estoppel will be maintained, and the affirmative answer of illegality will fail, for, the Royal prerogative not being invaded, and the State therefore not being injured, nor any of His Majesty's subjects for whom that Royal prerogative is held in trust, there is no ground of public policy, or other just cause, why the litigant, to whom alone in that case the statutory benefit belongs, should not be left free to surrender it at pleasure, or why having so surrendered it, whether by contract, or by conduct or inaction implying consent, he should be afterwards permitted to claim it. Accordingly, in all cases of the first class, that is, of *defectus jurisdictionis* the representor has been held incapable of estopping himself from resisting the usurped authority; whereas in all those of the other class, that is of mere *defectus triationis*, the affirmative answer has been rejected, and the representor has been held estopped from objecting to the irregularity". We thus have the two classes of cases covering want of jurisdiction and the effect of a party's conduct in either class explained by the learned author in these two passages. It is beyond doubt that a sharp distinction exists between cases of patent and latent want of jurisdiction, as the two classes are also called. The right of a party aggrieved to apply for relief in either case by way of Prohibition is clearly dealt with in Shortt on Mandamus (1887) page 447 where he quotes Lord Mansfield as having said:—"If it appears upon the face of the proceedings that the Court below had no jurisdiction, a prohibition may issue at any time, either before or after sentence, because all is a nullity: it is *coram non judice*. But where it does not appear upon the face of the proceedings, if the defendant will lie back and suffer that Court to go on, under an apparent jurisdiction, it would be unreasonable that this party, who, when defendant below, has thus lain by and concealed from the Court below a collateral matter, should come hither after sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition upon it, after all this acquiescence in the jurisdiction of the Court below". Acting on this rule in the case of a patent want of jurisdiction in *Farquharson v. Morgan* [1], Lord Halsbury said:—"In this case, with every disposition to decline to interfere with the course of litigation, and with a strong desire to visit an unreasonable and persistent litigant with the consequences of the course which he has pursued, I have earnestly striven to see whether I could, according to the well known and ordinary practice of the Court, refuse the application for a prohibition. I think, however, that the writ must go so far as those portions of the plaintiff's claim which are outside the Agricultural Holdings (England) Act, 1883, are concerned. It has been well settled for many years that when the objection to the want of jurisdiction on the part of an inferior Court appears on the face of the record or proceedings (and it is immaterial by what means that objection was brought to the knowledge of the Court) it is the duty of the Court to interfere and protect the prerogative of the Crown, and in the due course of the administration of justice prohibit the inferior Court from entertaining a matter which is outside its jurisdiction". The other two judges of the Court of Appeal in their judgments explain the principle upon which a party acquiescing in the proceedings, where it is a case of latent defect of

[1] *(1894) 63 L. J. K. B. 474.*

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jurisdiction, disentitles himself to relief even in cases of prohibition. Lopes, L.J., in his judgment quoted the opinion of the Judges delivered by Willes, J., to the House of Lords in the *Mayor of London v. Cox* [1] :—

" Where the defect is not apparent, and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition in respect of the right of the Court is not taken away, for mere acquiescence does not give jurisdiction—yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ though of right is not of course, the Court would decline to interpose, except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant ". Davey, L.J., in his judgment emphasised what I consider is the keynote of this passage when he said : " It will, however, be observed that the learned Judge's statement is confined to cases where the defect is not apparent, and depends upon some fact in the knowledge of the applicant which he might have brought forward in the Court below, but has kept back without excuse—that is, when the applicant has been guilty of some misconduct in the proceedings, and has in a sense misled the Court". In a later passage in his judgment he used language which seems particularly appropriate to the matter I have to deal with : " In the present case the jurisdiction invoked is the creation of a statute not even conferring jurisdiction in general terms, but confined to a particular defined subject matter. The first question which a Judge has to ask himself when he is invited to exercise a limited statutory jurisdiction is whether the case falls within the defined ambit of the statute ; and it is his duty to decline to make an order as Judge if, and so far as, the matter is outside the jurisdiction ; and if he does not do so he may (if a Judge of an inferior Court) be restrained by prohibition . . . . . In *Jones v. Owen* . . . . it was held by Mr. Justice Patteson that when there was a total want of jurisdiction no consent could be given, and that learned Judge said, ' It is said that the attorney for the defendant did not object to the jurisdiction ; but that is not admitted on the other side. At all events, there was total want of jurisdiction which no assent could cure' ".

The principle—that estoppel by conduct does not preclude a party who took part in the proceedings from raising the question of jurisdiction, or give jurisdiction in a case where the want of jurisdiction appears on the face of the proceedings and the Judge must or ought to have known that he was acting beyond his jurisdiction—has been applied in later cases. In *Simpson and Latton v. Crowle* [2], a party raised the question of jurisdiction in appeal, though he had failed to raise it in the lower Court and it was held that the principle of *Farquharson v. Morgan* (*supra*) should be applied, as the principle should not be confined to cases of prohibition. But the operation of the principle of estoppel must not be misunderstood and its limits are clearly stated in Halsbury's Laws of England

[1] (*1867*) *36 L. J. Ex. 225.* [2] (*1921*) *90 L. J. K. B. 878.*

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(3rd Edition) Vol. 9, paragraph 824: " Where by reason of any limitation imposed by statute, charter or commission, a Court is without jurisdiction to entertain any particular action or matter, neither the acquiesence nor the express consent of the parties can confer jurisdiction upon the Court, nor can consent give a Court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled. When the Court has jurisdiction over the particular subject matter of the action or the particular parties, and the only objection is whether, in the circumstances of the case, the Court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case, or a defendant by appearing without protest, or by taking any steps in the action may waive his right to object to the Court taking any cognisance of the proceedings ". When a Court has jurisdiction in particular cases which depend on the existence of a certain state of facts a person who admits, or does not challenge, the existence of those facts can estop himself from denying their existence at a subsequent stage of the proceedings. But where a Court has jurisdiction in a particular class of cases, not depending on the existence of any fact but limited to particular subject-matters, estoppel or consent does not arise because there is total lack of jurisdiction in respect of matters outside those limits. Spencer Bower draws attention to the two types of cases at page 236 : " So when a party litigant, being in a position to object that the matter in difference is outside the local, pecuniary, or other limits of jurisdiction of the tribunal to which his adversary has resorted, deliberatedly elects to waive the objection, and to proceed to the end as if no such objection existed, in the expectation of obtaining a decision in his favour, he cannot be allowed, when this expectation is not realized, to set up that the tribunal had no jurisdiction over the cause or parties, except in that class of case already noticed, where the allowance of the estoppel would result in a totally new jurisdiction being created. The like estoppel is raised by a party's attendance at the hearing and taking part in the proceedings without raising any objections to the personal disqualification of a member of the tribunal, or to the non-compliance of any notice, summons, or service of process, with statutory requirements or rules of court, or to the informality of a writ, or to the irregularity of a verdict in a statutory compensation case on matters which by statute the tribunal is not authorized to take into consideration." " The class of case already noticed " which he refers to, is the class where there is a total want of jurisdiction, and to which the passage on page 187 already cited refers.

The rule has been expressed in many different ways and the most recent authority brought to my notice is *Madhara Rao v. Surya Rao* [1], decided by a Full Bench of the Madras High Court. The petitioners in that case applied for a writ of Certiorari to quash an order made by a Deputy Registrar of Co-operative Societies (which had set aside the election of Directors of a Co-operative Bank) on the ground that the Deputy Registrar had no initial jurisdiction to deal with the matter. A preliminary objection to the application was raised on the ground that as no exception was taken by the petitioners before the Deputy Registrar regarding the exercise of jurisdiction by the Deputy Registrar, but they

[1] *(1954) A. I. R. Madras 103.*

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had on the contrary acquiesced in the exercise of jurisdiction by him, they were precluded from now raising their objection. The objection was supported by reference to the case of *Laxaman Chettiar v. Commissioner of the Corporation of Madras* [1]—which, I should add, is one of the authorities relied on by Mr. Jayewardene in support of his preliminary objection. The objection was overruled, the judgment stating, " No amount of consent would cure the initial want of jurisdiction. It is not open to a person to confer jurisdiction by consent and no amount of acquiescence would confer jurisdiction upon a tribunal or Court where such jurisdiction did not exist. The contention raised by the petitioner if well founded would go to the root of the matter, and it would be a case of total lack of jurisdiction, which cannot be cured by consent or acquiescence ". The case of *Laxaman Chettiar v. Commissioner of the Corporation of Madras* was distinguished as not being a case of initial want of jurisdiction. It seems to me that the principles on which the Court acts are the same in the case of Prohibition as in the case of Certiorari, where there is a want of jurisdiction pleaded. There is much to be said for the view that the only difference between Prohibition and Certiorari is that the former " can be brought at an earlier stage of the proceedings complained of: it is preventive rather than remedial "—C. K. Allen, Law in the Making, (5th Edition), page 548. This view is supported by the judgment of Atkin L.J., who said in *R. v. Electricity Commissioners* [2], " I can see no difference in principle between Certiorari and Prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matter which would result in its final decision being subject to being brought up and quashed on Certiorari, prohibition will lie to restrain it from so exceeding its jurisdiction ". Thus it seems clear that if the Tribunal of Appeal laboured under an initial want of jurisdiction to hear the appeals of the 4th to 9th respondents, the acquiescence of the petitioner has no bearing on the question of its validity or invalidity on the ground of want of jurisdiction.

(6) The objection based on the alleged lack of bona fides depends on the materiality of the averments which, it is said, should have had a place in the affidavit filed by the petitioner. The particular averments which Mr. Jayewardene and Mr. Thambiah claim should have been made are (1) that the petitioner's counsel was present on October 10, 1952, when the order of the Tribunal was delivered especially in view of the " suggestio falsi " contained in the averment that the petitioner received a copy of the order on November 15th, 1952, and (2) that the petitioner raised the objection of want of jurisdiction and later withdrew it and continued to take part in the proceedings. Now it is undoubtedly true that the petitioner in an ex parte application for relief, whether in the shape of an injunction or a rule nisi for a writ of Certiorari or any other discretionary writ must be frank with the Court, and must not suppress material facts or practise anything like deception. The rule was referred to by Scrutton, L.J., in *Rex v. Kensington Income Tax Commissioners* [3] in the following terms :—" It has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that

[1] *50 Madras 130.* [2] *(1924) 1 K. B. 171.*
[3] *(1917) 86 L. J. K. B. 257.*

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when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts—it says facts, not law. He must not misstate the law if he can help it, the Court is supposed to know the law. It knows nothing about the facts, and the applicant must state fully and fairly the facts ; and the penalty by which the Court enforces that obligation is that if it finds out that the facts have been fully and fairly stated to it the Court will set aside any action which it has taken on the faith of the imperfect statement ". I would, however, stress the words " material facts, " and I need hardly add that their materiality must depend on the particular circumstances of each case. I have tried to show that acquiescence is not a relevant matter in a case of total want of jurisdiction: it follows that it is immaterial whether the petitioner raised an objection based on the lack of jurisdiction and withdrew it or not, for it has no bearing on the invalidity of the proceedings. How then could its non-disclosure in the affidavit come within this rule of the Court? Even if the petitioner's counsel was present when the order of the Tribunal was delivered I do not think that makes any difference, because I have already held that there has been no inordinate delay between that date and the date of filing this application.

But it is also necessary in this connection to consider whether the petitioner is entitled to relief—assuming there are no other obstacles in his path—as of right or merely as a matter of discretion, for the rule enunciated by Scrutton, L.J., applied to cases where a discretion has to be exercised by the Court. Mr. Perera's proposition was that when an aggrieved party applies for Certiorari in respect of an order made by a quasi-judicial body which had acted in the particular matter where it totally lacked jurisdiction, that party is entitled to the writ as of right ; but where there was only a contingent want of jurisdiction, acquiescence or waiver or similar conduct would place even an aggrieved party in the same position as a stranger and the grant of relief is discretionary. I consider, after examining the many authorities cited, that this is the correct position. The opinion of Willes, J., in the *Mayor of London v. Cox* (*supra*) points out the distinction between the two cases :—" There is indeed a distinction after sentence between a patent and a suggested defect, for if the party below, whether plaintiff or defendant, thinks proper, instead of moving for a prohibition to proceed to trial in the special or inferior Court and is defeated, then if the defect be of power to try the particular issue only the right to move for a prohibition is gone. If the defect be of jurisdiction over the cause and that defect be apparent upon the proceedings a prohibition goes after sentence". This decision was followed by the full Court of Appeal in *Broad v. Perkins* [1], which was a case where the defect in the jurisdiction of the inferior Court was not apparent but depended upon some fact in the knowledge of the applicant for prohibition which he had an opportunity of bringing in the Court below—but did not. In such a case the grant of the writ was discretionary as contrasted with a case such as *Farquharson v. Morgan* (*supra*) where there is a total absence of jurisdiction to deal with the particular matter ; in the latter case I am satisfied that the Court is bound to grant the writ, if it is applied for by a person

[1] (1888) 57 L. J. Q. B. 638.

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aggrieved, notwithstanding the existence of consent or acquiescence, and I do not therefore see how it is necessary for an applicant is such a case to set out facts which have a significance only where there is a discretion to be exercised. The cases of *R. v. The Justice of Surrey* (*supra*) and *R. v. Williams* (*supra*) already cited also deal with this distinction.

(7) Was the Tribunal of Appeal under a duty to act judicially in hearing the appeal in question ? Mr. Jayawardene submitted it had no such duty and was acting as a purely administrative body, in which case of course Certiorari could not issue. Slesser L.J., in *R. v. London County Council*[1], sub-divided the celebrated dictum of Atkin L.J., in the case of *R. v. Electricity Commissioners* (supra) to read : "Wherever any body of persons "—firstly—" having legal authority "—secondly—" to determine questions affecting the rights of subjects, " and—thirdly—" having the duty to act judicially "—fourthly— " act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs ". It is the third necessary characteristic that I am now considering. It must be emphasised that this application is not to quash the order of the Commissioner of Motor Transport and it is therefore hardly necessary to consider whether he was under a duty to act quasi-judicially or not when he made his order imposing a condition on the licences of the 4th to 9th respondents. But I would point out, in passing, that the case of *Errington v. Minister of Health* [2] shows that a proceeding may be administrative at one stage and quasi-judicial at another—depending on whether there are objections to be considered or not—even though the same authority may be acting throughout. When there are objections to be considered and the authority has to decide whether an order should be made in spite of the objections raised, he may then be regarded as exercising judicial functions. We have, however, to consider the position which arose when the Commissioner's order was appealed from, and the duty of deciding the appeal devolved upon the Tribunal. Had it the duty to act judicially ? Kania C.J. said in *Province of Bombay v. Khushaldas* [3] : " The true position is that when the law under which the authority is making a decision itself requires a judicial approach, the decision will be quasi-judicial. Prescribed forms of procedure are not necessary to make an inquiry judicial, provided that in coming to the decision the well recognized principles of approach are required to be followed ". In the same case Mukherjea, J., said, " Every judicial act presupposes the application of the judicial process. There is a well marked distinction between forming a personal or private opinion about a matter and determining it judicially. In the performance of an executive act, the authority has certainly to apply his mind to the materials before him : but the opinion he forms is a purely subjective matter which depends entirely upon his state of mind. It is of course necessary that he must act in good faith, and if it is established that he was not influenced by any extraneous consideration, there is nothing further to be said about it. In a judicial proceeding, on the other hand, the process or method of application is different. ' The judicial process involves the application

[1] *(1931) 100 L. J. K. B. 760.* [2] *(1935) 104 L. J. K. B. 49.*

[3] *A. I. R. (1950) S. C. 222.*

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of a body of rules or principles by the technique of a particular psychological method'—Robson's Justice and Administrative Law, p. 33. It involves a proposal and an opposition, and arriving at a decision upon the same on consideration of facts and circumstances according to the rules of reason and justice. Vide *R. v. London County Council* [1]. It is not necessary that the strict rules of evidence should be followed; the procedure for investigation of facts or for reception of evidence may vary according to the requirements of a particular case. There need not be any hard and fast rule on such matters, but the decision which the authority arrives at must not be his 'subjective', 'personal' or 'private' opinion. It must be something which conforms to an objective standard or criterion laid down or recognized by law, and the soundness or otherwise of the determination must be capable of being tested by the same external standard. This is the essence of a judicial function which differentiates it from an administrative function; and whether an authority is required to exercise one kind of function or the other depends entirely upon the provisions of the particular enactment. Where the statute itself is clear on this point, no difficulty is likely to arise, but where the language of the enactment does not indicate with precision what kind of function is to be exercised by an authority, considerable difficulties are bound to be experienced".

Mr. Jayewardene contended that before the Commissioner there were no two parties, nor were there a proposal and an opposition, and before the Tribunal the position was the same. He relied on the dictum of Scrutton, L. J., in *R. v. London County Council* (*supra*) that "it is enough if it (the Tribunal) is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition". But in *R. v. Manchester Legal Aid Committee* [2], Parker, J., stressed the word "enough" in this passage and said: "The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable to attempt to define exhaustively". Mukherjea, J., in the judgment from which I have already quoted pointed out that a proposal and an opposition merely meant a point in controversy or a "lis". It may consist of the interest of the public on the one hand and the interest of the party affected on the other. "No formal array of parties," he said, "is necessary. It is enough that there is a point in issue which has got to be decided between parties having conflicting interests in respect to the same". In the case of *R. v. Electricity Commissioners* (*supra*) the only parties were the Commissioners who proposed the scheme and the companies who objected to it. The Commissioners had to make an order after hearing the objections, but since they had a duty to act judicially they were held to be subject to Certiorari. Nor, again, is the hearing of evidence a necessary pre-requisite of a quasi-judicial proceeding. It is at the earlier stage of a proceeding that evidence is taken, before the hearing of the appeal is reached. Lord Haldane, L.C., said in *Local Government Board v. Arlidge* [3], "When the duty of deciding an appeal is imposed, those whose duty it is to decide must act judicially. They must deal with the question

[1] *(1931) 100 L. J. K. B. 760.*

[2] *(1952) 2 Q. B. 413.*

[3] *(1915) A. C. 120.*

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referred to them without bias, and they must give each of the parties the opportunity of adequately presenting the case made. The decisions must be come to in the spirit and in the sense of responsibility of a tribunal whose duty it is to mete out justice ". The point decided by the Privy Council in *Shell Company of Australia v. Federal Commissioner of Taxation*[1] was that " an administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called ", so that case has no bearing on this issue. When I consider the position of the Tribunal of Appeal in the light of the Regulations governing its procedure, and its powers after it has heard an appeal, I cannot see how it can be regarded as anything but a body which is required to act quasi-judicially. I think the Chairman of the Tribunal fully appreciated this position when he said in his order, overruling an objection to the petitioner being heard at the appeal: " In the ordinary course of business and of justice it is right to hear the parties who are affected by an order . . . . I have no doubt that the legislature would wish us to hear all parties affected by any conditions proposed to be attached to such a licence ". Of course it does not follow that if he had decided not to hear the petitioner, because the Regulations gave the petitioner no right to be heard, the tribunal would not have been a body acting quasi-judicially; the test is not whether it did in fact act in a judicial manner but whether it had a duty to act in a judicial manner.

At this stage it is convenient to consider a submission made by Mr. Nadesan. His point was that even if the condition imposed by the Commissioner has been wrongly deleted by the Tribunal, the passing of the Motor Traffic Act, No. 14 of 1951, had made the Commissioner's order void; therefore the order of the Tribunal was also void; in the result, he submitted, no practical purpose is served by the present application and this Court should not therefore make an order which is unnecessary. The argument is attractive but lacks substance; it overlooks the reason for granting certiorari, viz., an act done in excess of or in usurpation of jurisdiction. As Slesser, L.J., said, in *R. v. London County Council* (*supra*), " To argue that because an authority was usurping a jurisdiction or acting contrary to their judicial powers, therefore certiorari would not lie would be to defeat the whole purpose of the writ. But the question is, have they purported under the statute, and have they a duty under the statute, to perform a judicial function ?". Mr. Nadesan raised his objection before I had heard Mr. Perera on his application, and his argument may have had to be considered more carefully if this case was one where there was only a latent want of jurisdiction in the Tribunal. In such a case, as I have tried to show, even when an aggrieved party applies, the grant of the writ is discretionary and he can preclude himself by acquiescence. But here the petitioner has attacked the order as being void on the ground that the Tribunal suffered from a patent want of jurisdiction to make it; in such a case Certiorari is granted as of right, and the void order is quashed. In the view I take of the Tribunal's power to make the order it is, strictly speaking, unnecessary for me to go into the question of the effect the Commissioner's order had upon the licences of the 4th to 9th respondents.

[1] *(1931) 100 L. J. P. C. 55.*

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The objection was taken on the basis that the Commissioner's order of variation ceased to have any effect when the Ordinance No. 47 of 1942 was repealed. I accept Mr. Nadesan's contention that the word "licence" is used in very many parts of the Ordinance No. 47 of 1942 to refer to the written document of authority, but it is not always so used. For example, when the Ordinance refers to an order revoking or suspending the licence it surely refers not to the written document but to the authority conferred by that document. It is permissible to give different meanings to the same word, even in the same section of an Ordinance, if the context so requires it, and that has become necessary in this case. Now the point we are concerned with in this case is in section 6 (2) which enacts :—

> "The Commissioner may at any time, by notice served on the holder of a road service licence, vary the conditions attached to a road service licence, and require the production of the licence for the purpose of such variation."

Does this sub-section mean that the conditions cannot be varied except by a writing on the document, or does it mean that the serving of a notice on the holder *ipso facto* affects the variation ? I take the latter view, and I also take the view that the words "for the purpose of such variation" do not mean "for the purpose of giving effect to such variation", but "for the purpose of implementing such variation". The variation takes effect when the notice is served, or is deemed to have been served under section 17. It is from such notice that the holder is given the right of appeal by section 13 (4). But it is said that no such variation can take effect until it is entered on the written document, because the Regulations require the Commissioner to so enter it. The logical effect of this argument would be that a holder of a licence can completely nullify any order of variation by refusing to produce the document for the necessary alteration. I do not think a person can, by his own act, be allowed to defeat the object of an Ordinance in this way, and I should be reluctant to interpret section 6 (2) so as to permit of such an evasion of the provisions of the Ordinance, unless it is necessary. I would hold that the order varying the licences of the 4th to 9th respondents took effect as soon as the Commissioner gave them notice of such variation, and the licences therefore had the new condition imposed on them though it was not actually written on the documents. Since they are deemed to be stage carriage permits granted under Act 14 of 1951 (see section 246 (1)), they would be such permits containing this condition.

I shall now deal with the application of the petitioner. As I have already indicated, it is made on the basis that there was a total want of jurisdiction in the Tribunal of Appeal to deal with the appeal of the 4th to 9th respondents against the Commissioner's order varying their licences by imposing a particular condition. If this is the position it follows, in the view I take of the authorities already cited, that the writ must go. If the law had remained as enacted in Ordinance No. 47 of 1942, there would have been no question as to the Tribunal's jurisdiction to make the order it did, but on September 1st, 1951, the Motor Traffic Act came into operation. By section 243 (1) the Act repealed the Motor Car Ordinance No. 45 of

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1938 and the Omnibus Service Licensing Ordinance No. 47 of 1942; provisos (*b*) and (*c*) however kept those Ordinances in force for particular purposes as follows :—

(*b*) the provisions of the Omnibus Service Licensing Ordinance, No. 47 of 1942, shall continue in force for the purpose and only for the purpose of enabling the provisions of section 246 of this Act to have effect ; and

(*c*) the provisions of the repealed Ordinance relating to the constitution and powers and functions of the Tribunal of Appeal and to appeals to the Tribunal of Appeal or appeals from decisions of the Tribunal shall continue in force but only for the purpose of enabling the provisions of section 246 of this Act to have effect.

What is the effect of the repeal and of these two provisos read together ? I think they mean that nothing further could be done under the repealed Ordinance by reason of the repeal beyond what was expressly saved in the provisos. Mr. Thambiah submitted that under section 6 (3) (*c*) of the Interpretation Ordinance, Cap. 2, the appeal before the Tribunal continued as though there had been no repeal. But I think that this would have been the position only if the two provisos had been absent. The provisos have expressly laid it down that nothing beyond what is preserved in section 246 shall continue in force. No more emphatic words could have been used to indicate that. The Tribunal therefore had no powers left to it beyond those conferred on it by section 246 (4) which is the only part of section 246 which deals with the matter of appeals and their consequences. Section 246 (4) reads as follows :—

" In any case where an application was made to the Commissioner of Motor Transport under the Omnibus Service Licensing Ordinance, No. 47 of 1942, for a road service licence, or under the repealed Ordinance for a licence for a lorry, and the Commissioner has given a decision granting or refusing the application—

(*a*) all the provisions of sections 13 and 14 of Ordinance No. 47 of 1942, or as the case may be, sections 50 to 54 of the repealed Ordinance shall apply in relation to the right of appeal against such decision, and in relation to any appeal which may have been duly preferred thereunder prior to the date of the commencement of this Act ;

(*b*) if the decision is that the application should be granted, and no appeal is or has been preferred against it, effect shall be given to the decision as provided in sub-section (5) or in sub-section (6) of this section ;

(*c*) if an appeal is or has been preferred against the decision, and the final determination upon such appeal, whether by a tribunal of appeal or the Supreme Court or by His Majesty in Council, is that the application should be granted, effect shall be given to such final determination as provided in sub-section (5) or in sub-section (6) of this section. "

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Mr. Perera submitted that nothing more was necessary to ensure that the only decisions of the Commissioner to which the sub-section applied are those either granting or refusing an application for a licence; and, therefore, a decision attaching any condition to a licence or varying the conditions of a licence, which was the decision in this case, is not provided for in the sub-section and no appeal then pending before the Tribunal was saved by sub-section (4) (*a*). There can be no doubt that under section 13 (4) of Ordinance No. 47 of 1942, a holder of a licence could appeal against such a decision to the Tribunal, and section 14 (4) provided for the order the Tribunal could make on such an appeal. The omission in section 246 (4) of any reference to such a decision of the Commissioner is significant and was stressed by Mr. Perera.

The main submissions of the respondents' counsel were (1) that since the Commissioner had granted the respondents licences within the meaning of the words " the Commissioner has given a decision granting or refusing the application ", paragraph (*a*) made all the provisions of sections 13 and 14 of Ordinance No. 47 of 1942 applicable in relation to the appeal filed by the 4th to 9th respondents, since their appeal was filed prior to 1st September 1951 ; (2) that the operation of paragraph (*a*) was not confined to appeals against decisions granting or refusing applications for licences but to " any appeals " against any decision of whatever kind such as is provided for by section 13, Ordinance No. 47 of 1942, including a decision varying a licence ; (3) stress was laid on the reference to " all the provisions of sections 13 and 14 " of that Ordinance and the absence of words which confined the class of appeals to appeals against decisions granting or refusing applications for licences ; (4) it was submitted that since section 13 does not provide for an appeal against an order granting a licence, paragraph (*b*) could only be given a meaning by extending the operation of sub-section (4) to appeals in all cases against any decision made by the Commissioner ; (5) support was sought to be derived from the Amending Act No. 1 of 1952 which added sub-section (7) to section 246 of the main Act, and in which the holder of a licence was mentioned as a possible party to an appeal. In replying to the submissions Mr. Perera argued (1) that sub-section (4) dealt only with two classes of decisions, viz., those granting licences, (but which had not been implemented by the issue of licences), and those refusing licences ; he submitted that decisions granting licences which had been implemented were dealt with in sub-section (1) ; (2) that sub-section 4 (*a*) conferred the right of appeal against only those two classes of decisions, and laid down the conditions which applied to the filing of appeals against only such decisions, the words " any appeal " not having the effect of enlarging the classes but only meaning " any appeals of the classes specified " ; (3) the reference to all the provisions of sections 13 and 14, Ordinance No. 47 of 1942, did not enlarge the classes which had already been defined, but was merely to require that there should have been due compliance with the provisions of those sections ; (4) an appeal against a grant of a licence is possible where there have been two or more applicants for a licence and one of them is granted, and the others are refused the licences ; (5) the Amending Act No. 1 of 1952 can be given effect to without enlarging the scope of section 246 (4) ;

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(6) not only does section 246 not provide for an appeal against an order varying the conditions of a licence, it does not provide for an appeal against an order suspending or revoking a licence, nor does it provide the machinery to give effect to any order made on such appeals. The absence of administrative provision for such cases, he submitted, indicates that no right of appeal in such cases was intended to be preserved.

The arguments for the respondents were ingenious but I cannot accept them. They do violence to the wording of section 246 (4) because they seek to give the words " a decision granting or refusing the application " an unreasonable interpretation ; they overlook the situation of the words " in relation to any appeal which may have been duly preferred " in the sub-section, for I cannot believe that any draughtsman who intended to confer such a right of appeal as that contended for by the respondents' counsel would have done so by merely tacking on the words to complete the sentence that comprises paragraph (*a*) ; they fail to convince, whereas Mr. Perera's explanation of the scope of section 246 (4) is reasonable and gives due weight to all its provisions so that they form a coherent scheme. It was also submitted by Mr. Thambiah that the Act should be so interpreted as to preserve, if possible, the right of appeal which had vested in the respondents before the Act came into operation. While I accept the force of his argument which is based on the proposition that it is a serious thing to deprive a person of the right of appeal to a superior tribunal which had accrued to him, I think the cumulative effect of the provisions of section 243 and section 246 (4) is just that.

The consequence of my findings on the points of dispute is that the Tribunal acted without any jurisdiction in hearing the appeal and making an order since the appea was not against an order granting or refusing a licence. The Tribunal suffered from a total and patent want of jurisdiction over the subject matter of the appeal ; the petitioner has not therefore precluded himself, by taking part in the proceedings, from making this application. I therefore grant the prayer of the petitioner and quash the order made by the Tribunal of Appeal. The 4th to 9th respondents will pay the costs of the petitioner.

Application allowed.

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1955 *Present :* **Gratiaen J. and Sansoni J.**

K. DURAISAMY, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 517—Application No. J 514

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Citizenship by registration—Sections 6 and 22 (as amended by Section 4 of Act No. 37 of 1950)—"Permanently settled in Ceylon"—Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949, s. 4 (1) (a)—Citizenship Act, No. 18 of 1948, ss. 4, 5—Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947, s. 29.

In an application by an Indian Tamil to register him and his wife and minor children as citizens of Ceylon—

Held, that under Section 6, read with Section 22, of the Indian and Pakistani Residents (Citizenship) Act, an Indian or a Pakistani residing in Ceylon is entitled as of right to exercise the privilege of being registered as a citizen of Ceylon if at the time of his application (made within the requisite period of time)

(1) he and his family (if any) possess the residential qualifications respectively prescribed for them by the Act, and he demonstrates his intention to settle permanently in Ceylon by electing irrevocably to apply for registration ;

and (2) he satisfies all the other relevant conditions laid down in Section (2) of the Act ;

and (3) the requirement as to "origin" in paragraph (*a*) of the words of the definition is satisfied, or, he is at least a descendant of a person whose origin was as aforesaid.

Although the concept of "permanent settlement" involves two elements—the fact of residence and the intention permanently to remain in Ceylon—the requisite intention is satisfactorily established by the applicant's positive decision to claim registration with a "clear understanding" of its implications. Once the practical tests prescribed by the Act have been satisfied, it is not necessary to decide inferentially whether or not the applicant may be presumed to have acquired a domicil of choice in Ceylon.

APPEAL under Section 15 of the Indian and Pakistani Residents (Citizenship) Act. Listed before two Judges upon a reference by Fernando A. J.

H. V. Perera, Q.C., with *Walter Jayawardene* and *S. P. Amerasingham*, for the applicant-appellant.—The Commissioner for the Registration of Indian and Pakistani Residents says, "You must first prove that you have abandoned your domicil of origin". The text books say this is not

2——J. N. B 43808-1,597 (1955)

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an easy matter to prove. The intent of this piece of legislation was to deprive some people of certain rights. It does cause a great deal of hardship to certain people. The Privy Council said in the case of *Kodakan Pillai v. Mudanayake* [1], " If there was a legislative plan, the plan must be looked at as a whole and when so looked at it is evident in their Lordships' opinion that the legislature did not intend to prevent Indian Tamils from attaining citizenship provided that they were sufficiently connected with the island ".

The expression " permanently settled " is one that has been previously used—Donoughmore and Soulbury Elections Orders-in-Council. A mere declaration by a person that he intended to stay in Ceylon entitled him to a certificate.

In this case the condition of uninterrupted residence has been satisfied. Sections 3 and 6 referred to. The applicant cannot then be told " Show me first that you have abandoned your domicil of origin ". Section 6 (4) next referred to. The legislation, if fairly administered, is a very benevolent measure, of which no one can complain.

Section 22 referred to. The words " permanently settled " in sub-section (*b*) discussed. See also amending Act 37 of 1950, Section 4. This is a definition and cannot be said to include a highly complex legal concept such as domicil of choice.

The words " permanently settled " have been used in previous legislation—Nationalisation Ordinance, No. 21 of 1890, Chapter 243, Section 2 ; Order-in-Council 1931—State Councils Elections (Donoughmore Constitution)—Section 9 and also Section 7. These indicate that permanent settlement is something less than domicil.

In giving the expression " permanently settled " a meaning, it is permissible to consider the earlier use of this expression. The word " permanent " is used as opposed to the term temporary. It is not reasonable to expect a person to give his mind for all time and to decide to stay permanently. A person can permanently be resident in Ceylon although he may not have changed his domicil of origin.

The facts were next dealt with.

Counsel then referred to the signing of the " B " forms in applying to the Exchange Controller for authority to transfer money to India. This question has been considered in *Thomas v. Commissioner for Registration of Indian and Pakistani Residents* [2] and in *Poravia Pillai v. Commissioner for Registration of Indian and Pakistani Residents* [3].

T. S. Fernando, Q.C., Acting Attorney-General, with *M. Tiruchelvam*, Deputy Solicitor-General, *H. A. Wijemanne* and *R. A. Wanasundera*, Crown Counsel, for the respondent.—The words " provided they were

[1] *(1953) 54 N. L. R. 433 at 439.* [2] *(1953) 55 N. L. R. 40.*
[3] *(1953) 54 N. L. R. 407.*

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sufficiently connected with the island" in *Kodakan Pillai v. Mudanayake* are important. See also Section 22 of Act No. 3 of 1949, Section 4 of Act No. 37 of 1950 and Sections 7 and 9 of the Order-in-Council of 1931.

The expression "permanently settled" cannot be given a meaning without any reference to domicil. See *Lord v. Colvin* [1]. It is impossible to acquire a domicil of choice without permanent residence—Cheshire's Private International Law (4th edn.) page 160; *Hodgson v. De Beauchesne* [2]; *Drevon v. Drevon* [3]. The applicant must prove not merely that he has acquired a domicil of choice, but also that he is permanently settled—Dicey: Conflict of Laws (6th edn.) pages 89 to 97; *Bell v. Kennedy* [4]; *Udny v. Udny* [5]. The lowest that an applicant must show is that he has acquired a domicil of choice—in addition he must show as a matter of fact that he is permanently settled.

The Indian Courts will not accept the position that one can acquire citizenship by something less than a domicil of choice. See Maxwell: Interpretation of Statutes (10th edn.) page 148. Permanent settlement cannot certainly be anything less than domicil of choice—*Winans v. Attorney-General* [6]; *Huntley v. Gaskell* [7]; *Ramsay v. Liverpool Royal Infirmary* [8]; *May v. May & Leiman* [9]; Dicey; Conflict of Laws (6th edn.) pages 89 to 97.

The statements made by the applicant in the "B" Forms must be explained by him; otherwise it must be taken as a factor against him.

The Commissioner has not misdirected himself. He has rightly applied the test of domicil of choice.

H. V. Perera, Q.C., replied.—It is wrong to substitute for "permanent settlement", "domicil". The expression "permanent settlement" is a simpler expression than "domicil".

With regard to the cases cited concerning domicil, the question of domicil is tested by some more or less technical rules. The approach is completely different. In the context, "permanent settlement" means, "he is residing here in Ceylon with the intention of making Ceylon his permanent home—for an indefinite period". I have not got to begin by rebutting a presumption. The mode of approach is: are you permanently settled? In proving a domicil of choice one must displace a domicil of origin. In this case it is not necessary for me to prove that I have abandoned my domicil of origin.

Deputy Commissioners cannot be expected to be aware of the concepts of domicil. The legislature has used a simpler term.

[1] *(1859) 28 L.J. (N.S.) Equity 361 at 365 et seq.*
[2] *(1858) 12 Moore's Privy Council Cases page 286 at page 330.*
[3] *(1864) 34 L.J. (N. S.) Equity 129.*
[4] *(1868) L. R. 1 Scottish Appeals 307 at 319.*
[5] *1869 L.R. 1 Scottish Appeals 441 at 449.*
[6] *1904 A. C. 287 at page 290.*
[7] *1906 A. C. 56 at page 68.*
[8] *1930 A. C. 588.*
[9] *1943 All E. R. 146.*

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The object is to give citizenship rights. A naturalised person does not necessarily change his domicil. He gets only citizenship rights, e.g., the right to vote.

Counsel then referred to Section 6 (4) (*b*). The scheme of the Act contemplates a postponement of certain rights which are acquired by a change of domicil. This indicates that change of domicil and permanent settlement are not the same. Otherwise the legislature could have easily said so.

Cur. adv. vult.

February 18, 1955.

This is an appeal by an Indian Tamil against an order refusing to register him and his wife and minor children as citizens of Ceylon under the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949. The judgment of this Court upon a reference by Fernando A.J. is as follows :—

Sections 4 and 5 of the Citizenship Act, No. 18 of 1948 and Section 4 (1) (*a*) of the Ceylon (Parliamentary Elections) Amendment Act No. 48 of 1949 had the effect of disfranchising many Indian Tamils (and indirectly their descendants) in spite of their long residence in Ceylon. In enacting these laws, however, Parliament was exercising " the perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals " on *bona fide* considerations which did not violate Section 29 of the Ceylon (Constitution and Independence) Orders-in-Council 1946 and 1947. *Kodakan Pillai v. Mudanayake* [1]. The complaint of unfair discrimination against a community as such was negatived, *inter alia*, by the provisions of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949, whereby an Indian Tamil could by application obtain citizenship by registration and thus protect his descendants, " *provided that he had a certain residential qualification* " and was " *sufficiently connected with the Island* ". The Judicial Committee pointed out in this connection that the migratory habits of most Indian Tamils in this Island were facts " directly relevant to the question of their suitability as citizens of Ceylon ".

The main provisions of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949 (hereinafter called " the Act ") must now be examined with special reference to the qualifications prescribed for acquiring citizenship by registration. Bearing in mind the legislative plan as a whole, we conclude generally that the intention was to admit any Indian or Pakistani residing in Ceylon to the privilege of Ceylon citizenship (if claimed within a stipulated period of time) provided that he satisfied *certain tests prescribed by statute for establishing that his association with the Island could not* (*or could no longer*) *be objected to as possessing a migratory or casual character.*

[1] (1953) 54 N. L. R. 433.

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The main question before us relates to the meaning of the words " permanently settled in Ceylon " in Section 22 of the Act (as amended by Section 4 of Act No. 37 of 1950) which defines an " Indian or Pakistani resident ". The Section in its amended form reads as follows :—

> " 22. An Indian or Pakistani resident means a person (*a*) whose origin was in any territory which immediately prior to the passing of the Indian Independence Act 1947 of the Parliament of the United Kingdom formed part of British India or any Indian State and (*b*) who has emigrated therefrom and *permanently settled in Ceylon.*
>
> and includes (1) a descendant of any such person and (2) any person, *permanently settled in Ceylon,* who is a descendant of a person whose origin was in any territory referred to in the preceding paragraph (*a*). "

The preliminary requirement as to " origin " in paragraph (*a*) presents no difficulty.

It has been suggested that an applicant must always prove that he " emigrated " from his country of origin in the sense that he had left it from the very outset with a firm resolve to abandon his domicil there. This could not have been the intention of an enactment designed to achieve a realistic purpose. Be that as it may, the language of the amending Act has virtually dispensed with the qualification of having " emigrated " in the strict sense suggested. An applicant who cannot come within the ambit of paragraph (*a*) is now invariably " included " in the definition because his father was of Indian or Pakistani " origin " ; so that " emigration " has ceased to be, even if it ever was, a vital qualification.

Section 6 (1), read with Section 22, directly raises the question whether an applicant is " permanently settled in Ceylon ". We therefore propose to postpone our discussion of Section 6 (1) until we have first examined the other special qualifications and conditions for registration prescribed by the Act :

> (1) the applicant must possess a minimum qualification of " uninterrupted residence " as defined in *Section 3* ;
>
> (2) his wife (if he is married) and his minor dependent children (if any) must also possess certain residential qualifications—*Section 6* (*2*) (*ii*) in its recently amended form ;
>
> (3) he must establish a reasonable degree of financial stability—*Section 6* (*2*) (*i*) ;
>
> (4) he must be free from any disability or incapacity of the kind referred to in *Section 6* (*2*) (*iii*) ;
>
> (5) he must " clearly understand " the statutory consequences of registration—*Section 6* (*2*) (*iv*).

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One observes in all these requirements an underlying decision to deny Ceylon citizenship to non-nationals whom Parliament for one reason or another would consider unsuitable for that privilege. Hence the insistence on the long and " uninterrupted residence " of the applicant himself and on the residential qualifications of his immediate family (if any) regarded as a unit ; and the further safeguard that his prospects of useful citizenship were not likely to be endangered by poverty or other handicaps. Each of these requirements, if satisfied, would guarantee a more enduring quality to the tie between the new citizen and the country which he has elected to adopt, " for better, for worse ", as his own.

The requirement that the applicant must establish a minimum period of residence is easily explained. " *A presumption of domicil grows in strength with the length of the residence* . . . . A residence may be so long and continuous as to raise a presumption that is rebuttable only by actual removal to a new place ". *Cheshire's Private International Law* (4th edition) page 159. Similarly, the fact that a man's immediate family shares his connection with the country of disputed domicil is an extremely relevant factor for consideration. The imposition of these statutory standards relieves the investigating authority of the duty of deciding by mere legal inference whether an applicant's residence bears in the circumstances of any particular case a sufficient degree of permanency. Equally significant is the requirement that an applicant " clearly understands " the serious consequences which automatically flow from registration under the Act—namely (1) a statutory renunciation of the man's former *political status* and (2) the change in *civil status* which automatically results under the rules of private international law from a change of domicil. Here again the legislature has laid down in positive terms another well-established test of permanency (instead of leaving the applicant's intentions to be judicially ascertained by inference).

In ordinary litigation, a man may be held to have acquired a domicil of choice although the far-reaching consequences involving a change of civil status may never have entered his mind. The Court must then decide as best as it can whether the circumstantial evidence justifies a legal inference that " if the question had arisen in a form requiring a deliberate or solemn determination ", the person whose domicil was in dispute would have elected to renounce his former civil status and " to assume a position for the like purposes as a citizen of another (country) " —per Wickens V. C. in *Douglas v. Douglas* [1]. This formula was approved and applied by Lord MacNaghten in his notable judgment in *Winans v. Attorney-General* [2]. The local Act has advisedly taken the precaution of substituting a positive for an inferential test. The necessity of " making an election between the two countries " is directly addressed to the applicant's mind, and his choice must be deliberately and solemnly made with a full appreciation of all that the decision involves. If this positive

[1] *(1872) L. R. 12 Eq. 617.* [2] *1904 A. C. 287.*

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test is satisfied, there is neither scope nor necessity for probing further into his state of mind in order to ascertain (by inference or perhaps by guesswork) his actual intentions.

An Indian or a Pakistani residing in Ceylon is in our opinion entitled *as of right* to exercise the privilege of being registered as a citizen of Ceylon if *at the time of his application* (made within the requisite period of time)

(1) he and his family (if any) possess the residential qualifications respectively prescribed for them by the Act, and he demonstrates his intention to settle permanently in Ceylon by electing irrevocably to apply for registration ;

and (2) he satisfies all the other relevant conditions laid down in Section 6 (2) of the Act ;

and (3) the requirement as to " origin " in paragraph (*a*) of the words of the definition is satisfied, *or*, he is at least a descendant of a person whose origin was as aforesaid.

We agree with the Crown that the words " permanently settled in Ceylon " mean nothing less than " having acquired a domicil of choice in Ceylon " ; indeed, they mean something else as well, namely, that the applicant has also made a deliberate decision to renounce his former political status.

Once these exacting statutory tests have all been satisfied, the man's previous residence in this country assumes (unless it has already done so) the requisite degree of " permanency ", and Ceylon has become his " home ". His solemn " election between the two countries " in favour of Ceylon dispels any lurking suspicion that his association with Ceylon may be merely casual or migratory.

The concept of " permanent settlement " doubtless involves two elements, the *fact* of residence as well as the *intention* permanently or at least indefinitely to remain in this country. But in the context of the Act, *the requisite intention is satisfactorily established by the applicant's positive decision to claim registration with a " clear understanding " of its implications. The condition laid down in Section 6 (1) is thus fulfilled.* The gravity of the consequences of registration must be assumed to provide an adequate safeguard against an application by a person who does not genuinely intend to renounce his former status as a citizen of his country of origin.

It is not difficult to find a logical explanation, indeed a justification, for Parliament's decision to prescribe its own tests of " permanency ". In recent years there has been considerable criticism of the difficulties involved in the function of deciding judicially (but without the aid of statutory standards) whether or not a man may be presumed to have

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acquired a domicil of choice in the country in which he actually resides. A special Committee appointed by the Lord Chancellor of England in 1952 published a report last year recommending the adoption of certain simple rules contained in a Draft Code (reproduced in the 3rd edition of *Schmitthof's 'The English Conflict of Laws'* pages 491–493.) Until these or similar reforms are introduced, the Courts must continue "to investigate a man's actual state of mind rather than rest content with the natural inference of his long continued residence in a given country". *Cheshire* (supra) page 162.

By way of contrast, the administrative machinery provided by the Act has been admirably designed by Parliament to eliminate the tantalising problems which beset the regular Courts in deciding issues of "domicil". An application for registration is submitted in a prescribed form in which the applicant sets out the particulars on which he relies to establish his special residential qualifications and his compliance with the other onerous conditions precedent to registration. The facts relied on are in the first instance verified by an investigating officer (*not necessarily required by the Act to possess legal qualifications*) who reports thereon to the Commissioner (*who significantly is himself not required to possess legal qualifications*). If "a *prima facie*" *case for registration* has been established, the application is in due course allowed, unless an objector can show that "a *prima facie* case" does not in fact exist. Alternatively, the applicant has a further opportunity to establish "a *prima facie* case" at an inquiry held by the Commissioner (or one of his Deputies) "free from all the formalities and technicalities of the rules of procedure applicable to a Court of law". In these proceedings, the Commissioner, though "subject to the general direction and control of the Minister" (Section 18), nevertheless performs a judicial function which is confined to the impartial ascertainment (free from administrative direction of any kind) of the uncomplicated questions of fact specified by the Act. The legislative plan works well and expeditiously so long as it is clearly realised that there is no super-added responsibility to investigate extremely difficult mixed problems of fact and law which in most cases would present formidable obstacles even to an experienced Judge trained in the law. Those latter difficulties have been described as follows in *Cheshire* (supra) at page 155 :—

> "Once the relevance of vague hopes or dim expectations of a return to the fatherland is admitted, there is no end to the detail that the judge must consider. Often he must review the whole history of a man's life and examine such elusive factors as his fears and aspirations, his hopes and prejudices, his declarations both written and spoken. It follows that in many cases a practitioner will experience great difficulty in advising his client upon his place of domicil until it has been judicially determined, for the puzzle will be to predict what weight will be given by a judge to the various factors upon which the question turns. There is no common standard, since a fact which appeals to one mind as being of decisive significance seems of trivial importance to another. The desire of Mr. Winans (of *Winans v. Attorney-General*) to return to

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America in order to construct anti-British ships impressed Lord MacNaghten, but was discarded by Lord Lindley as immaterial. *The result is that a man's domicil may remain uncertain throughout his life.*"

Fortunately the Commissioner and his Deputies (lacking as they do the judicial experience and equipment of a MacNaghten or a Lindley) need not stray as amateurs into the complex field of human psychology in order to determine the real intentions of an applicant for registration. But, they have no doubt been selected for office because they are sufficiently competent to decide whether an applicant has satisfied the practical but uncomplicated tests prescribed by the Act.

In this view of the matter, the appellant was clearly entitled to succeed in his application. He and his wife have resided in Ceylon since 1934. Their minor children live with them and attend school in this country. He has always enjoyed the benefits of fixed employment in Ceylon; his modest savings have been invested here, and he has no ties with India except those of natural affection for his widowed mother and his two sisters (whom he dutifully wishes to support). He has ultimately made a genuine decision to cement his long association with this country by claiming the privileges of Ceylon citizenship with a clear understanding of the consequences which will result from registration. We can conceive of no better example of the kind of "suitable" person whom Parliament had in mind when the Act passed into law. He has satisfied all the onerous statutory conditions prescribed, and the circumstance that, in a very different context, he incorrectly described his residence in this country as "temporary" in order to facilitate (in violation of the "exchange control" regulations) the forwarding of the usual subsistence allowances to his mother and his sisters abroad cannot disqualify him. Indeed, even if the question had arisen for determination by an "understanding" judge on the issue of domicil, this isolated circumstance would have carried no weight in view of the other compelling factors established in his favour. The decision appealed from seems to us to have been reached in accordance with some *pre-determined departmental formula* (evidenced by preliminary orders made in identical language by different officers of the department in different areas) which is not warranted by the Act. We allow the appeal and direct the Commissioner to take appropriate steps under Section 14 (7) of the Act on the basis that a *prima facie* case for registration has been established to the satisfaction of this Court. The appellant is entitled to the costs of this appeal.

(Sgd.) E. F. N. GRATIAEN,
Puisne Justice.

(Sgd.) M. C. SANSONI,
Puisne Justice.

Appeal allowed.

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1955 *Present :* **Gratiaen J. and Sansoni J.**

REV. MORAGOLLE SUMANGALA, Appellant, *and*
REV. KIRIBAMUNE PIYADASSI, Respondent

S. C. 3—D. C. Kurunegala, 6,730

Buddhist ecclesiastical law—Incumbency of temple—Sisyanusisya paramparawa—*Impostor cannot acquire right to incumbency by prescription— Prescription Ordinance (Cap. 55), s. 10*—Res judicata—*Two important principles—Privity between pupil and tutor—Admission—Weight to be attached to it—Evidence Ordinance (Cap. 11), ss. 17 (1), 18 (3) (b).*

The status of the lawful incumbent of a Buddhist temple under the *sisyanusisya paramparawa* cannot be extinguished by prescription by a *de facto* incumbent who is an impostor.

For the purpose of adjudicating upon a plea of *res judicata* raised in a dispute concerning rights to the incumbency of a Buddhist temple no privity of estate or interest can be assumed between a pupil and his tutor who is not proved to have been the lawful incumbent.

Two important tests must be applied whenever a plea of *res judicata* is raised : (1) whether the judicial decision in the earlier litigation was, or at least involved, a determination of the same question as that sought to be controverted in the later litigation in which the estoppel is raised, and, if so, (2) whether the parties to the later litigation are the parties or the privies of the parties to the earlier decision.

An admission within the meaning of sections 17 (1) and 18 (3) (*b*) of the Evidence Ordinance does not create a conclusive estoppel ; the weight to be attached to it in any particular case depends on many considerations.

APPEAL from a judgment of the District Court, Kurunegala.

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

N. E. Weerasooria, Q.C., with *Eardley Perera* and *B. S. C. Ratwatte*, for the defendant respondent.

Cur. adv. vult.

February 23, 1955. GRATIAEN J.—

The plaintiff claims a declaration in this action that he (and not the defendant) is the lawful incumbent of the Kandewela Vihara. It is common ground that the rules of succession known as the *sisyanusisya paramparawa* apply.

Certain admissions were recorded at the commencement of the trial. The plaintiff is a pupil of a Buddhist priest called Indajoti who himself had been a pupil of Waradala. The defendant is a pupil of Ratnajoti who was in fact functioning as incumbent at the time of his death.

According to the plaintiff, the original incumbent of the temple was the "Ganangamuwe High Priest" who had three pupils named Dhammarakkita, Waradala (previously referred to) and Seelawantha ; Dhammarakkita, being the senior pupil, in due course succeeded to the incumbency and he was in turn succeeded by his own pupil Sobita ;

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Sobita died leaving no pupils, and the incumbency accordingly passed under the *sisyanusisya paramparawa* to Indajoti (previously referred to) and, on Indajoti's death, to the plaintiff.

The defendant does not concede the earlier stages of succession pleaded in the plaint, but it is at least common ground between the parties that Sobita had at one stage been the lawful incumbent, and that Sobita died leaving no pupils. According to the defendant, Sobita duly appointed Ratnapala (presumably a stranger to the normal line of succession) to succeed him ; the incumbency in due course passed from Ratnapala to Deela Guneratne and from Deela Guneratne to the plaintiff's tutor Ratnajoti (previously referred to) ; the defendant then succeeded to the incumbency on Ratnajoti's death. An important point for decision concerns the question as to who was entitled to succeed to the incumbency when Sobita died leaving no pupils.

There can be no doubt that the factual position was as stated by the defendant—namely, that (lawfully or otherwise) Ratnapala, Deela Guneratne and Ratnajoti had in turn functioned successively as *de facto* incumbents ; similarly, the defendant was *de facto* incumbent when this action commenced. On the other hand, it is settled law that " an impostor cannot acquire a right to an incumbency by prescription ; nor can the rights of the true incumbent be extinguished by prescription ". Although the operation of Section 10 (of the Prescription Ordinance) may in certain circumstances destroy a particular incumbent's remedy against an impostor, his right or status itself still subsists. *Kirikitta Saranankara Thero's case*[1]. This latter proposition is of course subject to the exception that a true incumbent's status may be extinguished by other modes recognised by Buddhist ecclesiastical law—for instance, by abandonment of his office. What follows in such an event calls for no solution for the purposes of the present appeal.

Several issues were framed at the trial, but, by agreement of parties, the following question of law was disposed of as a preliminary issue :—

> " 5. Is the decree in Case No. 5232 of this Court dated 27.11.14 *res judicata* between the parties in regard to the subject matter of this action ?"

This issue was answered by the learned trial judge in favour of the defendant. Accordingly, the plaintiff's action was dismissed without consideration of the other issues.

I shall now examine the scope of this earlier action No. 5232 which is claimed to have operated as *res judicata* between the parties to the present dispute. On 12th June 1914 Indajoti (i.e., the present plaintiff's tutor) had claimed a declaration that he was the true incumbent of this temple as against the person who was actually functioning in that office at the time (namely, the defendant's tutor Ratnajoti). Indajoti's action was dismissed by the District Judge of Kurunegala on 27th November 1914, and his appeal against the judgment of the lower Court was dismissed on 4th March 1915. One cannot but marvel at the admirable manner in which a complicated litigation in former times could be finally disposed of

[1] *(1954) 55 N. L. R. 313 at 315.*

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(in the original Court as well as the Court of Appeal) within a period of only 9 months. The present action, by way of lamentable contrast, was instituted on 18th August 1950, and 4½ years later, this Court is only disposing of a preliminary issue of law. Having permitted myself this melancholy reflection, I return to the immediate issue before us.

The dismissal of the action manifestly precluded Indajoti at any rate from re-agitating his claim to the incumbency against Ratnajoti. But a great deal more must be established before we can accept it as a corollary that this decree also operates as *res judicata* in respect of the dispute between the present plaintiff and the present defendant.

This plea of *res judicata* would without doubt have succeeded if a decision that Ratnajoti was in truth the lawful incumbent of the temple had been implicit in the dismissal of Indajoti's action. In that event, the present defendant's claim to have succeeded to the incumbency (by reason of the " privity of estate or interest " which exists under the *sisyanusisya paramparawa* between a proved incumbent and his pupil) could not have been challenged by the plaintiff (claiming the office as Indajoti's privy). A careful examination of the judgment of Walter Pereira J. (Shaw J. concurring) dated 4th March 1915 makes it clear, however, that this Court advisedly refrained from making, even by implication, any pronouncement as to the validity of Ratnajoti's claim to the incumbency.

Two important tests must be applied whenever a plea of *res judicata* is raised (1) whether the judicial decision in the earlier litigation was, or at least involved, a determination of the same question as that sought to be controverted in the later litigation in which the estoppel was raised, and if so (2) whether the parties to the later litigation were the parties or the privies of the parties to the earlier decision. *Spencer Bower on Res judicata*, page 9.

As to the former test, let us first examine the grounds on which Indajoti sought to oust Ratnajoti from the office of incumbent in Action No. 5232 and also the grounds on which Ratnajoti challenged the validity of his claim. Finally, we must ascertain *the particular grounds on which Indajoti's claim was rejected.*

Indajoti admitted that Ratnapala did function as the incumbent of the Kandewela Vihara ; he also conceded that Ratnapala was the lawful holder of the office. Indeed, he claimed to succeed Ratnapala " as the only priest present at his death and as a co-pupil of the same tutor ". Ratnajoti, on the other hand, took up the position that the original incumbent was not Ratnapala but Deela Guneratne whom he (Ratnajoti) lawfully succeeded as sole pupil.

In the lower Court the trial judge took the view that " Indajoti's claim could not be sustained on either of the grounds he relied on no more than Ratnajoti's claim could be sustained on the grounds he relied on ". His ultimate conclusions, however, were in favour of Ratnajoti's claim on a somewhat different basis, namely :—

(1) that Sobita had been the lawful incumbent and that he had, in the absence of any pupils in the normal line of succession, *validly appointed Ratnapala as his successor ;*

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(2) that upon Ratnapala's death the incumbency passed (in the absence of pupils) to Ratnapala's own tutor (somebody else named Indajoti) ;

(3) that Deela Guneratne in due course succeeded that "other Indajoti" as incumbent ; and

(4) that eventually Ratnajoti, who was Deela Guneratne's pupil, succeeded him as his "lawful successor".

If these conclusions had been the basis of the final decision in Action No. 5232, I am satisfied that the plea of *res judicata* ought to have succeeded in the present litigation. There was a categorical pronouncement that Ratnajoti was the lawful incumbent in preference to Indajoti, and the mere omission of a formal decree to that effect would not, I think, have altered the position. As to the issue of privity, the present plaintiff is Indajoti's pupil claiming as such to succeed him as his privy while the present defendant is Ratnajoti's pupil claiming the office under Ratnajoti.

But, unfortunately for the defendant, the trial judge's decision in Action No. 5232 did not constitute the final judicial pronouncement in those proceedings. The Supreme Court admittedly affirmed the decree of the lower Court, *but for entirely different reasons.* The plea of *res judicata* must therefore be considered solely by ascertaining the basis of the decision of the appellate tribunal dated 4th March 1915. The judgment of the original Court was "replaced by the appellate decision, which thenceforth holds the field". *Spencer Bower* (supra) at page 34. It was in this respect that the judgment now appealed from has erred. Too much emphasis was placed on the terms of the superseded judgment of the original Court, and little or no consideration was paid to the narrower grounds on which the decree was ultimately affirmed in appeal.

I shall now examine the judgment pronounced by this Court on 4th March 1915, in order to ascertain what precisely it did decide, either expressly or by necessary implication, in regard to the issues calling for adjudication in the present action. It at once becomes clear that the rejection of Indajoti's claim to oust Ratnajoti *did not proceed* (*as was the case in the superseded judgment*) *on a recognition of the validity of Ratnajoti's rights to the incumbency.* For instance, Walter Pereira J.'s principal judgment said :—

> "*The deed whereby Sobita instituted Ratnapala as his successor to the incumbency is of very doubtful validity, because Ratnapala was not a pupil of Sobita*, and, as pointed out in *Dhammajoti v. Sobita* [1], while an incumbent priest of a Buddhist temple may by means of a deed appoint his successor, he must confine the selection to his own pupils. *Anyway*, Indajoti could not claim to be the successor of Ratnapala because he was not a co-pupil with Ratnapala".

In the result, Indajoti's action was dismissed because, *whether or not Ratnajoti's rights of succession were valid*, Indajoti at least had failed to furnish evidence establishing that he had a right to oust an alleged trespasser. To that extent, Indajoti was of course precluded by the rule of *res judicata* from re-asserting his own rights against Ratnajoti on any ground whatsoever. But the immediate parties to the litigation are now

[1] (*1913*) *16 N. L. R. 403.*

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dead, and the issue as to whether the present plaintiff or the present defendant is the lawful incumbent is not embarrassed by the earlier decree. The defendant can only establish " privity in estate or interest " between himself and Ratnajoti *either* on proof that Ratnajoti was in truth the lawful incumbent *or* on production of a judicial decision (binding on the plaintiff) that he was. As I have pointed out, there is no earlier judicial decision, even by implication, to that effect. Accordingly, the plea of *res judicata* fails. For the purposes of a dispute concerning rights to the incumbency of a Buddhist temple, no privity can be assumed between a pupil and his tutor who is not proved to be the true incumbent.

Indajoti's concession in his pleadings that Ratnapala had at a certain stage lawfully succeeded to the incumbency has no bearing on the plea of *res judicata*, but it does at least constitute an " admission " within the meaning of Section 17 (1) of the Evidence Ordinance. It can therefore be proved under Section 18 (3) (*b*) against the plaintiff who claims to have derived his " interest " from Indajoti. But an " admission " does not create a conclusive estoppel; it merely " suggests an inference " which a Court of trial may properly take into account, and the weight to be attached to it in any particular case depends on many considerations.

The true principle of *res judicata* where a decision dismissing an earlier action is relied on as creating " an estoppel by record " in subsequent litigation is thus explained by *Spencer Bower* (supra) at page 29 :—

> " The answer to this inquiry depends upon whether, on reference to the record and such other materials as may properly be resorted to, the dismissal itself is seen to have *necessarily involved* a determination on any particular issue or question of fact or law, in which case there is an adjudication on that question or issue ; if otherwise, the dismissal decides nothing, except that in fact the party has been refused the relief that he sought . . . . *Prima facie*, in the absence of materials on which such a necessary inference can be established, a dismissal is not a decision of any question of title without an express declaration of the Court ".

I have already explained why in my opinion the plea of *res judicata* fails. The judgment of Walter Pereira J. and Shaw J. decided only that Indajoti had not furnished proof entitling him to the immediate relief which he sought against his adversary. On that narrow ground, the position of Ratnajoti (whether he was the true incumbent or merely a trespasser functioning as such) could not be disturbed by Indajoti. Under Buddhist ecclesiastical law as judicially interpreted, Ratnajoti and those who claim under him could not however acquire a title to the office by mere prescriptive user. The issue as to who is now the present true incumbent is therefore at large.

I would allow the appeal and answer issue 5 in favour of the plaintiff. The record must now be returned to the lower court for a re-trial on the outstanding issues and on any other issues which may properly be raised by the parties. The plaintiff is entitled to the costs of this appeal and of the abortive trial.

SANSONI J.—I agree.

Appeal allowed.

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1955 *Present:* **Gratiaen J. and Sansoni J.**

DAMBADENI HATPATTU CO-OPERATIVE STORES UNION, LTD., Appellant, *and* Y. P. A. YAGODA *et al.*, Respondents

S. C. 357—D. C. Kurunegala, 5,634

Guarantee—Fidelity bond—Misbehaviour of employee—Duty of employer to inform guarantor about it immediately—Co-operative Societies.

In the case of a continuing guarantee for the honesty of a servant there should be read into the contract "an implied term between the employer and the fidelity guarantor that the former will inform the latter of such cases of dishonesty in the servant as will entitle the employer to dismiss him and that the surety is then entitled to call upon the employer either to dismiss the servant or to discharge him (the surety) from further liability".

By a bond dated January 14, 1946, the 1st, 2nd and 3rd defendants bound themselves jointly and severally in a sum of Rs. 4,000 to indemnify a registered Co-operative Society against the loss of its property or monies through defalcation or other breach of duty on the part of the 1st defendant during the period of his stewardship as Manager of the Society's Wholesale Department. On March 21, 1946, a shortage of Rs. 1,500 was detected for which the 1st defendant was unable to account. The offence was, however, condoned upon the replacement of the money within a week. Subsequently, on June 30, 1947, it was discovered that 1st defendant had been committing a series of misappropriations to the extent of Rs. 13,701·52 between March 21, 1946, and June 30, 1947. The Co-operative Society thereupon sued all three defendants on the bond dated January 14, 1946, for the recovery of Rs. 4,000.

Held, that the conduct of the Co-operative Society in condoning, without the knowledge or approval of the 2nd and 3rd defendants, the misappropriation brought to light in March, 1946, had the effect of discharging the 2nd and 3rd defendants from liability to indemnify the Society in respect of subsequent acts of dishonesty.

APPEAL from a judgment of the District Court, Kurunegala.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the plaintiff-appellant.

H. W. Tambiah, with *A. I. Rajasingham*, for the 2nd and 3rd defendant-respondents.

Cur. adv. vult.

February 24, 1955. GRATIAEN J.—

The plaintiffs, a Co-operative Stores Union duly registered under the Co-operative Societies Ordinance, employed the 1st defendant as the Manager of its Wholesale Department on 1st June, 1945. His duties involved the handling of large sums of money and the custody of considerable quantities of stores belonging to the Union. Accordingly, the 1st

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defendant was called upon to furnish security in a sum of Rs. 4,000 for the faithful discharge of his duties. By a bond dated 14th January, 1946 the 1st defendant, together with the 2nd and 3rd defendants (described as " sureties ") bound themselves jointly and severally to indemnify the Union against the loss of its property or monies through defalcation or other breach of duty on the part of the 1st defendant during the period of his stewardship.

On 21st March, 1946 (about two months after the execution of the bond) the Assistant Registrar of the Co-operative Department checked the cash balance in the department and detected a shortage of Rs. 1,500 for which the 1st defendant was unable to account. This discovery took place in the presence of the President and two Committee members of the Union. The 1st defendant offered an explanation which did not satisfy the Assistant Registrar who threatened to hand the matter over to the Police unless the money was replaced within a week. This officer also sent a copy of his notes of inquiry to the Committee and " took the office-bearers to task for allowing this kind of thing to go on ".

The 1st defendant replaced the money within the stipulated time. He has explained in evidence how he solved his immediate problem. Having borrowed the sum required from some friends, and by this means avoided his prosecution and summary dismissal, he repaid them out of his daily collections. Further misappropriations followed, and, as he naively says, " I went on ' rolling ' until finally the day came (i.e. 30th June 1947) when I got caught . . . . then I went on a pilgrimage ". In point of fact, this " pilgrimage " ended at the Welikade jail where he is now serving a term of imprisonment for criminal breach of trust of Rs. 13,701·52. The offence was committed on various dates between 21st March, 1946 (when the first irregularity was detected and condoned) and 30th June, 1947 (when the " pilgrimage " commenced).

The Union has sued all three defendants on the bond dated 14th January, 1946, for the recovery of Rs. 4,000 out of the sum embezzled as previously described. The 1st defendant, while still in prison, consented to judgment, but the decree against him is clearly valueless. The " sureties " disclaimed liability on various grounds only one of which need be discussed for the purposes of this appeal. In my opinion the learned Judge has correctly decided that the Union's conduct in condoning, without the knowledge or approval of the 2nd and 3rd defendants, the misappropriation brought to light in March, 1946 had the effect of discharging the 2nd and 3rd defendants from liability to indemnify the Union in respect of any subsequent acts of dishonesty.

This special defence is no doubt governed by the Roman-Dutch Law, but it is convenient in the first instance to examine the English law on the subject.

" In a case of a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty

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in the course of his service, to which the guarantee relates, and if, instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ the dishonest servant without the consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service". *Phillips v. Foxhall* [1]. The guarantee, at its inception, was founded on the trustworthiness of the servant, so far as was known to both parties; so that, as soon as his dishonesty is subsequently discovered by the master (but not communicated by the master to the guarantor) the whole foundation for the continuance of the contract fails. "It seems to us, in accordance with the plainest principles of equity and fair dealing, that the master should, on making such discovery, either dismiss the servant, or, if he chooses to continue him in his employ without the knowledge or assent of the surety, he must himself stand the risk of loss arising from any future dishonesty". *Smith v. The Bank of Scotland* [2].

I reject the argument that this requirement of "fair dealing" is peculiar to the English law. *Wessells' Law of Contract in South Africa* ii, page 1109 para. 4026 regards it as fundamental to all contracts for continuing guarantees of this nature that there should be read into them "an implied term between the employer and the fidelity guarantor that the former will inform the latter of such cases of dishonesty in the servant as will entitle the employer to dismiss him and that the surety is then entitled to call upon the employer either to dismiss the servant or to discharge him (the surety) from further liability". The continuing obligation undertaken by the guarantor calls for continuing good faith on the part of the employer who must not wilfully conceal subsequent frauds of the employee; nor must the employer during the period covered by the guarantee be guilty of negligence "so gross as to be equivalent to a wilful shutting of the eyes to the fraud which the employee is about to commit". *Dawson v. Lawes* [3].

In this case, the Union officials were at least guilty after 21st March, 1946 of callous indifference to the obvious risk of further dishonesty on the part of the 1st defendant; this conduct constitutes "gross negligence" of the kind condemned in *Dawson v. Lawes* (supra).

It was suggested that these principles protect only a surety and not a person who (like the 2nd and 3rd defendants) has undertaken the liabilities of a principal debtor. I disagree. The more onerous the liability undertaken by the fidelity guarantor, the greater is the degree of good faith which the employer must observe. I would dismiss the appeal with costs.

SANSONI J.—I agree.

Appeal dismissed.

[1] *(1872) L. R. 7 Q. B. 666.* [2] *1 Dow. 272 H. L.*
[3] *(1854) 69 E. R. 119.*

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1954 *Present :* **Pulle J.**

SOUTH WESTERN OMNIBUS CO., LTD., Appellant, *and* S. P. JAMES SILVA, Respondent

S. C. 523—Workmen's Compensation, C 30/11,798/51

Workmen's Compensation Ordinance (Cap. 117)—Clause 1 of Schedule II—"Workman"—Proof of manual labour not essential—Section 16 (2)—"Sufficient cause".

(i) A person was employed in an omnibus company as a Senior Traffic Inspector whose duty it was to check the number of passengers carried by each omnibus operating in the area allotted to him and the ticket books. He had also to supervise the field staff which included checkers, time-keepers, stand supervisors, drivers and conductors. In the event of the breakdown of an omnibus he had to make a report to the proper official of the company although it was not part of his duty personally to attend to any repairs.

Held, that the employee was a workman within the meaning of section 2 of the Workmen's Compensation Ordinance read with clause 1 of Schedule II, although he did not fall within the category of manual labourers.

(ii) Ignorance of the legal requirements of section 16 (1) of the Workmen's Compensation Ordinance is not a sufficient cause within the meaning of section 16 (2) for failure to make a claim within the prescribed time. Nor does the fact that notice of the claim was given to the employer have any bearing on the question of sufficient cause for failure to claim in time.

APPEAL under section 48 of the Workmen's Compensation Ordinance.

D. S. Jayawickreme, with *H. B. White* and *A. C. M. Uvais*, for the respondent-appellant.

M. M. Kumarakulasingham, for the applicant-respondent.

Cur. adv. vult.

May 10, 1954. PULLE J.—

This appeal raises two questions of difficulty under the Workmen's Compensation Ordinance. The first is whether the claim was made out of time and the second whether the respondent in whose favour an award has been made is a person who is included in the definition of "workman" in section 2 of the Ordinance read with Clause 1 of Schedule II.

The accident which resulted in injury to the respondent occurred on the 23rd November, 1951. At this time he was employed by the appellant company as a Senior Traffic Inspector whose duty it was to check the number of passengers carried by each omnibus operating in the area allotted to him and the ticket books. He had also to supervise the field staff which included checkers, time-keepers, stand supervisors, drivers and conductors. In the event of the breakdown of an omnibus he had to make a report to the proper official of the company although it was

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not part of his duty personally to attend to any repairs. The circumstances in which the accident occurred are detailed in the evidence of the respondent which has been accepted. On the 23rd November the respondent was riding a motor bicycle with a Junior Traffic Inspector on the pillion in the course of their employment. At Dodanduwa the respondent heard the sound of a bus coming from Galle and as he saw it coming he signalled to the driver to stop. The latter applied the brakes but it moved towards its right and collided with the motor bicycle. The pillion rider was thrown off and the respondent was run over and severely injured.

I am not prepared to accept the submission that the Assistant Commissioner erred in law in holding that the respondent was employed, otherwise than in a clerical capacity, in connexion with the operation of mechanically propelled vehicles used for the carriage or conveyance of passengers. The only authority cited in support of the company's contention is a passage from the judgment of Gratiaen J. in *De Silva v. Premawathie* [1] in which he said :

" I think that the language of the local Ordinance and of its relevant Schedule catches up only the occupations of persons who belong to what are popularly described as ' the working classes ' engaged in manual labour and earning ' wages ' as distinct from salaries. "

As a guide to the interpretation of the definition of " workman " in section 2, read with Schedule II, I think, if I may say with all respect, the proposition is stated too widely in the passage which I have quoted. I prefer to accept the interpretation in two earlier passages where the learned Judge states :

" It is clear that the Legislature intended to give the enactment only a fairly restricted range of operation and that it was not intended to benefit all classes of employees . . . . An employee could not qualify for any statutory benefit unless he came strictly within one or other of the various occupations specified in Schedule II. "

If, therefore, an employee came within the description in Clause I of Schedule II, in my opinion it makes no difference whether the nature of his duties places him or not in the category of manual labourers. I derive some support from *Manicam v. Sultan Abdul Cader Bros.* [2] in which Soertsz A.J. said :

" Take the case of an omnibus. It is operated in order to carry passengers. It requires besides a driver and a cleaner, a conductor. Can it be said that the conductor is not employed in connexion with the operation of the omnibus ? If the interpretation of the Commissioner is right, a conductor of an omnibus does not fall within the definition of workman in the Ordinance. Is there any justification for such an exclusion, when the express terms of the paragraph exclude *only* those employed in a clerical capacity ? "

In my opinion there was evidence before the Assistant Commissioner on which he could properly find that the respondent was a workman within the meaning of Clause 1 of Schedule II.

The question which has troubled me most is the plea that the claim for compensation not having been instituted within six months of the

[1] *(1948) 50 N. L. R. 306.* [2] *(1936) 38 N. L. R. 28.*

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occurrence of the accident the learned Assistant Commissioner was wrong in admitting the claim under section 16 (2) on the ground that the failure to institute the claim in time was due to sufficient cause. The company has formulated the plea as follows :

" That in holding that there was ' sufficient cause ' within the meaning of section 16 (2) of the Ordinance, for the claim not being instituted within six months, the learned Assistant Commissioner had failed, *inter alia*, to take into consideration the applicant-respondent's own admission that he was ignorant of the provisions of section 16 (1) of the Ordinance and had therefore misdirected himself in law. "

The first intimation that the Commissioner had of the accident was on 13th May, 1952, when he received the letter A4 dated 9th May, 1952, from one Hema Lalitha Jayawardena praying the Commissioner to order the company to pay Rs. 4,900 to the respondent as compensation under the Ordinance. The writer described the respondent as her husband although she stated in her evidence that she was not legally married to him. According to her and the respondent A4 was written for and on behalf of the latter. It is not argued that A4 marks the institution of the claim for, if that be so, its receipt was well within six months reckoned from 23rd November, 1951. The period of six months expired on the 23rd May, 1952, but the application for compensation in Form A under regulation 11 of the Workmen's Compensation Regulations, 1935, was received by the Commissioner only on the 9th July, 1952. It is in evidence that the respondent sought to settle the claim with the company but that fell through completely towards the end of April, 1952, so that the respondent had still nearly a month within which to institute the claim.

Regulation 17 (1) provides that after considering any written statement and the result of any examination of the parties, the Commissioner shall ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues upon which the right decision of the case appears to him to depend. It is a curious feature in this case that the respondent on whom the burden lay to establish a sufficient cause to account for his failure to institute his claim in time was not asked to state categorically the reason for the failure. His own position and that of his wife are contradictory. He stated in his evidence that he did not know that a claim for compensation is prescribed in six months. The wife's evidence is that when she wrote A4 on the 9th May she was aware that the claim had to be made within six months of the date of accident. In finding sufficient cause in favour of the respondent the Assistant Commissioner has not adverted to the one reason which, by implication, the respondent assigned for the failure, namely, his ignorance of the legal requirements. The question I have to decide is whether in the events which have happened there wa evidence on which the Assistant Commissioner could have found in favour of the respondent under section 16 (2). I am compelled reluctantly to come to the conclusion that there was no evidence. In so far as it can be said that the finding is a question of fact I am empowered under section 48 (3) to reverse it for the purpose of disposing of the appeal.

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That ignorance of legal requirements is not a reasonable excuse was laid down by the Court of Appeal in England in *Roles v. Pascall & Sons* [1]. The words that fell to be interpreted were, " the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom or other reasonable cause ". This case has been expressly followed in *Christoffelsz v. Dhanarath Menika* [2]. Learned Counsel for the respondent invited me to distinguish *Dhanarath Menika's case* [2] on the ground that it does not appear in the judgment that notice of the claim had been given to the employer by the widow. I do not think it is a valid ground for making a distinction. However, I have called for and examined the record of that case and it does appear that notice had been given before the claim was instituted. That a notice of the claim given to an employer has no bearing on the question of sufficient cause for failure to claim in time is implicit in section 16 (1) the first paragraph of which lays down two concurrent conditions, one of which is the giving of notice and the other, the institution of proceedings within six months.

Learned Counsel for the respondent relies on the case of *Munshi & Co. v. Yeshwant Tukaram* [3] where an application made out of time for compensation was admitted under section 10 of the Indian Workmen's Compensation Act VIII of 1925. That section is in terms almost identical with section 16 (2) of the Ordinance. The workman was injured in an explosion in a dockyard and he claimed compensation before a Claims Commission set up by the Government of India. He was awarded a sum of Rs. 2,280 in respect of his injury but that sum was made subject to a deduction of the amount awarded under the Workmen's Compensation Act. The reason he gave for applying for compensation after the prescribed period was that he was under the impression that he would receive the full compensation from the Claims Commissioner and that it was only afterwards he was informed that in the first instance compensation would be granted under the Workmen's Compensation Act and that thereafter he would receive additional compensation from the Claims Commissioner. The High Court of Bombay held that the workman genuinely misunderstood his position and that they saw no reason to find that the discretion under section 10 was exercised unjudicially. If this case purported to hold ignorance of the law as a sufficient cause I do not feel I should follow it in preference to *Christoffelsz v. Dhanarath Menika* [2] based as it is on the judgments of Cozens-Hardy M. R., Fletcher Moultan L.J. and Buckley L.J. in *Roles v. Pascall & Sons* [1] which is not considered in the Bombay case [3].

Much as I would like to reach a conclusion favourable to the respondent I am unable to do so having regard to the evidence and the proper interpretation of the phrase " sufficient cause ".

It is unfortunate that no issue was formulated as to whether grounds existed to justify relief to the respondent under section 16 (2). The only

[1] *(1911) 1 K. B. 982.* [2] *(1949) 51 N. L. R. 275.*
[3] *(1948) A. I. R. Bombay 44.*

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issue on the point was "Is the claim prescribed in law?". The real issue was whether the failure to institute the claim within six months was due to sufficient cause. The Assistant Commissioner's finding is expressed as follows:

"The respondent company has not in any way been prejudiced by this application being made about one and half months after the prescribed period. Moreover, at no stage could it be said that the applicant waived his claim for compensation."

Neither reason seems to be satisfactory. It was not the case of either party that the applicant waived his claim at any time. The Assistant Commissioner continued, "In view of all the circumstances of this case I hold that there was sufficient cause within the meaning of section 16 (2)". Whether he did or did not take into account the one substantial reason given by the respondent, namely, that he was ignorant of the legal requirements, the finding cannot be supported.

I would allow the appeal and set aside the order made by the Assistant Commissioner. I make no order as to costs.

Appeal allowed.

1955 *Present:* **Sansoni J.**

PERERA & SONS, LTD., Appellant, *and* MRS. F. PATE, Respondent

S. C. 52—C. R. Colombo, 46,488

Rent Restriction Act, No. 29 of 1948—Section 13 (1) (d)—Nuisance—Nature of responsibility of tenant—"Adjoining" occupiers—Must landlord himself give evidence?

Defendant, a limited liability Company carrying on the business of bakers, was a tenant of certain rented premises. One of the rented rooms was being used as a rest room by the Company's workmen. There was evidence that the occupants of the room used to urinate in and pollute the drains on both sides of the road just outside that room. A neighbouring occupier who lived opposite the premises repeatedly complained about the objectionable behaviour of the occupants of the room, but the defendant permitted the nuisance to continue.

Held, that the defendant was guilty of conduct which was a nuisance to adjoining occupiers within the meaning of section 13 (1) (*d*) of the Rent Restriction Act and was therefore liable to be ejected from the premises.

APPEAL from a judgment of the Court of Requests, Colombo.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the defendant appellant.

E. A. G. de Silva, for the plaintiff respondent.

Cur. adv. vult.

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February 15, 1955. SANSONI J.—

In this action the landlord relying on section 13 (1) (*d*) of the Rent Restriction Act, No. 29 of 1948, has sued to eject a tenant from the rented premises on the ground that the tenant has been guilty of conduct which is a nuisance to the landlord and other adjoining occupiers. The tenant is a limited liability Company carrying on the business of bakers. Its main bakery, to which are attached lavatories and bathrooms, is about 50 yards away from the rented premises. The evidence has conclusively proved that one of the rented rooms has for a long time prior to this action been used as a rest room by the Company's workmen. Although the Managing Director denied this, he admitted that his workmen change in that room and leave their clothes there before they go to work. But the evidence of independent witnesses, whom the learned Commissioner has believed, has established much more. It has proved that the room in question was being habitually occupied at all times of the day and night even for the purpose of sleeping.

The particular nuisance complained of is that the occupants of the room used to urinate in and pollute the drains on both sides of the road just outside that room. A neighbouring occupier, Mr. Ebert, who lives opposite these premises repeatedly complained to the Police, to the defendant, and to the Municipal authorities about the objectionable behaviour of the occupants of the room, but the defendant permitted the nuisance to continue. The learned Commissioner held in favour of the landlord and in this appeal it was argued that the case does not fall within section 13 (1) (*d*) because (1) the tenant has not been guilty of the conduct complained of and the Act does not provide that the tenant may be held responsible for the conduct of other persons who use the premises ; (2) the conduct must be conduct on the rented premises and not outside them ; (3) Mr. Ebert was not an " adjoining occupier " ; (4) the plaintiff has not given evidence that she considered the conduct of those persons a nuisance. I shall consider these submissions in the above order.

(1) Although the Company which is the tenant of the premises has not directly committed this nuisance, I am satisfied that it has indirectly committed it and is therefore penalised by the Act, for it must be held liable for the nuisance committed by those who occupied the room in question. The Managing Director was repeatedly informed that the occupants of the room were behaving in an objectionable manner, and this was obviously due to the absence of lavatory accommodation ; if he was unable to provide such accommodation or otherwise abate the nuisance, he should not have permitted the room to be used as a rest room. I do not think this is a matter which turns on the liability of a master for the acts of his servants but rather on the responsibility of an occupier of premises to see that a nuisance is not created by anybody who comes on those premises with his permission. I think such a liability exists because the nuisance may be said to have been committed under his implied authority. The following passage in " The Rents Act in South Africa " (2nd Edition) p. 106 by Rosenow and Diemont seems relevant :

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" The onus is on the lessor to satisfy the Court that the lessee is responsible for the nuisance. So, for example, an ejectment order was refused in a case where a nuisance in the form of brawling and drinking was alleged, and it appeared that *chance intruders* might be responsible for the nuisance ".

(2) The sub-section does not require that the nuisance should exist on the rented premises and I am not prepared to limit it in the way suggested. Mr. Megarry in " The Rent Acts " (7th Edition) p. 245 cites a case where an order was made on account of a married tenant's acts of undue familiarity with the landlord's adolescent daughter who lived in a flat in the same house, even though those acts took place not in the house but in an alley some distance away ; for on a claim based on annoyance (which is an additional ground in the English Statute) to adjoining occupiers, " what arises from their being adjoining may properly be considered in the light of an event which took place outside the premises ".

(3) On page 246 Mr. Megarry refers to a case where the word " adjoining " seems to have been construed as meaning " contiguous " but he comments : " This seems too strict a construction, for one meaning of the word is ' neighbouring ' and all that the context seems to require is that the premises of the adjoining occupiers should be near enough to be affected by the tenant's conduct on the demised premises ". My own view of the meaning of the word accords with this comment.

(4) There is no question that the plaintiff herself is an adjoining occupier even in the most limited sense of the term and that the plaint alleges a nuisance to her as well. I do not think it was necessary that evidence should have been given by the plaintiff herself that she considered the conduct complained of a nuisance. Upon proof of conduct capable of having this effect the Court is entitled to infer that it had that effect even if there is no positive evidence that it did. The Court is entitled to presume that the adjoining occupiers are reasonable people to whom the conduct in question would be a nuisance. See *Frederick Platts Co., Ltd. v. Grigor* [1].

I would therefore dismiss this appeal with costs in both Courts.

Appeal dismissed.

[1] *(1950) 66 T. L. R. 859.*

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1955 *Present :* **Gratiaen J. and Sansoni J.**

B.M.G. SETUWA *et al.*, Appellants, *and* B.T. UKKU *et al.*, Respondents

S. C. 164—D. C. Kandy, 3,219

Sale of immovable property—Contract of re-purchase—Parol evidence of a mortgage—Admissibility—" Moratuwa mortgage "—Evidence Ordinance, s. 92—Trusts Ordinance, s. 5 (3).

It is never open to a party who executes a conveyance which is unambiguously a deed of sale to lead parol evidence to show that in reality it is a deed of mortgage and not of sale. This rule equally applies where there is an agreement in the deed itself whereby the vendee undertakes to retransfer the property for consideration within a specified period and also where there is a separate agreement to the same effect, whether notarial or not.

Per GRATIAEN J.— " The respondent did not rely on any proviso to section 92 of the Evidence Ordinance. Nor did he allege a trust of the kind which section 5 (3) of the Trusts Ordinance permits to be established by oral evidence. In the result, the learned trial Judge should not have admitted evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of two notarial instruments each of which unambiguously purported to record a transaction between a vendor and his purchaser (not between a mortgagor and his mortgagee). "

APPEAL from a judgment of the District Court, Kandy.

N. E. Weerasooria, Q.C., with *G. T. Samarawickreme* and *N. D. M. Samarakoon*, for the plaintiffs appellants.

H. V. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, *D. R. P. Goonetilleke* and *V. P. Ranasinghe*, for the defendants respondents.

Cur. adv. vult.

February 22, 1955. SANSONI J.—

The question of law which arises for decision in this appeal has been before this Court on many occasions. It is this :—Where X by deed purports to sell a land for valuable consideration to Y who in turn by deed agrees to re-transfer the land to X, on payment of an agreed amount within a specified period, is it open to Y to show by parol evidence that the transaction was not a sale but a mortgage? One would normally expect that this question would have been decisively answered by now and so it has, except that there are a few judgments which have created doubts where it seems to me there should have been no room for doubt.

In this case the 1st defendant had borrowed a sum of Rs. 700 in 1929 from the 1st plaintiff and executed a mortgage bond as security. In 1937 the 1st defendant sold the land in dispute and another land to the 1st plaintiff for a sum of Rs. 1,410 of which Rs. 1,350 was set off against the principal and interest due on the mortgage and the balance was paid in cash. By a contemporaneous deed the 1st plaintiff agreed to retransfer the lands to the 1st defendant if she paid a sum of Rs. 1,410 within a period of 5 years. The 1st defendant failed to comply with the terms of this

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agreement, and the 1st plaintiff in 1949, gifted the land in dispute to the 2nd plaintiff. The two plaintiffs brought this action against the 1st defendant and 4 others asking for a declaration of title, ejectment and damages. The defendants in their answer pleaded that the deed of sale though in form a transfer was in fact a mortgage for repayment of the sum of Rs. 1,410 and that the 2nd plaintiff therefore had no title to the land. The learned District Judge admitted evidence, both oral and documentary of the circumstances surrounding the transaction of 1937 and the subsequent conduct of the parties. Such evidence was led by the defendants with a view to proving that the deeds of 1937 were executed as security for a loan and were not a pure contract of sale with an agreement to retransfer.

In my opinion such evidence, being non-notarial, should not have been admitted. The purpose of leading it was solely to contradict the two deeds which were clear and unambiguous, and section 92 of the Evidence Ordinance forbids the reception of such evidence for such a purpose. We were referred to the South African case of *Zandberg v. Van Zyl* [1] where it was held that the Court should have regard to the substance of the transaction and not to the form which it assumes, and that it should consider what was the intention of the parties judged by the surrounding circumstances and not by the label which they affixed to the documents. But there is no reference in the judgments delivered in that case to any provisions equivalent to the Prevention of Frauds Ordinance or to section 92 of the Evidence Ordinance. I think a proper comment on the argument that a Court should ascertain the true nature of the transaction is the remark of de Kretser, J., in *Sobana v. Meeralebbe* [2] that " to do substantial justice the Court must have evidence, and that evidence must come before it in a form recognized by law ". There was no plea in this case that any of the provisos to section 92 were applicable. The only admissible evidence of the transaction was, therefore, the deeds themselves. Hutchinson, C.J., and Wood Renton, J., in *Somasunderam Chetty v. Todd* [3] decided a very similar case to the present one. There, as here, a deed of sale of land was accompanied by a deed of agreement to retransfer the land within a specified period. The period elapsed without such retransfer being obtained. It was sought to lead evidence to prove that the transaction set out in the deeds was not the real agreement but that in reality it was one of mortgage. It was held that no such evidence was admissible in view of section 92 of the Evidence Ordinance.

The next case I should refer to is *Perera v. Fernando* [4] which has been referred to over and over again with approval in subsequent judgments of this Court. There, a person who transferred lands to another by a deed of sale for consideration sought to show that the transferee orally agreed to reconvey the lands on the latter being repaid the full consideration, and that the transfer was really a mortgage. It was held by Ennis, J., and de Sampayo, A. J., that the admission of oral evidence to prove the alleged agreement would be to contradict or vary the deed of sale and this was prohibited by section 92 of the Evidence Ordinance. It is true that in that case, unlike the present one, there was no deed of agreement to

[1] (*1910*) *A. D. 302.*
[2] *5 Ceylon Law Journal 46.*
[3] (*1910*) *13 N. L. R. 361.*
[4] (*1914*) *17 N. L. R. 486.*

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retransfer the land, but the alleged oral agreement to retransfer was not provable because it was a pure contract for the purchase and sale of immovable property which is void, under the Prevention of Frauds Ordinance, in the absence of a notarial instrument. The judgment of de Sampayo, A. J., which set out these rules has recently been approved by the Privy Council in *Saverimuttu v. Thangavelauthan* [1] and I think it provides a sufficient answer to the proposition founded on *Zanberg v. Van Zyl* to which I have referred. It can hardly be suggested that when there is such a notarial instrument embodying an agreement to retransfer the door is in some mysterious way opened for the reception of oral evidence to prove that the deeds are not what they purport to be, for that is precisely what section 92 of the Evidence Ordinance forbids. If I may put it in another way, can it be seriously argued that although a deed of sale cannot be shown by oral evidence to be in fact a deed of mortgage yet a deed of sale which is accompanied by a deed of agreement to retransfer the property sold can be shown by oral evidence to be a deed of mortgage? It seems to me that if one deed of sale cannot be contradicted by oral evidence the execution of two deeds based on a contract of sale should be doubly effective to shut out oral evidence which would have the effect of contradicting or varying them.

In the case of *Don v. Don* [2] Dalton, J., and Drieberg, J., again held that one cannot lead evidence to show that a deed by which the owner purported to transfer a land to another was in reality a deed of mortgage, because section 92 of the Evidence Ordinance prohibits the admission of such evidence. Nor does it make a difference if any money is paid on the footing that it was treated as a mortgage, for such payment cannot be referred to an agreement which cannot be proved. I refer to this because it has been proved that such payments were made by the 1st defendant in this case and the learned District Judge has used such evidence to support his finding that the transfer was a mortgage. I would also say that the continuance in possession of the land sold by the 1st defendant is irrelevant on such an issue. In *Wijewardene v. Peiris* [3] the plaintiff against whom a mortgage decree had been entered conveyed the mortgaged property to the defendants (the mortgagees) who agreed to reconvey the property to the plaintiff on the latter paying a certain price by a certain date. It was argued for the plaintiff that the transaction constituted a mortgage while the defendants contended that it was a sale with a contract of repurchase. Koch, J., and Soertsz, A. J., held that the latter was the only possible construction of the transaction, and following the ruling in *Fernando v. Perera* [4] they held that tender of the price was a condition precedent to obtaining a reconveyance and that time was the essence of the contract.

In *de Silva v. de Silva* [5] Hearne, J., and Fernando, A. J., had to consider whether a conveyance of property for consideration, with a provision for a retransfer within one year if the vendor repaid the consideration with interest, was a sale with a contract for a repurchase or a security of money advanced. Hearne, J., referred to the principle of law that no matter what name the parties give to a transaction, the Court will inquire into the

[1] *(1954) 55 N. L. R. 529.*
[2] *(1929) 31 N. L. R. 73.*
[3] *(1935) 37 N. L. R. 179.*
[4] *(1926) 28 N. L. R. 183.*
[5] *(1937) 39 N. L. R. 169.*

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substance of the transaction and give effect to what it finds its true substance or nature to be. He clearly had in mind the decision in *Zandberg v. Van Zyl* [1]. He did not consider the bearing which section 92 of the Evidence Ordinance has on this principle but after referring to *Saminathan Chetty v. Vanderpoorten* [2], *Wijewardene v. Peiris* [3] and *Fernando v. Perera* [4] he affirmed the finding of the District Judge that it was a sale with a right to repurchase within a certain time, that time being of the essence of the contract. The judgment of Hearne, J., would appear to have gone contrary to the rule which had by then been established that a deed of sale cannot be shown by parol evidence to be in reality a deed of mortgage. A similar case where a deed of transfer contained a reservation of the right to pay the vendee the amount of the consideration and obtain a retransfer was considered in *Jonga v. Nandarasa* [5] and it was held by a Bench of three Judges that such a deed did not convey the whole beneficial interest in the property to the vendee. But this is very different from saying that such a deed was a deed of mortgage. The vendor is bound even in such a case to pay the agreed amount within the specified period, which he need not do if it had been a mortgage. Canekeratne, J., in *Uduma Lebbe v. Kiri Banda* [6] had a similar deed to deal with and he so held. Whether a transfer can be said to have been executed in trust or not is an entirely different matter to which entirely different considerations apply. We are not considering that question on this appeal and I therefore do not intend to refer to decisions which have a bearing on it. Neither section 92 of the Evidence Ordinance nor the Prevention of Frauds Ordinance necessarily applies to cases of trusts. See *Valliamma Atchi v. Abdul Majeed* [7].

In *Sobana v. Meera Lebbe* [8] de Krester, J., and Wijeyewardene, J., also decided that a party cannot be permitted to prove by oral evidence that a deed which purports to be a sale was in reality a mortgage. In *Thangavelauthan v. Saverimuttu* [9] Gratiaen, J., and Gunasekara, J., again decided that an instrument which is in terms a sale cannot be construed as a hypothecation of immovable property. Gratiaen, J., followed the judgments of Ennis, J., and de Sampayo, J., in *Perera v. Fernando* (supra) to which I have already referred and explained the limited effect of the decision in *Saminathan Chetty v. Vanderpoorten.* [4] His judgment was affirmed by the Privy Council which is reported as *Saverimuttu v. Thangavelauthan* [10]. Mr. L. M. D. de Silva in delivering the judgment of the Board said, " In the case of *Perera v. Fernando* it was 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.' It was further held that the agreement relied on amounted not to a trust but to 'a pure contract for the purchase and sale of immovable property'. Their Lordships are of opinion that *Perera v. Fernando* sets out correctly the law of Ceylon. In the case before their Lordships it was a writing (established by secondary oral evidence) that was invoked by the

[1] *(1910) A. D. 302.*
[2] *(1932) 34 N. L. R. 287.*
[3] *(1935) 37 N. L. R. 179.*
[4] *(1926) 28 N.L.R. 183.*
[5] *(1944) 45 N. L. R. 128.*
[6] *(1947) 48 N. L. R. 220.*
[7] *(1947) 48 N. L. R. 289.*
[8] *5 Ceylon Law Journal, 46.*
[9] *(1951) 54 N. L. R. 28.*
[10] *(1954) 55 N. L. R. 529.*

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appellant but that makes no difference because the statute law referred to earlier excludes for the purposes mentioned in it not only oral evidence but evidence contained in a writing which is not notarially attested."

In *Palingu Menika v. Mudianse* [1] Basnayake, J., had to consider the effect of a transfer of a land in the form of a deed of sale wherein the transferors reserved the right to repurchase the land within a period of 3 years on payment of a particular sum with interest. The disputed question was whether the transaction evidenced by the deed was a mortgage or a transfer with an undertaking to resell within a specified time. The learned Judge held that "in order to determine the nature of the transaction the circumstances leading up to and surrounding the execution of the document under consideration and the language employed therein may all be taken into account". He cited in support the decision of the Privy Council in *Saminathan Chetty v. Vanderpoorten* [2]. With respect, I would say that the facts in that case were peculiar and the decision turned on those facts. The 2 deeds which had to be construed there showed that an absolute interest did not pass on what purported to be an out and out conveyance because a contemporaneous deed disproved such a theory, and when both deeds were read together their effect was to create "a security for money advanced which, in certain events, imposed upon the creditor duties and obligations in the nature of trusts". I respectfully disagree with the view that oral evidence of a stipulation for payment of interest and the retention of possession by the vendor can be considered as negativing the conclusion that the transaction was clearly (on the face of the written instrument) a sale with an agreement for repurchase. Oral evidence as to what happened after the execution of the deed should not, in my opinion, have been admitted in order to interpret the deed in that case. Soertsz, A. J., was of the opinion in *Wijewardene v. Peiris* [3] that these are not matters which can effect the construction of a deed of sale and I respectfully agree with that opinion. In *Ehiya Lebbe v. Majeed* [4] Dias, J., was dealing with a plea that a deed of transfer was executed in trust but the learned Judge in the course of his judgment said:— "If it appears from the facts that, although the transfer is in form an out and out sale, there exist facts from which it can be inferred that the real transaction was either a money lending transaction when the land was transferred to the creditor as security or that it was a transfer in trust, a Court of Equity would grant relief in such a case". He cites *Fernando v. Thamel* [5] in support of this proposition but that was a case in which a trust was pleaded and not that the transfer was security for a loan. If the latter plea had been advanced I think it would have had to be rejected in view of the many decisions I have referred to. To this extent I think the dictum of Dias, J., requires modification.

If I may sum up the result of the authorities I have referred to I would say that it is never open to a party who executes a conveyance which is unambiguously a deed of sale to lead parol evidence to show that it is a deed of mortgage. This rule equally applies where there is an agreement in the deed itself whereby the vendee undertakes to retransfer the property for consideration within a specified period and also where there is a separate

[1] *(1948) 50 N. L. R. 566.*
[2] *(1932) 34 N. L. R. 287.*
[3] *(1935) 37 N. L. R. 179.*
[4] *(1947) 48 N. L. R. 357.*
[5] *(1946) 47 N. L. R. 297.*

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agreement to the same effect, whether notarial or not. The question posed at the beginning of this judgment must therefore be answered in the negative. I would allow this appeal with costs in both Courts ; the plaintiffs are entitled to a decree as prayed for save that damages will be Rs. 100 up to date of action brought and at Rs. 150 per annum thereafter until the plaintiffs are restored to possession.

GRATIAEN J.—I agree entirely with my brother Sansoni. In *Saverimuttu v. Thangavelauthan* [1] the Judicial Committee of the Privy Council expressly approved the ruling in *Perera v. Fernando* [2] so that any earlier pronouncements of this Court which are in conflict with the *ratio decidendi* of *Perera v. Fernando* must now be regarded as having been overruled by implication.

The respondent did not rely on any proviso to section 92 of the Evidence Ordinance. Nor did he allege a trust of the kind which section 5 (3) of the Trusts Ordinance permits to be established by oral evidence. In the result, the learned trial Judge should not have admitted evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of two notarial instruments each of which unambiguously purported to record a transaction between a vendor and his purchaser (not between a mortgagor and his mortgagee). A rule of evidence which disentitles a transferor to contradict one such written instrument *a fortiori* disentitles him to contradict two of them, and it makes no difference whether the documents are severable or should be interpreted together as recording the unambiguous terms of a single transaction. *Perera v. Fernando* (supra) has laid down two separate and distinct propositions, namely, that where a person transfers a land to another by a notarial deed, purporting on the face of it to sell the land,

(1) it is not open to the transferor to prove by oral evidence that the transaction was in reality a mortgage ;

(2) it is also not open to the transferor to prove by oral evidence that the transferee agreed to reconvey the property.

In the case now under consideration, the first of those propositions prevents the respondents from establishing by oral evidence that the appellant's rights and obligations (under either instrument) were in reality those of a mortgage. In addition, section 92 of the Evidence Ordinance prevents him from varying the unambiguous terms and conditions of the appellant's obligation to reconvey which are contained in the second instrument. Under our law, there must be some ambiguity in the language of a written instrument before evidence of the "surrounding circumstances" can be admitted as a guide to its interpretation. If it is felt that a relaxation of these rigid rules should be permitted in the case of what is commonly described as a "Moratuwa mortgage", the remedy lies with the legislature and not with us. In the meantime, the draftsman of a conveyance granted only "as security for a debt" must take special care to employ language which on the face of the instrument negatives an outright sale.

Appeal allowed.

[1] *(1954) 55 N. L. R. 529.* [2] *(1914) 17 N. L. R. 486.*

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1954 *Present :* **Gratiaen J. and Fernando A.J.**

THANGADORAI NADAR *et al.*, Appellants, *and*
G. H. ESMAILJEE *et al.*, Respondents

S. C. 393—D. C. Colombo, 22,990M

Rent Restriction Act—Payment of rent by cheque—Return of cheque after it becomes " stale "—Effect on question of rent being " in arrear "—Tender of rent.

When a landlord accepts payment of rent by cheque but does not present the cheque at the bank and returns it to the tenant after it becomes " stale ", the failure of the tenant to make a fresh payment within a reasonable time after the stale cheque is returned does not have the effect of a forfeiture of the tenant's statutory protection. Rent for any particular month is not " in arrear " within the meaning of the Rent Restriction if it was paid *or tendered* by the tenant within the stipulated period.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *H. W. Tambiah* and *S. Sharvananda*, for the defendants appellants.

N. E. Weerasooria, Q.C., with *V. A. Kandiah* and *V. Arulambalam*, for the plaintiffs respondents.

Cur. adv. vult.

July 20, 1954. GRATIAEN J.—

This is an appeal against a decree for the ejectment of two statutory tenants (who are partners) from business premises protected by the Rent Restriction Act, No. 29 of 1948. The grounds for ejectment upheld by the learned District Judge were :

(*a*) that their rent had been " in arrears for one month after it became due ", and

(*b*) that the premises were " reasonably required " by the landlords for the purposes of their own business.

In my opinion, neither of these allegations was established at the trial.

The practice during the relevant period was for the tenants to pay rent by cheque at the end of each quarter. Accordingly on 4th July, 1949 they forwarded a cheque to the landlords' proctor in payment of rent for April, May and June. Similar cheques were forwarded on 28th September, 1949 (for July, August and September) and on 24th January, 1950 (for October, November and December).

Throughout this period, an earlier tenancy action was pending between the landlords and one of the tenants. For that reason, the cheques referred to were accepted " without prejudice to the rights of the plaintiffs in these proceedings ". This was no doubt a wise precaution to take but, instead of presenting the cheques for payment without unreasonable delay as they should have done, the landlords retained them in their proctor's custody without reference to the tenants until the conclusion of the trial.

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The earlier action was dismissed early in February, 1950 owing to an irregularity resulting from non-joinder of a necessary party. Immediately thereafter, the cheques dated 28th September, 1949 and 24th January, 1950 were belatedly presented for payment and were realised. The earlier cheque dated 4th July, 1949 was however not presented to the bank because the landlords' proctor assumed (perhaps correctly) that it had become "stale" during the long period when it had been retained in his hands. This cheque was returned to the tenants on 23rd February, 1950 without any request that a fresh cheque should be forwarded in place of it. Four days later, a formal notice was sent to the tenants terminating the contractual tenancy with effect from 31st March 1950. The landlords no doubt hoped that the tenants (whose ability and anxiety to avoid the statutory consequences of falling into arrears of rent cannot be disputed) would make some tactical blunder and thereby lose the protection of the Act. This (it is now submitted) is precisely what did occur. No further payments were made until the present action was instituted in May, 1950.

The tenants are admittedly also entitled to credit in a sum of Rs. 269·51 representing rent previously paid in excess of the authorised rate, and a further sum of Rs. 400 paid by way of advance at the commencement of the contract of tenancy in 1945. These sums were more than sufficient to discharge the tenants' liability in respect of rent for the months of January, February and March, 1950. The learned judge therefore correctly took the view that the tenants could only have lost their statutory protection "*if they are not to be given credit for the sum of Rs. 600 which was the amount of the cheque dated 4th July, 1949 sent to the landlords for the months of April, May and June, 1949*". This vital issue was answered in favour of the landlords in the Court below. For the reasons which I shall now set out, it should clearly have been decided the other way.

Apart from their stipulation that its acceptance should not be regarded as a waiver of any rights in the pending action, the receipt of the cheque dated 4th July, 1949 against rent for April, May and June, 1949 was unconditional. The payees' decision not to present this cheque for payment before it became stale could not therefore retrospectively convert the tenants into defaulters within the meaning of the Act, as it is not suggested that the cheque would have been dishonoured if presented for payment within a reasonable time. It would indeed be a remarkable result if a landlord, by resorting to the simple device of postponing presentation of his tenant's cheque until the bank refused to honour it (for no reason than that it had become stale), could deprive the tenant of his statutory protection.

Mr. Weerasooria invited us to hold that the tenants at least became defaulters when they failed to make a fresh payment within a reasonable time after the stale cheque was returned to them in February, 1950. I agree that the debt was perhaps revived. But the revival of indebtedness must not be confused with the totally independent issue as to the alleged forfeiture of statutory protection. Rent for any particular month is not "in arrear" within the meaning of the Act if it was paid *or tendered*

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by the tenant within the stipulated period. Let us take the hypothetical case where a valid tender of rent had without justification been rejected by the landlord. In such a situation, the debt remains unsatisfied, but the tenant's statutory protection is not thereby forfeited.

If the tenants were not "in arrears of rent" for April, May or June, 1949 within the meaning of the Act, they could not be held to have fallen into arrears in respect of any subsequent months. The landlords had no right to appropriate any payment (specifically accepted to cover a later period) towards satisfaction of a revived debt in respect of an earlier period.

There remains the question whether the premises were "reasonably required" by the landlords for their own business. The documentary and oral evidence convincingly established that, if they succeeded in this action, it was not their intention to occupy the premises in their present condition but to demolish the buildings and embark upon a more ambitious building programme in accordance with plans previously approved by the local authority. The third proviso to section 13 (1) of the Act precludes the Court from sanctioning such a proposal. *Deerasooriya v. Masilamany* [1].

For these reasons, I take the view that the landlords have not established their claim to eject their tenants. The judgment under appeal must therefore be set aside, and, in place of the decree passed in the lower Court, a fresh decree must be entered ordering the defendants to pay to the plaintiffs a sum of Rs. 594·78 which is admittedly due as rent up to 31st May, 1950. With regard to rents payable after that date, the defendants are entitled to credit in all sums subsequently deposited to the credit of the action. Subject to this, the plaintiffs' action must be dismissed with costs in both courts.

FERNANDO A.J.—I agree.

Judgment set aside.

1954 *Present :* **Gunasekara J. and de Silva J.**

MOHAMEDALY ADAMJEE *et al.*, Appellants, *and* HADAD SADEEN *et al.*, Respondents

S. C. 72, with Application 203—D. C. Colombo, 5,951 L

Registration—Will—Probate—Failure to register it—Effect as against person claiming adverse interest under subsequently registered deed.

Fideicommissum—Claim by prescription as against fideicommissary—Burden of proof—Evidence Ordinance (Cap. 11), ss. 101, 103—Prescription Ordinance (Cap. 55), proviso to s. 3.

Partition Ordinance (Cap. 86)—Section 9—Finding of fraud and collusion—Final decree cannot be set aside on that ground.

The non-registration of the probate of a will affecting immovable property renders it void as against a person claiming an adverse interest under a duly registered deed of a subsequent date. Therefore, where property of the estate

[1] (1953) 55 N. L. R. 57.

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is disposed of by a devisee, who is also an heir of the deceased, or is sold against him in execution, upon an instrument which is registered prior to the probate of the will, the transferee obtains, in respect of any share or interest to which the devisee would have been entitled by law but for the will, a title superior to that of the executor or a party claiming under him.

Where a plaintiff claims title to immovable property by prescriptive possession as against a fideicommissary, the burden is on him to prove the point of time when the fideicommissary acquired, under the fideicommissum, a right of possession to the property in dispute and to establish that from that time he (the plaintiff) has been in possession for a period of ten years or more.

Fraud and collusion on the part of the parties to a partition action does not entitle the person defrauded to an order setting aside the decree entered in that action ; his only remedy, according to section 9 of the Partition Ordinance, is an action for damages.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *S. J. Kadirgamar* and *B. S. C. Ratwatte*, for the plaintiffs appellants.

E. B. Wikramanayake, Q.C., with *V. Arulambalam*, for the 1st to 8th, 13th, 21st, 29th to 31st, and 37 defendants respondents.

Cur. adv. vult.

February 10, 1954. GUNASEKARA J.—

In District Court Colombo Case No. 5,706/P, which was an action under the Partition Ordinance (Cap. 56), a decree was entered on the 30th April, 1950, declaring the respondents entitled to certain immovable property in Kollupitiya and directing a sale of the property under the Ordinance. On the 20th May, 1950, the appellants, who had not been parties to that action, instituted in the district court the action out of which this appeal arises, claiming title to the entire property and alleging that the respondents had obtained the decree in the partition action by fraud. They prayed that the district court should " set aside or vacate " that decree and declare that it was " null and void and of no force or effect in law " ; or, in the alternative, award them damages in a sum of Rs. 100,000. The learned district judge held that the appellants were entitled (up to the time of the decree in the partition action) to an undivided 1/16 share of the property and to compensation for certain improvements effected by them, and that the respondents " wrongfully, unlawfully, fraudulently and collusively " omitted to make them parties to the partition action or give them notice of it and that they obtained the decree in question by fraud. Upon this footing he awarded the appellants damages in a sum of Rs. 29,687·50 and ordered the respondents to pay them half the costs of the action. He held that the appellants were not entitled to have the decree in the partition case set aside, or to have it declared null and void or to be declared owners of the premises in question.

The property was originally part of the estate of one Idroos Lebbe Marikar, who died in 1876 and whose last will was admitted to probate on the 29th May of that year. In accordance with directions contained in

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the will the estate was divided among those who would have been the intestate heirs in such a manner that each received the equivalent in value of what would have been his or her share upon an intestacy. In that division this property was conveyed by the executor, by the deed No. 2,575 of the 14th September, 1888, attested by Don Simon Lewis, Notary Public, to Savia Umma, a daughter of the testator. The conveyance was made subject to conditions that were set out in certain clauses of the will, which were also reproduced in the deed. It has been held by the Privy Council in *Sitti Kadija v. de Saram* [1] (where the same will was construed) that the effect of these clauses was to create a fideicommissum in favour of the children and grandchildren of the devisees. Later, in an appeal in the partition action, it was held by this court that the property was subject to a single fideicommissum and that the time of the gift-over was the death of the last of Savia Umma's children. The learned district judge holds that Savia Umma and her children are all dead, and that the respondents are her grandchildren. The appellants have not canvassed this finding of fact or the view that the property was subject to a fideicommissum from which it was freed only upon the death of Savia Umma and all her children.

In January, 1916, the property was sold in satisfaction of a mortgage decree entered against Savia Umma and her husband, and was purchased by the mortgagee, Leonora Fonseka, to whom it was conveyed by a fiscal's conveyance dated the 29th March, 1916. This conveyance describes the property by reference to a "diagram or map annexed to the deed No. 2,575 dated 14th September, 1888, attested by Don Simon Lewis of Colombo, Notary Public". Leonora Fonseka sold the property on the 16th August, 1919, to Adamjee Lukmanjee, whose interests have devolved on the appellants.

The fiscal's conveyance of 1916 and the other deeds in the appellants' chain of title have been duly registered, and the probate of 1876 and the executor's conveyance of 1888 have not been registered. Upon this ground the learned district judge holds that the probate is void as against parties claiming an adverse interest under the fiscal's conveyance and therefore the appellants were "entitled to claim the intestate rights of Savia Umma from Idroos Lebbe Marikar free of the fideicommissum created by his Last Will by virtue of due prior registration", and that the interest to which they were so entitled was a 1/16th share of the property. He rejected a contention that what they were entitled to upon this view was "the entirety of the property in question that was allotted to Savia Umma at the division of Idroos Lebbe Marikar's property amongst his heirs".

If the learned judge is right in his view that the last will is void as against the appellants, it seems to me that he is also right in holding that the interest they became entitled to was no more than the share that Savia Umma would have inherited (free of the fideicommissum) from Idroos Lebbe Marikar if the latter had died intestate. It was held in *Fonseka v. Carolis* [2], upon a point of law reserved for consideration by a Bench of three Judges, that the non-registration of the probate of a will affecting

[1] [*1946*] *A. C. 208; (1946) 47 N. L. R. 171.* [2] *(1917) 20 N. L. R. 97.*

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immovable property will render it void as against a person claiming an adverse interest under a duly registered deed of a subsequent date. Referring to this decision de Sampayo J. said in the same case [1],

> " The effect of the decision on the point referred to the Full Bench, so far as this case is concerned, is that where property of the estate is disposed of by a devisee, who is also an heir of the deceased, or is sold against him in execution, upon an instrument which is registered prior to the probate of the will, the transferee obtains, in respect of any share or interest to which the devisee would have been entitled by law but for the will, a superior title to that of the executor or a party claiming under him. "

There is no dispute as to the extent of the share of her father's estate to which Savia Umma would have been entitled but for the will. It is contended for the appellants, however, that that by virtue of the fiscal's conveyance of 1916 they are entitled to claim not merely the share that Savia Umma would have inherited in this property as an intestate heir but the shares of the other heirs as well, upon the footing that there had been cross-conveyances among all the heirs at the division of the estate. It is also argued, upon the authority of the decision in *Fonseka v. Fernando* [2], that the will is void only *quoad* the adverse interest claimed by the appellants, and that Savia Umma must be regarded as having been allotted the property in question free of the fideicommissum in a division of the estate among the intestate heirs. It seems to me that to treat the executor's conveyance of the property to Savia Umma as being in effect a conveyance by the other heirs of a 15/16ths share to her would be to take an altogether unreal view of the transaction. I am therefore unable to accept the appellant's contention on this point.

Mr. Wikramanayake has argued that the interest that can be claimed by virtue of the fiscal's conveyance is not adverse to the probate, and that therefore the learned judge has erred in holding that the will is void against the appellants. In the view that I take of the effect of this finding it is not necessary to consider the argument that the will is not void against the appellants. The respondents have not appealed from the learned district judge's decision that the appellants become entitled to a 1/16th share of the property.

The appellants have also set up a title by prescription. The learned district judge holds that they and their predecessors have been in exclusive and uninterrupted possession of the property from 1919, but that they have failed to prove a title by prescription inasmuch as they have not proved possession for a period of ten years after the accrual of the respondents' right of possession. The latter were fideicommissaries, and, in terms of the proviso to section 3 of the Prescription Ordinance (Cap. 55), the period of ten years " shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute ". The time when the respondents acquired this right has not been established, and the learned judge holds that the burden of proof on that issue lay on the appellants. It is contended for the appellants that this finding is erroneous.

[1] *(1917) 20 N. L. R. 97, at page 108.* [2] *(1912) 15 N. L. R. 491.*

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The argument for the appellants is that it was not necessary for them to prove that their possession was adverse to any particular person, but that it was sufficient to prove as regards the character of their possession that it was possession *ut dominus* ; and when they had proved that they had such possession for a period of ten years or more, the burden shifted to the respondents to prove that the appellants did not have possession for ten years after the respondents had acquired their right of possession.

I am unable to accept this argument. Section 3 of the Prescription Ordinance provides that the possession by a defendant for ten years that must be proved in order to entitle him to a decree in his favour is possession " by a title adverse to or independent of that of the claimant or plaintiff ; " and, conversely that the possession by a plaintiff for ten years that must be proved to entitle a plaintiff to a decree in his favour is possession " by a title adverse to or independent of " that of the defendant. It seems to me, therefore, that before it can be held that the appellants have established a title by prescription there must be proof that they possessed the property adversely to the respondents for a period of ten years or more. There appears to be support for this view in two cases that were cited to us ; while no authority was cited in support of the appellants' contention. In *Raki v. Lebbe* [1] a decision that the predecessor of the respondents in that case had a title by prescription was based on a finding that his possession was adverse *as against the appellants*. In *Abdul Cader v. Habibu Umma* [2] it was held that (to quote the head note) " possession which commenced before the accrual of a fideicommissary's right is not adverse against the fideicommissary ". Mr. H. V. Perera contends that the headnote is misleading where it uses the expression " adverse *against the fideicommissary* ". With respect, I disagree. The idea that the possession that had to be proved by the defendants who were setting up a title by prescription was possession that was adverse to the plaintiffs (who had been fideicommissaries) is implicit in both the judgments delivered in that case. Lyall Grant J. said [3] " It seems to us clear on the Ordinance that a *fideicommissarius* does not become an adverse claimant under the second proviso of section 14 [4] until he acquires a right of possession. If this be so, there is no *adverse possession as against the present plaintiffs* for thirty years, and there is nothing to take the case out of the ordinary rule that the ten years required to establish a prescriptive possession do not begin to run until the adverse claimant has attained majority ". Jayawardene A.J. said : [5] " Mr. Hayley's argument requires that adverse possession commenced before the accrual of the fideicommissary's right should be regarded as *adverse possession against the fideicommissary* himself. That would certainly be a contravention of the principle laid down in *Casim v. Dingehamy* [6] ".

If the possession that had to be proved before the appellants could get judgment was possession that was adverse as against the respondents, then both under section 101 and under section 103 of the Evidence Ordinance (Cap. 11), the burden of proving such possession lay on the appellants. As possession could be adverse as against the respondents only from the time

[1] *(1912) 16 N. L. R. 138.*
[2] *(1926) 28 N. L. R. 92.*
[3] *at page 94.*
[4] *Now Section 13.*
[5] *at page 96.*
[6] *(1906) 9 N. L. R. 257.*

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of the accrual of their right of possession, it follows, I think, that the burden of proving when that right accrued was on the appellants. As was pointed out in *Chelliah v. Wijenethan* [1], " where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests fairly and squarely on him to establish a starting point for his or her acquisition of prescriptive rights ". I agree with the learned district judge's view that the appellants have failed to prove a title by prescription.

A further contention that was urged in support of the appeal was that the decree in the partition action was a nullity or at any rate was not binding on the appellants as a decree that was conclusive in terms of section 9 of the Partition Ordinance. It was urged that it had not been given in the manner provided in the Ordinance, in that there had been no proper investigation of the title to the property. In our opinion the learned district judge was right in his conclusion that the decree was not open to this criticism, and we therefore did not call upon the learned counsel for the respondents to address us on this ground of appeal. Nor did we call upon him to reply to a further argument, that the finding of fraud and collusion on the part of the respondents entitled the appellants to an order setting aside the decree in the partition action. Mr. Perera submitted that it was a general principle of the Roman-Dutch Law that fraud vitiates any transaction that is tainted by it, and that a decree that has been obtained by fraud can be set aside on that ground where no other remedy is available. This common law remedy, he argued, had not been taken away by statute : section 9 of the Partition Ordinance did not provide that the decree must stand notwithstanding that it may have been obtained by fraud, but only made it conclusive against all persons while it stood, and the proviso merely saved the common law right of a party who might be prejudiced by a partition or sale to recover damages in certain circumstances in those cases in which the decree was not aside. This view of the effect of section 9 is in conflict with a current of authority that is binding on this court. It is sufficient to refer to one of the series of decisions on the point, *Jayawardene v. Weerasekera* [2], where Sir Alexander Wood Renton said :

> " It is as well settled as any point of law can be that a partition decree is conclusive against all persons whomsoever, and that a person owning an interest in the land partitioned whose title even by fraudulent collusion between the parties had been concealed from the court in the partition proceedings, is not entitled on that ground to have the decree set aside, his only remedy being an action for damages. "

The appeal must be dismissed with costs, and Application No. 203, which is an application for revision of the proceedings in the partition action, must be refused.

DE SILVA J.—I agree.

Appeal and Application dismissed.

[1] *(1951) 54 N. L. R. 337 at 342 ; 46 C. L. W. 27 at 31.*
[2] *(1917) 4 C. W. R. 406.*

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1954 *Present :* **Nagalingam S.P.J. and Fernando A.J.**

M. N. M. SALAHUDEEN, Appellant, *and* COMMISSIONER OF STAMPS, Respondent

S. C. 241—Appeal under the Stamps Ordinance

Stamps—Trust in favour of Company which is not yet in existence—Conveyance by trustee to Company after grant of incorporation—Amount of stamp duty payable—Stamps Ordinance, Schedule, Part 1, Items 23 (1) (b), 23 (4), 23 (8), 27 (Proviso)—Trusts Ordinance, s. 84.

Property can be held by a person in trust to convey it to a Company which is to come into existence in the future. When immovable property thus held in trust is conveyed by the trustee to the Company when formed, the deed of transfer is a conveyance " by a trustee without consideration to the person beneficially entitled ", and as such attracts only the duty chargeable under Item 23 (4) of Part 1 of the Schedule to the Stamps Ordinance.

APPEAL against a determination of the Commissioner of Stamps.

H. W. Tambiah, with *A. M. Ameen*, for the appellant.

M. Tiruchelvam, Crown Counsel, for the respondent.

Cur. adv. vult.

November 24, 1954. FERNANDO A.J.—

The appellant contests the correctness of the opinion of the Commissioner of Stamps that Deed No. 1,644 of July 15, 1943, is liable to stamp duty of Rs. 2,840 as a conveyance of property under Item 23 (1) (*b*) of Part 1 of the Schedule to the Stamps Ordinance read with the proviso to Item 27, or alternatively to duty of the like amount under Item 23 (8) as a conveyance not otherwise charged or excepted. He maintains that the deed is a conveyance " by a trustee without consideration to the person beneficially entitled ", and as such attracts only the nominal duty of Rs. 10 under Item 23 (4).

The circumstances under which the deed came to be executed are not disputed by the Commissioner and have an important bearing on the question we have to decide. It would appear that one A. R. M. Mohamed in December 1942, made an offer of Rs. 177,500 for the purchase of two estates, and the offer being accepted, a conveyance in his favour was executed on March 15, 1943. The consideration for the purchase was provided by Mohamed himself and three other persons in varying proportions and by cheques drawn by or on behalf of each of those persons. The documents in the case make it clear that these four persons had decided (*a*) to float a private company which would own the two estates and (*b*) that

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they would be allotted shares in the company in strict proportion to the amounts respectively contributed by them towards the total purchase price paid for the estates. The application for the incorporation of the proposed company was made in January 1943, but the grant of incorporation was delayed, for one reason because the law at that time required the sanction of the Governor for the formation of a company with a capital exceeding one lakh. The Controller of Exchange was informed by the Proctor for the parties of the purpose of the incorporation and of the fact that it was intended that the property would be purchased in trust for the company to be formed. As the sale had to be concluded before the certificate of incorporation could be granted, the proctor first tendered to the vendors a draft deed in favour of Mohamed " in trust for the proposed company ", but the vendors were unwilling to agree to that form and relied on the fact that the offer they had accepted had been made by Mohamed personally. Hence it was that the deed No. 1620 of March 15, 1943, purported to be an outright transfer to Mohamed and contained no reference to the object with which the estates were being purchased. The certificate of incorporation of the company was subsequently issued (on June 8, 1943), and in July Mohamed executed, in favour of the company, the conveyance No. 1644 which is the subject of this appeal.

The intention of the persons who provided the consideration for the conveyance No. 1620 was that the estates should be purchased on behalf of the company and thereafter owned by the company. It was impossible at that date for that conveyance to be executed in the name of the company, but only for the reason that the grant of incorporation was delayed. Accordingly, the conveyance was in favour of Mohamed, but with the intention not of vesting the beneficial interest either in himself alone or in himself, together with his three " partners " but rather of vesting the legal title in Mohamed in trust to convey the property to the company when formed—a trust which was duly honoured by the execution of the conveyance No. 1644.

The Commissioner and Crown Counsel both rely on the fact that the company was not in existence at the time of the execution of Deed No. 1620, and argue therefrom that there cannot be a trust in favour of a company which is not in existence at the time of the constitution of the trust. In the case of *De Silva and Mendis v. Commissioner of Stamps* [1], where a testator appointed trustees and directed them to convert an estate into a company and allot shares in the company to the heirs, it was held that the subsequent conveyance of the estate to the company was chargeable with duty only as a conveyance by a trustee to the beneficiary. Such a decision could only have been reached on the basis that property can be held by a person in trust to convey it to a company which is to come into existence in the future.

Crown Counsel then contended that since the consideration for the first transfer No. 1620 was provided by the four " partners ", the estate would be held by Mohamed in trust for all the partners as a constructive trustee

[1] *(1943) 44 N. L. R. 462.*

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under Section 84 of the Trusts Ordinance, and not in trust for the proposed company, and that accordingly the Deed No. 1644 was not a transfer to the persons beneficially interested. This contention would undoubtedly have been a sound one if the " partners " had not in fact formed and expressed a different intention. Although that intention was not specifically expressed in the first conveyance, there is no question but that the company had a right to demand a conveyance from Mohamed who would have been met by the plea of fraud if he relied upon the absence of a written declaration of trust.

It was lastly argued that the expression " trustee " in item 23 (4) covers only persons holding office as such by express appointment or designation (as in the case of " executors " and " administrators " who are also mentioned in the same Item), and that the Court will not be at pains to consider a person to be a " trustee " in order to confer the advantage of a low rate of stamp duty. This is in my opinion an interpretation too narrow for adoption in the case of a taxing statute. I think Item 23 (4) would be applicable in every case where the holder of a bare legal title conveys the property to persons having the beneficial interest in fulfilment of an obligation which is a " trust " as defined in the Trusts Ordinance.

I would therefore hold that the Deed No. 1644 is chargeable with duty under Item 23 (4). The appeal must be allowed with costs.

NAGALINGAM S. P. J.—I agree.

Appeal allowed.

[COURT OF CRIMINAL APPEAL]

1955 *Present* : **Rose C.J. (President), Gunasekara J. and Weerasooriya J.**

RUPARATNE, Appellant, *and* THE QUEEN, Respondent

APPEAL 10 OF 1955, WITH APPLICATION 13

S. C. 34—M. C. Kurunegala, 8,934

Criminal Procedure—Evidence of accused—Contradictory of previous statement to Police—Right to prove such statement—Evidence in rebuttal—Impeaching credit of witness—Evidence Ordinance, ss. 120 (6), 155 (c)—Criminal Procedure Code, ss. 122 (3), 237 (1).

The accused in a trial for murder gave evidence on his own behalf which differed from a statement that had been made by him to an Inspector of Police to the effect that about a month prior to the deceased's murder the deceased

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and his brother had assaulted the accused. Although oral evidence of that statement to the Police could have been adduced by the prosecution as part of its case on the basis that the statement was an admission by the accused relating to a probable motive for the commission of the alleged murder, there were certain circumstances which deterred the prosecution from adducing evidence of it in the first instance. When, however, the accused denied in cross-examination that he had made such a statement, the trial Judge permitted the Crown to call the Inspector of Police to give evidence of the statement for the purpose, as stated by him, of showing that " the witness made a different statement to the Police". The jury were also warned, in the summing-up, that the effect of the evidence of the accused's statement to the Police could not properly be treated as substantive evidence of any fact.

Held (by the majority of the Court), that the trial Judge was not wrong in permitting the Crown, after the case for the defence had been closed, to lead evidence of the statement made by the accused to the Inspector of Police.

" As was pointed out in the case of *Rasiah v. Suppiah* [(1949) 50 N. L. R. 265] the right given to a party under Section 155 (*c*) of the Evidence Ordinance of impeaching the credit of a witness by proving a former statement which is inconsistent with his evidence is, strictly speaking, not a right to adduce rebutting evidence for which, by leave of the Judge (in the case of a trial before the Supreme Court), special provision is contained in Section 237 (1) of the Criminal Procedure Code. "

Thuraisamy v. The Queen (1952) 54 N. L. R. 449, distinguished.

APPEAL, with application for leave to appeal, from a conviction in a trial before the Supreme Court.

W. E. M. Abeysekera, with *L. F. Ekanayake*, for the accused appellant.

Vincent T. Thamotheram, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 14, 1955. WEERASOORIYA J.—

The substantial point that was raised in this appeal relates to what is alleged to be an improper exercise of the learned trial Judge's discretion in permitting the Crown to call certain evidence in rebuttal.

The appellant was charged with the murder of one Ran Banda by shooting, and the evidence against him consists in the main of the evidence of an eye-witness Dingiri Appu, supported by certain items of circumstantial evidence.

The prosecution had in their possession a statement which was alleged to have been made by the appellant to the Inspector of Police in which the appellant was recorded as having said that about a month prior to the deceased's murder the deceased and one Dingiri Banda (a brother of the deceased) assaulted him because he had held the hand of their step-sister Kawamma. Although this statement was one which was made to the Inspector of Police in the course of the investigation under Chapter XII of the Criminal Procedure Code it would seem on the authority of the decision in *Rex v. Jinadasa* [1] that oral evidence of it could have been

[1] *(1950) 51 N. L. R. 529 at 540.*

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adduced by the prosecution as part of its case on the basis that the statement was an admission by the appellant relating to a probable motive for the commission of the offence with which he was charged.

The prosecution elected, however, in the presentation of its case, to refrain from adducing this evidence, may be for the reason (apart from, perhaps, a reluctance to use a statement by an accused person to a Police Officer as substantive evidence against the person making it) that it was regarded as unlikely that Dingiri Banda, whom it called as a witness to testify to certain other matters as well, would support the allegation of an assault on the appellant by him and the deceased. The evidence given by him in fact negatived such an assault since he stated that although Kawamma had made a complaint to him against the appellant, he took no action on that nor did he know whether "the deceased did anything about it". There was also the evidence of the eye-witness Dingiri Appu, who is the father of Kawamma, that despite her complaint against the appellant he was not angry with the appellant "at any time" and that as far as he knew the deceased and the appellant were not enemies, and the evidence of the mother of Kawamma that the deceased and the appellant were on speaking terms. In the circumstances it seems to the majority of the Court that the prosecution cannot fairly be criticised for not adducing the evidence of the appellant's statement as part of its case in the first instance.

When the appellant gave evidence on his own behalf at the trial he took up the position that the deceased was his "best friend". This evidence, it will be seen, is not inconsistent with the evidence already adduced by the prosecution and referred to in the preceding paragraph as regards the relations that existed between the deceased and the appellant. Under cross-examination the appellant was confronted with his statement to the Inspector of Police and questioned whether he had made it. The appellant denied that he had made such a statement. After the case for the defence was closed learned Crown Counsel made an application to be permitted to lead evidence of this statement by calling the Inspector of Police. Although objection was taken by the defence to this application the learned Judge overruled it and permitted the evidence to be led for the purpose, as stated by him, of showing that "the witness made a different statement to the Police".

In his charge the learned Judge warned the jury as to the effect of this evidence and explained that it could not properly be treated as substantive evidence of any fact, and it was conceded by learned counsel for the appellant that this warning was an adequate one. But he submitted that in a case of this nature where in the proof of the charge against the appellant the prosecution had to rely mainly on a single eye-witness the effect of this evidence might well have been prejudicial to the appellant in that, despite the warning, the jury may have improperly regarded that evidence as proof of a motive for the appellant to have killed the deceased, and that in the circumstances the learned Judge should not have permitted the prosecution to adduce the evidence in question even for the limited purpose stated by him.

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It seems, however, to the majority of the Court that this is not a submission which can be accepted. As was pointed out in the case of *Rasiah v. Suppiah* [1] the right given to a party under s. 155 (*c*) of the Evidence Ordinance of impeaching the credit of a witness by proving a former statement which is inconsistent with his evidence is, strictly speaking, not a right to adduce rebutting evidence for which, by leave of the Judge (in the case of a trial before the Supreme Court), special provision is contained in s. 237 (1) of the Criminal Procedure Code. In the present case no objection was taken by the defence to the cross-examination of the appellant nor did the learned Judge himself, despite the power given to him under s. 120 (6) of the Evidence Ordinance to limit the cross-examination relating to the credit of the appellant, choose to interfere when the appellant was questioned whether he had not made a statement to the Inspector of Police which was inconsistent with his evidence as to the relations that existed between himself and the deceased. Possibly one reason why the learned Judge chose not to interfere at this stage was that had the appellant answered that question in the affirmative his reply could not have been excluded as inadmissible. It does not appear to the majority of the Court that the learned Judge wrongly exercised his discretion in this instance. That being so, it would be seen that when the prosecution made the application to adduce evidence of the statement which the appellant is alleged to have made to the Inspector of Police there was no ground on which it could have been refused. Had the application been refused, counsel for the appellant may well have complained (notwithstanding that the application was objected to by the defence at the trial) of the prejudice that could have been caused to the appellant by it having been brought to the notice of the jury in the course of the cross-examination of the appellant that he had made an inconsistent statement to the Inspector of Police, and that the refusal of the Judge to allow the Inspector of Police to be called in effect prevented the defence from cross-examining him on the basis that the statement imputed to the appellant was never in fact made.

The majority of the Court consider that this case can be distinguished from that class of cases in which according to the following observations of Lord Du Parcq in *Noor Mohamed v. The King* [2] evidence which could be prejudicial to an accused should be excluded :

> " In all such cases the Judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interests of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the Judge would be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused, even though there must be some tenuous ground for holding it to be technically admissible. The decision must then be left to the discretion and sense of fairness of the Judge." "

[1] *(1949) 50 N. L. R. 265.* [2] *(1949) A. C. 182 at 192.*

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In the present case it cannot in the view of the majority of the Court be urged that the evidence in question was of trifling weight in so far as it could have been legitimately used as a test of the credibility to be attached to the evidence of the appellant, or that the learned Judge should not have permitted it to have been led on the ground of the possibility that the jury, despite the adequate warning given by him, would *improperly* use it as substantive evidence of the facts to which it relates.

The majority of the Court are also of the opinion that the present case is distinguishable from the case of *Thuraisamy v. The Queen* [1] where the learned trial Judge fell into the error of directing the jury that certain evidence which had been adduced to contradict the evidence of the appellant in that case could be treated as substantive evidence of the facts deposed to.

As to the remaining points raised at the hearing of the appeal, we are of the opinion that there was sufficient evidence to enable the jury to return the verdict which they did. The appeal and application are, therefore, dismissed and the conviction and sentence affirmed.

Appeal and application dismissed.

1955

Present : **Sansoni J.**

S. SILVA, *et al.*, Appellants, *and* MUNIAMMA, Respondent

S. C. 138—C. R. Colombo, 45,592

Landlord and tenant—Donee or vendee of leased premises—His right to sue tenant for rent.

Where a landlord donates the rented premises reserving a life-interest in his favour, the donee is entitled to claim the rent from the tenant on the death of the donor; it is not open to the tenant to continue to remain in possession and refuse to pay rent to the new owner on the pretext that he never attorned to the new owner.

Zackariya v. Benedict (1950) 53 N. L. R. 311, considered.

APPEAL from a judgment of the Court of Requests, Colombo.

Vernon Wijetunga, with *H. D. Perera*, for the plaintiffs appellants.

No appearance for the defendant respondent.

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January 24, 1955. SANSONI J.—

The premises in dispute were rented by one Girigoris Perera to the defendant. Girigoris had become the owner of these premises under a final decree entered in a partition action in 1939. After that decree had been entered Girigoris gifted these premises in 1946 to the plaintiffs subject to a life interest in his favour. Girigoris died on 15th November, 1952, and, on the 29th November, 1952, the plaintiffs wrote to the defendant informing her of Girigoris' death and asking the defendant to pay the future rents to them because they are entitled to the premises under the deed of 1946. The defendant did not even acknowledge this letter but continued in occupation of the premises. She has now been sued for rent from December, 1952, until the end of April, 1953, amounting to Rs. 60. The defendant in her answer denied that she was at any time the tenant of the plaintiff. She also pleads that she has paid rent to one Marthelis Perera who is a brother of Girigoris.

The learned Commissioner found that the defendant was Girigoris' tenant. He has also found that rent was paid to Marthelis on 1st December, 1952, that is to say, after Girigoris had died and after the plaintiffs had informed the defendant of his death. He appears to be satisfied that Marthelis was setting up the defendant to contest the plaintiffs' rights. He has, however, held that because the defendant refused to comply with the plaintiffs' request to pay rent to them, the plaintiffs cannot bring an action to recover rent as the defendant has not attorned to the plaintiffs. He cites a judgment of this Court in *Zackariya v. Benedict*[1], but the point decided there was different. Mr. Justice Swan was dealing with the case where a tenant refused to pay rent to the vendee of the landlord and all he held was that the vendee could give the tenant notice to quit and sue the tenant for ejectment, but there are numerous authorities in support of the proposition that when a landlord sells premises which have been rented the purchaser steps into the landlord's shoes and is entitled to claim the rent from the tenant. Of course it is not incumbent on the tenant to remain in possession if he does not wish to acknowledge the vendee as his landlord. He is quite entitled to give up the tenancy and quit the premises, but so long as he remains in possession he must pay the rent to his new landlord, that is the vendee[2]. In this case, apart from the fact that the defendant did not refuse to accept the plaintiffs as her landlord, it was not open to her to remain in possession and refuse to pay the rent to the plaintiffs. Although the plaintiffs are the donees of Girigoris their position is in no way different from that of a vendee. The only point of distinction is that their right to claim possession did not accrue until Girigoris had died. Once he died they were in exactly the same position in which any vendee from Girigoris would have found himself. I therefore set aside the judgment under appeal and enter judgment for the plaintiffs in a sum of Rs. 60 with costs in this Court and in the lower Court.

Appeal allowed.

[1] *(1950) 53 N. L. R. 311.*

[2] *(1913) 16 N. L. R. at 317; (1951) 52 N. L. R. at 445.*

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1954 *Present :* **Swan J.**

A. L. M. A. HAMID MARIKAR, Appellant, *and* COMMISSIONER OF INCOME TAX, Respondent

S. C. 369, with Application 69—M. C. Kalutara, 15,789

Excess Profits Duty—Proceedings for recovery—Notice of assessment—Time-limit for service—Form of notice—Income Tax Ordinance, ss. 68 (1), 80 (1).

Notice of assessment of Excess Profits Duty need not be served on the assessee before the last day fixed for assessment ; it may be served subsequently.

A defect in the notice would be cured by section 68 (1) of the Income Tax Ordinance if in substance and effect the notice informs the assessee that he is required to pay the amount of the assessed levy.

APPEAL, with application in revision, from a judgment of the Magistrate's Court, Kalutara.

H. V. Perera, Q.C., with *H. W. Tambiah* and *H. L. de Silva*, for the assessee appellant.

G. F. Sethukavalar, for the respondent.

Cur. adv. vult.

December 13, 1954. SWAN J.—

There is no right of appeal in this case, but as papers have been filed in revision as well I shall consider the matter. The respondent issued a certificate to the Magistrate of Kalutara under Section 80 (1) of the Income Tax Ordinance as applicable to the Excess Profits Duty Ordinance No. 38 of 1941 for the recovery of a sum of Rs. 8,470 as excess profits duty from the appellant. The appellant duly appeared on summons and desired to show cause and the matter was fixed for inquiry. The appellant sought to prove that he was not a defaulter inasmuch as (i) the notice of assessment was not duly served on him but on his former partner A. L. M. A. Rahiman Marikar and (ii) the notice of assessment was served out of time. The learned Magistrate held against the appellant on both these points and imposed the amount of the assessed levy as a fine.

At the hearing of this appeal the same two points were raised. I shall first deal with the submission that the notice was served out of time. According to the Excess Profits Duty Ordinance as amended and extended the assessment had to be made before the 31st December, 1950. Mr. Perera contended that the notice of assessment should have been served also before that date. Mr. Sethukavalar who appeared for the respondent maintained that all that the Ordinance required was that the assessment should in fact have been made before the end of December, 1950, but the notice of assessment could be served at any time thereafter.

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In this connection he cited to me the case of *Pickford v. The Commissioner of Inland Revenue* [1] which supports his contention. A passage from "The Law and Practice of Income Tax" by Sri Kanga and Palkavala at page 581 referred to by the learned Magistrate in his judgment makes the position quite clear. I would therefore hold that the assessment was not made out of time.

The next point to consider is whether the appellant had notice of the assessment. The original notice has been produced by the respondent and is marked R5. That it was received by the appellant there can be no doubt. It is addressed to both partners. At the top is typed "For the information of A.L. Abdul Hamid Marikar". If, as Mr. H. V. Perera contends, it was an "information copy" it is none the less a notice of assessment. But even if there are any mistakes, defects or omissions in it, or it is lacking in form it would be cured by Section 68 (1) of the Income Tax Ordinance if it is in substance and effect a notice that the assessee was required to pay the amount of the assessed levy.

The appeal is rejected and the application in revision refused.

Appeal rejected and revision refused.

[1] *13 Tax Cases 251.*

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1955 *Present :* **Gratiaen J. and Sansoni J.**

D. H. S. AMARASEKARA, Appellant, *and* D. S. ABEYGUNAWARDENE, Respondent

S. C. 198—D. C. Colombo, 23,654/M

Prescription—Action instituted in Court of Requests—Claim in reconvention beyond jurisdiction—Transfer to District Court—Date of action in respect of the claim in reconvention—Courts Ordinance (Cap. 6), s. 79—Prescription Ordinance, s. 10.

Rent Restriction Ordinance, No. 60 of 1942—Sections 7 and 14—Premium illegally received by landlord—His right to retain it—Illegal contract.

When the Supreme Court authorises under section 79 of the Courts Ordinance a transfer of proceedings from the Court of Requests to the District Court by reason of the claim in reconvention being beyond the jurisdiction of the Court of Requests, the action for the recovery of the claim in reconvention in excess of the sum which the Court of Requests has jurisdiction to award does not " commence " within the meaning of the Prescription Ordinance until the transfer of the proceedings to the District Court has been authorised by the Supreme Court ; in regard to the issue of prescription, the action must be regarded as having *commenced* in the Court of Requests and *continued* in the *District Court* in respect only of those claims over which the former Court had jurisdiction to grant relief.

Quaere, whether a premium paid by a tenant to his landlord in contravention of the Rent Restriction Ordinance of 1942 and of the later Act of 1948 is recoverable in every case ? Scope of the applicability of the maxim *in pari delicto potior est conditio defendentis* considered.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy*, for the plaintiff appellant.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the defendant respondent.

Cur. adv. vult.

March 18, 1955. GRATIAEN J.—

The appellant was the landlord, and the respondent the tenant, of a bungalow in Colombo to which the Rent Restriction Ordinance, No. 60 of 1942, applied. The landlord sued the tenant in the Court of Requests on 15th May, 1950, for the ejectment of the tenant who claimed in reconvention the return of certain sums paid by him (*a*) as rent in excess of the authorised amount, and (*b*) by way of " premium " as a condition of the grant of the tenancy.

The total amount counter-claimed by the tenant far exceeded the monetary jurisdiction of the Court of Requests. Accordingly, he applied

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2——J. N. B 44786-1,592 (5/55)

for and obtained from this Court on 6th October, 1950, an order under section 79 of the Courts Ordinance transferring the entire proceedings to the District Court of Colombo.

Before the trial commenced in the District Court, the tenant had vacated the premises, so that only his claims in reconvention called for adjudication. The landlord admitted liability to refund a sum of Rs. 551·88 received by him in excess of the authorised rent. With regard to the outstanding claim for the return of the premium, the learned Judge held that the landlord had exacted a premium of Rs. 1,800 in breach of section 7 of the Rent Restriction Ordinance, No. 60 of 1942, and entered judgment in favour of the tenant for this amount in addition to the sum of Rs. 551·88 admitted to be due.

The landlord has appealed against that part of the decree which orders the repayment of the premium on two grounds :—

(1) that the claim was prescribed ;

(2) that in any event, the principle *in pari delicto potior est conditio defendentis* precluded the tenant from asking the Court's aid to recover an illegal payment.

As to the former plea, it is common ground that section 10 of the Prescription Ordinance applies, and the learned Judge accepted the evidence that the premium sought to be recovered had been paid on 3rd September, 1947. If, therefore, the action on the claim in reconvention can properly be regarded as having " commenced " when the tenant filed his answer in the Court of Requests—i.e., on 10th July, 1950, the plea of prescription admittedly fails. On the other hand, Mr. Jayawardene concedes that the claim was prescribed if 6th October, 1950, is taken as the operative date—that is to say, if the action for the recovery of the premium did not " commence " within the meaning of section 10 until the transfer of the proceedings to the District Court was authorised by the Supreme Court.

There are no earlier decisions precisely in point, but we do receive some guidance from *Mudiyanse v. Siriya* [1] and more particularly from *Kuluth v. Mohamadu* [2]. Each of these cases was concerned with a " 247 action " in which the plaint (originally filed in a Court lacking jurisdiction in the matter) was subsequently filed in the proper Court (the transfer in one instance having been authorised by the Supreme Court). It was held in both cases that, for purposes of prescription, the action " commenced " only on the date when the proceedings were initiated in the Court which did have jurisdiction to entertain the plaint. The *ratio decidendi* of Abrahams C.J.'s judgment in *Kuluth's case* (supra) is that an action cannot be regarded as having effectively *commenced* in the first Court (and *continued* in the other) unless the former Court had jurisdiction to give relief upon the cause of action relied on ; and that an order of this Court authorising a transfer of the proceedings does not affect the issue in the absence of special statutory provision to that effect.

The learned Judge rejected the plea of prescription in view of the interpretation which he placed on the concluding words of the proviso to section 79 of the Courts Ordinance—namely, that when the Supreme Court has

[1] *(1921) 23 N. L. R. 285.* [2] *(1936) 38 N. L. R. 48.*

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authorised a transfer of proceedings from a Court of Requests (which lacks jurisdiction to enter judgment upon a claim in reconvention) to a District Court (which has such jurisdiction) the proceedings "*shall thereafter be continued and proceeded in* (*the District Court*) *as if it had originally commenced there*". I find myself unable to accept this view. In my opinion, these words are not equivalent to a statutory provision that, upon a transfer, an action shall *for all purposes* (including an issue of prescription) be deemed to have commenced in the District Court on the date on which it had in fact commenced in the Court of Requests. On the contrary, the words relied on by the learned Judge seem to me to be only procedural in their nature : no fresh pleadings need be filed as a preliminary to the trial in the new Court but the proceedings "continue" (in that sense) from the stage at which they had been interrupted in the Court of Requests.

In his original answer filed in the Court of Requests, the tenant pleaded certain facts relating to payments made by him to the landlord—in so far as those facts had a bearing on his defence to the landlord's claim, the Court of Requests certainly had jurisdiction to adjudicate upon them ; but in so far as he further asked for a decree in his favour for a sum exceeding Rs. 300 upon his claim in reconvention based on these facts, the Court had no jurisdiction to grant him that additional relief. It is for this reason that the tenant obtained the sanction of this Court to have the whole proceeding (comprising the claims on which the Court of Requests had power to grant relief as well as those on which it had no such power) transferred to a Court "having jurisdiction over the whole matter in controversy". This analysis seems to me to lead to the following conclusions as far as the issue of prescription is concerned :—

(1) The action must be regarded as having *commenced* in the Court of Requests and *continued* in the District Court in respect only of those claims over which the former Court had jurisdiction to grant relief ; these "matters in controversy" were confined only to the landlord's claim for ejectment and damages until ejectment, and the tenant's claim to recover excess rent (on his first cause of action) limited however to a judgment in his favour for a maximum sum of Rs. 300 ;

(2) With regard to the outstanding matters in controversy, which included the entirety of the defendant's cause of action for the recovery of the premium, the action cannot be regarded as having "commenced" (within the meaning of the Prescription Ordinance) in the Court of Requests which had no jurisdiction to grant him substantive relief in the form of a money decree. Therefore, the action for the recovery of the premium effectually "commenced" only in the District Court which alone had jurisdiction to grant him the relief asked for ; it was in a different sense that the action "continued" for procedural purposes from an earlier procedural stage.

The word "commenced" appearing in "unless the same shall be *commenced* within three years from the time when such cause of action

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accrued" mean "initiated in a Court possessing jurisdiction to grant *relief in the form of a decree* upon the cause of action". I would accordingly hold that the tenant's claim in recovention for the recovery of Rs. 1,800 paid as premium was prescribed. The decree in his favour must therefore be confined to a sum of Rs. 551·88 in respect of which no plea of prescription has been raised, together with costs in that class. The appellant is however entitled to the costs of this appeal.

It is no longer necessary to give a definite finding on the landlord's alternative plea that the Court should not in any event lend its aid to a party seeking to recover money paid by him in pursuance of an illegal transaction. In deference to the interesting arguments addressed to us, however, I propose to make some observations on this issue.

Section 7 of the Ordinance of 1942 prohibited a landlord from demanding or receiving a premium "as a condition of the grant, renewal or continuance" of a tenancy of controlled premises, and section 14 prescribes the penalty for this offence. The Ordinance did not directly penalise payments of premium *by tenants* (such as is now done in the later Act of 1948), but no doubt a tenant making a payment which his landlord was prohibited from receiving under the earlier enactment would generally be found to have committed the offence of abetment within the meaning of the Penal Code. I therefore agree with Mr. Perera that the judgment of Pulle J. (Swan J. concurring) in *Vitharane v. de Zylva*[1], which dealt with a case under the Act of 1948, cannot be distinguished on this narrow ground. Whichever enactment applies, the question whether the maxim *in pari delicto potior est conditio defendentis* should operate or not must be decided with due regard to the facts of the particular case.

Mr. Jayawardene relied strongly on a recent judgment of Devlin J. in *Gray and others v. Southouse and another*[2] in which, under the English law, a premium paid to a tenant by his sub-tenant was held to be recoverable. It is safer, however, to examine the question solely by reference to the provisions of our local enactments in the light of the principles of the Roman-Dutch law.

I am not convinced that a landlord can automatically claim that the *in pari delicto* principle affords a complete answer to any claim for the recovery of a premium illegally received by him in contravention of the Ordinance of 1942 or of the Act of 1948. The law is not so rigid, and it is quite wrong to assume that, under existing conditions, a tenant making an illegal payment is necessarily *in pari delicto* with his landlord who illegally receives it.

The true principle to be applied in a case of this kind has been explained by the Appellate Division of the Supreme Court of South Africa in *Jajbhay v. Cassim*[3]. The maxim *ex turpi causa non oritur actio* will, of course, always preclude a litigant from seeking the assistance of a Court of law to enforce an illegal contract; but the ancillary maxim *in pari delicto potior est conditio defendentis* "has not, in modern systems of law, been rigidly and universally invoked to defeat every claim by one of two

[1] (*1954*) *56 N. L. R. 57.* [2] (*1949*) *2 A. E. R. 1019.*

[3] (*1939*) *S. A. A. D. 537.*

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delinquents to recover what he has delivered under such a contract ". The proper test is whether public policy would best be served by granting or refusing the plaintiff's case, and, in applying that test, " a Court should not disregard *the various degrees of turpitude* in delictual contracts ". Watermeyer J. said :

> " The principle underlying the general rule is that the Courts will disregard illegal transactions but, the exceptions show that where it is necessary to prevent injustice or to promote public policy, it will not rigidly enforce the general rule."

The underlying policy of the Rent Restriction Ordinance of 1942 and of the later Act of 1948 is to prevent certain abuses in a " seller's market " induced by the serious shortage of housing accommodation in certain localities. Both enactments make express provision for the recovery of payments illegally received (or illegally paid) by way of *excess rent*, but they are silent as to the right of a landlord to retain a premium illegally received by him. This omission does not convey to my mind that Parliament necessarily intended a landlord to retain the illegal premium in every case if he was willing to run the risk of paying a fine or serving a term of imprisonment prescribed for his offence. On the contrary, Parliament was content to leave issues arising on a tenant's claim to recover the money to be decided in accordance with the principles of the general law.

I can well conceive of cases where, in the context of rent restriction legislation, public policy would require a landlord to refund the illegal premium. Similarly, I can conceive of cases where the tenant ought not to be allowed to claim the money back. An illustration of the former case is when a rapacious landlord exacts an illegal payment from a person who is desperately in need of a house, and who cannot find shelter for himself and his family unless he submits to the illegal terms exacted by the landlord. An illustration of the converse case is where a wealthy person in search of a house puts temptation in the way of a landlord by offering him a " bribe " in order to obtain preference over other prospective tenants. The proper way to promote public policy and to administer justice between man and man is to give careful consideration to the circumstances of the particular case instead of applying an inflexible rule of law.

In the present case, the learned Judge took the view that the money ought to be refunded because " the landlord had taken undue advantage of the tenant's need for a house and exacted from him a sum of Rs. 1,800 notwithstanding the statutory prohibition ". If the evidence on record justifies that inference, I would be disposed to say that public policy would be better served by compelling the landlord to return his ill-gotten gains. However, as the claim is prescribed, this question need not be pursued further for the purposes of the present appeal. But landlords would be unwise to assume that *Vitharane v. de Zilva* (supra) has finally settled the law in their favour on the other issue.

SANSONI J.—I agree.

Appeal allowed.

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1955 *Present :* **Pulle J. and Weerasooriya J.**

T. K. SARNELIS, Appellant, *and* CIVILIAN LABOUR ADMINISTRATIVE OFFICER, Respondent

S. C. 962—Workmen's Compensation C. 30/9,807/50

Workmen's Compensation Ordinance—Appeal—Form of petition of appeal—Sections 48 (1), 49 (1), 51— Criminal Procedure Code, s. 340 (2).

A point of law stated in a petition of appeal filed under section 48 (1) of the Workmen's Compensation Ordinance need not be certified by an advocate or proctor in terms of section 340 (2) of the Criminal Procedure Code.

Thomas v. Ceylon Wharfage Co., Ltd. (1948) 49 N. L. R. 397, overruled.

THIS was a preliminary objection taken against an appeal preferred under the Workmen's Compensation Ordinance. The matter was referred to a Bench of two Judges.

No appearance for the appellant.

S. J. Kadirgamar, with *P. Somatilakam*, for the respondent.

Mervyn Fernando, Crown Counsel, as *amicus curiae*.

Cur. adv. vult.

March 30, 1955. PULLE J.—

This matter which has been referred to a Bench of two Judges raises a point of procedure in regard to appeals to this court under the Workmen's Compensation Ordinance.

The appellant claimed compensation against the Civilian Labour Administrative Officer, Royal Air Force, Katunayake, for injury suffered as the result of an accident which occurred on the 1st April, 1950. An order was made dismissing his claim on the ground that he was not a " workman " as that word is defined in section 2 (1) of the Ordinance. He appealed from that order. The question we have to decide is whether the appeal should be rejected on the preliminary objection taken by the employer that the petition does not bear a certificate by an advocate or proctor that the matter of law on which the appeal is taken is a fit question for adjudication by this Court. The objection is supported on the authority of *Thomas v. Ceylon Wharfage Co., Ltd.* [1] and *The Additional Controller of Establishments v. Lewis* [2]. The appellant did not appear nor was he represented and we are indebted to learned Crown Counsel for appearing as *amicus curiae*.

The right of a party aggrieved to appeal on a point of law is conferred by section 48 (1) of the Ordinance which is the first of the sections in Part X dealing with appeals. The appeal must be by way of petition which shall, by section 49 (1), " bear uncancelled stamps to the value of

[1] *(1948) 49 N. L. R. 397.* [2] *(1949) 40 C. L. W. 3.*

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five rupees and shall be filed in the Supreme Court within a period of thirty days reckoned from the date of the order against which the appeal is preferred ". The next stage of the appeal is its hearing and disposal and that is provided for in section 51 which reads,

> " Subject to the provisions of this Part the provisions of Chapter XXX of the Criminal Procedure Code shall apply *mutatis mutandis* in regard to all matters connected with the hearing and disposal of an appeal preferred under section 48 and, for such purpose, the order of the Commissioner shall be deemed to be the order of a court. "

In my view the qualifying phrase " subject to the provisions of this Part " means that if any matter pertaining to the hearing and disposal of an appeal is specifically provided for in Part X such a matter would not attract the provisions of Chapter XXX of the Criminal Procedure Code. On this line of reasoning, even if it can be maintained that the expression in section 51 " all matters connected with the hearing and disposal of an appeal " is wide enough to embrace the appeal itself, including, therefore, the form of that appeal, the qualifying phrase with which section 51 opens will exclude the petition of appeal from the ambit of Chapter XXX of the Criminal Procedure Code. In other words, sections 48 and 49 of the Ordinance deal expressly with the conditions necessary to constitute an " appeal " and one is not called upon, once those conditions are satisfied, to invoke Chapter XXX for the purpose of determining its true form.

With all respect to the learned Judge who decided the two cases relied on by the respondent to support the preliminary objection, I am unable to agree that, giving the words " in regard to all matters connected with the hearing and disposal of an appeal " even a connotation of the widest amplitude, the provisions of section 340 of the Criminal Procedure Code govern the form of an appeal under the Workmen's Compensation Ordinance. The matter becomes clear to me when sections 48 to 51 are examined in two stages. Section 48 confers the substantive right of appeal (vide *Colonial Sugar Refining Co. v. Irving* [1]) and section 49 regulates the conditions pre-requisite to the exercise of that right. Once that right is exercised only the steps taken for the adjudication of the questions raised by the appeal and the adjudication itself can be regarded as " all matters connected with the hearing and disposal of the appeal " within the meaning of section 51. The corresponding stages, namely, the exercise of the substantive right of appeal from a judgment or final order pronounced by a Magistrate's Court or District Court (vide sections 338 and 340) and the procedure thereafter (vide sections 343, 344, 345 and 347) are equally well marked.

In the case of *University Motors v. Barrington* [2] referred to in *Thomas v. Ceylon Wharfage Co., Ltd.* [3] Clauson, L. J., stated,

> " The phrase 'a hearing' is somewhat vague, and is susceptible of different meanings in various contexts. Perhaps the best example that can be given to show that that is so is the case which was cited

[1] *(1905) A. C. 369.* [2] *(1939) 1 All E. R. 630.*
[3] *(1948) 49 N. L. R. 397.*

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in the House of Lords, which it is unnecessary to go into at length, *Green v. Penzance (Lord)* [1], where in a particular context, the verb 'to hear' was decided to cover, not only the occasion on which the judicial officer in that case dealt with the case (if I may use that expression), but also all occasions on which he was performing the judicial functions vested in him under the particular statute in question. It is material to this case only as showing that it is impossible to come to a sound conclusion as to the meaning of the word 'hearing' in its application unless the particular circumstances of each case are given careful consideration".

Bearing in mind the caution in the last sentence of the passage cited I think it is a legitimate observation to make in the present case that unless and until the appeal was filed there was not called into operation the performance of any judicial functions or the taking of any steps connected therewith.

In my opinion a petition of appeal filed under the Workmen's Compensation Ordinance need not bear a certificate in terms of section 340 (2) of the Criminal Procedure Code and the preliminary objection must be overruled. The appeal will, therefore, be set down for hearing in the ordinary course.

WEERASOORIYA J.—

I agree.

Section 51 of the Workmen's Compensation Ordinance expressly refers to "an appeal preferred under section 48". In my opinion there is "an appeal preferred under section 48" when (in a case where an appeal lies) a petition of appeal bearing the requisite stamp or stamps is filed by the aggrieved party in the Supreme Court within the specified time.

It seems to me that the line is clearly drawn by the use of the words quoted above and that it is only in regard to all matters connected with the hearing and disposal of such an appeal that the provisions of Chapter XXX of the Criminal Procedure Code would apply. One may, however, then be faced with the argument that the words "all matters connected with" in section 51 are a superfluity and that the same result would have been achieved even if those words had been omitted from the context, but this argument appears to be met by the consideration that those words somewhat enlarge the expression "the hearing and disposal" so as to bring within its scope (in a case of doubt) such matters as, for example, the giving of notice of appeal, the listing of the appeal and the communication of the result of the appeal to the Commissioner, in regard to each of which there is no provision in Part X of the Workmen's Compensation Ordinance whereas specific provision in that behalf is contained in sections 342, 343 and 350 of the Criminal Procedure Code.

Preliminary objection overruled.

[1] *L. R. 6 App. Cas. 657*

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1955 *Present :* **Gratiaen J. and Gunasekara J.**

REV. WERAHERA WIMALASARA, Appellant, *and* N. POROLIS FERNANDO *et al.*, Respondents

S. C. 405—D. C. Colombo, 6,210

Buddhist ecclesiastical law—Trust—Property donated to seminary under a trust instrument—No formal dedication to Sangha—Power of trustee to remove a priest from premises—Sanghika property.

The ceremonies which took place when a Buddhist seminary was established upon certain premises did not constitute a formal dedication sufficient to pass the premises from private ownership to the Sangha. Thereafter the owners of the premises conveyed the premises to trustees to be used as a Buddhist seminary for the benefit of a certain priest, G., and his pupil priests. On the face of the instrument, the lay trustees were vested with power, *inter alia*, to appoint a successor to G. in the office of " Chief Priest " and also to remove " any of the priests remaining in the premises " on grounds of misconduct or misbehaviour.

Held, that inasmuch as the premises in question were not Sanghika property the trustees were entitled to remove a priest from the premises on *bona fide* grounds in accordance with the power vested in them under the trust instrument.

APPEAL from a judgment of the District Court, Colombo.

Sir Lalita Rajapakse, Q. C., with *M. L. S. Jayasekera* and *M. L. de Silva* for the defendant appellant.

H. W. Jayewardene, Q. C., with *D. R. P. Goonetilleke*, for the plaintiffs respondents.

Cur. adv. vult.

February 25, 1955. GRATIAEN J.—

In my opinion the judgment under appeal should not be disturbed. By P2 dated 16th September, 1913, two pious Buddhists named Romanis Fernando and Charles Fernando conveyed the property in dispute to certain trustees " to be used as a Buddhist seminary for the benefit of Kanugala Gunatissa Therunanse . . . . and his pupil priests who are prosecuting Oriental studies and studying the doctrines of Buddhism ". On the face of the instrument, the lay trustees are vested with power, *inter alia*, to appoint a successor to Gunatissa Therunanse in the office of " Chief Priest " and also to remove " any of the priests remaining in the premises " on grounds of misconduct or misbehaviour. The appellant has challenged the authority of the trustees to exercise these powers because, in his submission, the premises had already been formally dedicated by the donors to the Sangha so that the premises thereafter constituted Sanghika property. If that were so, it necessarily follows that Romanis Fernando and Charles Fernando had no right subsequently to convey the premises to the trustees.

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That certain ceremonies had in fact taken place at or about the time when the seminary was established is not disputed—but the question is whether they could properly be regarded as constituting a formal dedication sufficient to pass the premises from private ownership. On this vital issue, the learned trial judge seems to me to have applied certain extremely practical tests. "There is no reason that I can see," he observed, "nor has any been advanced by the defendant, as to why these two pious donors should have executed a document which was unnecessary and which would certainly have the effect of nullifying the act of dedication which they are alleged to have performed". The subsequent conduct of the parties also negatives the argument that anybody regarded the premises as *Sanghika* property. For instance, the defendant had actively associated himself with the trustees in 1946 when they successfully asserted their right under P2 to remove another priest named Wimalajothi from the premises. His present attitude is quite inconsistent with that which he had previously adopted, and I am unable to say that the learned judge was not justified in rejecting his explanation of this inconsistency.

Once the argument that the premises are *Sanghika* property is rejected, there is no reason for doubting the authority of the trustees to remove the defendant on *bona fide* grounds. I would therefore dismiss the appeal with costs.

GUNASEKARA J.—I agree.

Appeal dismissed.

1954 *Present :* **Gratiaen J. and Gunasekara J.**

G. E. MISSO, Appellant, *and* B. MOHAMEDALLY *et al.*, Respondents

S. C. 282—D. C. Colombo, 11,594 (Summary)

Promissory note—Subsequent additional security—Does not amount to discharge by novation— Negotiability—Bills of Exchange Ordinance, s. 36 (1).

The maker of a promissory note who subsequently creates a mortgage to secure the repayment of his debt is nevertheless liable to an indorsee for value without notice unless he shows that the mortgage bond was not merely an additional security but had superseded the obligation founded on the promissory note.

APPEAL from a judgment of the District Court, Colombo.

Colvin R. de Silva, with *S. J. Kadirgamar* and *L. Mututantri*, for the plaintiff appellant.

H. V. Perera, Q.C., with *H. W. Tambiah* and *C. Shanmuganayagam*, for the defendants respondents.

Cur. adv. vult.

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February 11, 1954. GRATIAEN J.—

This was an action for the recovery of a sum of Rs. 34,450 and interest alleged to be due on a promissory note dated 16th October, 1947, from the 1st defendant (as maker of the note) and the 2nd defendant (as payee who had subsequently indorsed it to the plaintiff).

The defendants filed separate answers, denying liability on the note. For the purposes of this appeal, the following facts as held by the learned trial Judge will form the basis of my judgment :

> The " on demand " promissory note sued on had been granted by the 1st defendant to the 2nd defendant for valuable consideration. On 15th January, 1948, a total sum of Rs. 94,150 was found to be due by the 1st defendant to the 2nd defendant on this and certain other transactions, and the 1st defendant executed a notarially attested mortgage bond whereby he hypothecated certain immovable property as security for the repayment of the aggregate amount (which was specifically stated to include the sum of Rs. 35,450, and interest borrowed on the promissory note sued on). The 2nd defendant continued, however, to retain the promissory note in its original condition except that it now bore an endorsement signed by both defendants and by the attesting notary to the following effect :
>
> > " The amount due on this promissory note together with interest from the date hereof has been secured by mortgage bond No. 44 dated 15th January 1948 . . . . "
>
> The endorsement was undated, but it was in fact made at the attesting notary's office immediately after the execution of the bond. Several months later, the 2nd defendant endorsed and delivered the note to the plaintiff for valuable consideration. It had never come back into the maker's hands during the intervening period.

Upon these facts, and upon the evidence of the attesting notary who explained his version of the circumstances which led to the execution of the bond and to the endorsement made on the note, the learned Judge held (1) that the note had been discharged on 15th January, 1948 by the 2nd defendant's acceptance of the " higher security " of the mortgage bond, and that therefore (2) only the 2nd defendant (but not the 1st defendant) was liable on the note to the plaintiff who subsequently became its holder for value. Judgment was accordingly entered as prayed for against the 2nd defendant, but the plaintiff's action against the 1st defendant was dismissed with costs. This appeal is against the latter part of the decree.

The learned Judge has rejected as unproved the allegation that the plaintiff was aware, at the time of the endorsement in his favour, that the note had been previously (as alleged) " discharged ". Nevertheless, he held, on the authority of *Jayawardena v. Rahaiman Lebbe* [1] and *Tenna v. Balaya* [2] that, when the bond had been granted to secure the liability

[1] (*1919*) *21 N. L. R. 178.* [2] (*1908*) *11 N. L. R. 27.*

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on the promissory note, the note itself was automatically discharged and became " a mere waste-paper "—with the result that its subsequent indorsement by the original payee could not vest the indorsee with any rights on the document against the original maker.

Section 36 (1) of the Bills of Exchange Ordinance provides, *inter alia*, that a promissory note loses its character of negotiability when it has been " discharged by payment or otherwise ", and it is clear law that the rights of a holder of a note can be satisfied, extinguished or released in a number of ways besides payment—*Byles on Bills (20th Ed.) p. 237.* As an illustration of a discharge " otherwise than by payment ", the textbook mentions, *at p. 238*, a case where " the taking of a security of a higher nature for a bill or note merges the remedy on the inferior instrument ". It is by the application of this rule that the learned Judge decided the present case.

There is no absolute proposition of law which declares that the taking of a " higher security " necessarily operates in every case as a discharge of the earlier " inferior instrument ". As I understand the true principle, the issue invariably calls for a decision on a question of fact, and the onus of proving the discharge in an action between an indorsee for value and a maker is on the maker. In *Twopenny v. Young* [1], for instance, the plea of " discharge " was rejected because the latter security recognized the earlier note as still existing. In other words, the maker had failed to prove that the transaction was intended to operate as an extinguishment of the payee's claims on the original security.

If the maker of a promissory note subsequently creates a mortgage to secure the repayment of his debt, the Court would not be justified in holding that the note was thereby discharged unless an intention to provide a substituted (as opposed to an additional) security was established. " It is often a nice question whether an obligation arising from a bond novates an earlier obligation founded on . . . . a promissory note or other *causa debendi*. If the facts show that the bond was granted as an additional security, there is no novation ; but if it is manifest that the parties intended the bond to supersede the original obligation and take its place, then there is a novation "—*Wessels' Law of Contract, Vol. 1, p. 723, para. 2409.*

In the present case, the language of the indorsement made on the note (and signed by both defendants) by no means makes it " manifest " that the liability on the note had been extinguished. On the contrary, it is calculated to give the impression that the repayment of the " amount due " on the note was *also* secured by the mortgage bond dated 15th January 1948. Besides, at the time when the note was subsequently indorsed to the plaintiff for value, it still remained in the payee's hands and bore all the appearances of an undischarged note. In *Glasscock v. Balls* [2] Lord Esher said :

> " If a negotiable instrument remains current, even though it has been paid, there is nothing to prevent a person to whom it has been indorsed for value without knowledge that it has been paid from suing ".

It is not easy to reconcile this *dictum* with the proposition laid down in far more general terms by a Bench of three Judges of this Court (wrongly

[1] *(1824) 3 B. and C. 208.* [2] *(1889) 24 Q. B. D. 13 at 15.*

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described in the Report as a " Full Bench ") in *Jayawardena v. Rahaiman Lebbe* (supra), and I respectfully agree with the view of Jayawardena J. that the question calls for an authoritative decision, after reconsideration of the problem, when a suitable occasion arises.—*Muttu Carpen Chetty v. Samaratunge* [1]. Be that as it may, it is certainly permissible to regard the fact that a promissory note remained in the payee's hands (without any indication of " discharge " or " cancellation " on the face of it) as a relevant circumstance to be taken into account in deciding the question of fact whether the liability had been extinguished by novation. Moreover, the 1st defendant (as maker of the note), is, in my opinion, precluded *as against an indorsee for value without notice* from alleging that the execution of the mortgage bond was intended by him to have more serious implications than those which were actually indicated in the indorsement which he signed. The language of his indorsement is quite insufficient to support the plea of discharge by novation, and is especially binding on the maker of a note who allows it thereafter to remain in circulation with all the appearances of a valid promissory note. Besides, to my mind the language of the bond itself is equivocal.

It would seriously impair the principle of negotiability attaching to instruments governed by the Bills of Exchange Ordinance if an indorsee for value without notice could be confronted with defences which are inconsistent with the terms of a memorandum or indorsement made on the face of the instrument by both the maker and the payee. Even, therefore, if as between the defendants *inter se*, the true position (unknown to the plaintiff) was that the note sued on ought to be regarded as having been discharged on 15th January 1948, that defence is not in my opinion available as against the plaintiff. The present case is, in the special circumstances described by me, distinguishable from those with which the earlier decisions were concerned.

It was suggested to us during the argument that the learned Judge had wrongly applied in favour of the plaintiff the statutory presumption that he was a holder for value, because the plaintiff had not discharged the initial onus of proving (as against the 1st defendant) that the note had in fact been indorsed and delivered to him by the 2nd defendant. I agree that generally an indorsee must establish that he is the *holder* of a note before he can rely on the presumption that he is a holder *for value*. But this, in any particular case, depends on whether the fact of indorsement and delivery has been challenged by the maker. I do not doubt that, at the preliminary discussion which took place under section 146 of the Civil Procedure Code when the trial commenced, the learned Judge was made to understand that the 1st defendant, while not disputing that the note had in fact been indorsed and delivered to the plaintiff, denied only that he was a *holder for value without notice*. Indeed, the 1st defendant's position (as indicated in his pleadings) seems to have been that the note had been indorsed to the plaintiff *but collusively and without consideration*. When the stage for determining the issues

[1] (1924) 26 *N. L. R.* 381 *at* 384.

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arrived, no issue was suggested by the 1st defendant's counsel with specific reference to the bare fact of endorsement and delivery (as distinct from the connected issues of "consideration" and "notice"). On the contrary, the issues, as finally determined at the trial, emphasised that the dispute on this aspect of the litigation was confined to the alleged absence of consideration for the indorsement, and to the further allegation that the plaintiff was well aware that the note had been discharged before indorsement. It could only have been for this reason that the learned Judge ruled that the onus was on the defendants to rebut the statutory presumptions in favour of the plaintiff. I cannot imagine that the experienced judge who tried the case could have entertained the view that a person purporting to sue on a promissory note as its indorsee must be presumed to be its indorsee even though the bare fact of indorsement has been put in issue.

I would allow the appeal and enter judgment in favour of the plaintiff as prayed for with costs in both Courts.

GUNASEKARA J.—I agree.

Appeal allowed.

1955 *Present :* **Pulle J.**

M. PALANIYANDI, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 838—In the Matter of an Appeal under section 15 of the Indian and Pakistani Residents (Citizenship) Act

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Citizenship by registration—Corroborative evidence—Prima facie *case—Section 14 (7) (a).*

If, in an application for acquisition of citizenship by registration under the provisions of the Indian and Pakistani (Citizenship) Act, the Commissioner insists on having corroborative evidence of the applicant's testimony, such corroborative evidence must not be rejected arbitrarily.

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APPEAL under section 15 of the Indian and Pakistani Residents (Citizenship) Act.

N. K. Choksy, Q.C., with *C. Shanmuganayagam*, for the appellant.

M. Tiruchelvam, Deputy Solicitor-General, for the respondent.

Cur. adv. vult.

March 14, 1955. PULLE J.—

This is an appeal taken from an order refusing an application by one Palaniyandi for registration as citizen under the provisions of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949. The appellant adduced at first documentary evidence to satisfy the requirements of the Act as to continuous residence during the period of ten years commencing on January 1, 1936, and ending on December 31, 1945, and at an inquiry held by the Deputy Commissioner on January 23, 1954, this was supplemented by oral evidence. For the purpose of this appeal it is necessary to deal only with the evidence called to prove that the appellant resided in Ceylon during the years 1936 to 1939. The Deputy Commissioner held that there was no satisfactory proof of residence during these years and the question I have to decide is whether within the meaning of section 14 (7) (*a*) of the Act there was a *prima facie* case for allowing the application.

The appellant was born in India in the year 1924 or 1925. He came to Ceylon with his mother in about 1934 and lived on Balmoral Estate, Agrapatna. There is proof that he attended the estate school from September 1935, to August 31, 1936. According to the appellant he continued to live on the estate with his mother until 1939 when he left Balmoral Estate and took employment under a Chettiar at Bogowantalawa in April of that year. The evidence of his employment at Bogowantalawa is amply proved. Was he on Balmoral Estate from September 1936 to April 1939 ? According to the appellant he took private tuition on the estate after he left school. He called one Periannan who was a labourer on the same estate from 1925 to 1950 to speak to the appellant's residence on the estate. There are, undoubtedly, minor inconsistencies between the evidence of the appellant and that of Periannan but the reasons given by the Deputy Commissioner for not acting on their evidence are, in my opinion, not valid. He says,

(*a*) that Periannan is an uncle of the applicant ;

(*b*) that he himself is an applicant for citizenship ; and

(*c*) that he stated in evidence that the applicant left the estate in 1938 or 1939.

Once it was accepted that Periannan was on the estate during the relevant period his relationship to the appellant would only serve to make his evidence more reliable in the sense that he should have known the

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whereabouts of a nephew who was 12 years old when he left the school on an estate where his mother had been a labourer from 1925 to 1950. The witness's uncertainty whether the appellant left the estate in 1938 or 1939 is not a matter for surprise when he is questioned in 1954.

I am wholly unable to appreciate the reason that Periannan laid himself open to have his evidence rejected on the ground that he himself was an applicant for citizenship.

It was perfectly open to the Deputy Commissioner for good reasons to refuse to act on the uncorroborated testimony of an applicant. If he insisted on corroboration the proper approach to the question he had to determine was whether there was reliable circumstantial or direct evidence tending to show that the appellant was speaking the truth. A piece of corroborative evidence is that the appellant was only 12 years old when he left the estate school where his mother was employed as a labourer and it is most unlikely that he was away from Ceylon between 1st September, 1936, and 18th April, 1939, while his mother continued to be a labourer.

Periannan had the means of knowledge and the grounds stated by the Deputy Commissioner for doubting his evidence appear to be arbitrary. In my opinion there was good and sufficient evidence to afford reasonable grounds for believing that the appellant resided in Ceylon during the period 1936 to 1939. Learned Counsel for the appellant asks me only to find that there was a *prima facie* case for allowing the application and I find accordingly.

The appellant is entitled to his costs which I fix at Rs. 210.

Appeal allowed.

1954 *Present :* **Gratiaen J. and Fernando A.J.**

T. SHIVAGURUNATHAN *et al.*, Appellants, *and* VISALADCHI *et al.*, Respondents

S. C. 482–483—D. C. Jaffna, 1,105 L

Thesavalamai—*Pre-emption*—"*Partners*"—*Requirement of* plenum dominium—*Cap. 51, Part 7, s. 1.*

A person whose title to a share in a common property is limited by rights of occupation enjoyed to his exclusion by someone else is not a "partner" within the meaning of section 1 of Part 7 of the *Thesavalamai* (Cap. 51) and is not entitled, therefore, to claim rights of pre-emption. In this context the word "partners" is necessarily confined to co-owners who exercise (or are at least entitled to exercise) *plenum dominium* over the common property.

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APPEALS from a judgment of the District Court, Jaffna.

H. V. Perera, Q.C., with *C. Shanmuganayagam*, for the 3rd to 6th defendants, appellants in No. 482.

S. J. V. Chelvanayakam, Q.C., with *C. Renganathan*, for the 7th and 8th defendants, appellants in No. 483.

C. Thiagalingam, Q.C., with *H. W. Tambiah* and *S. Sharvananda*, for the plaintiffs respondents.

Cur. adv. vult.

June 21, 1954. GRATIAEN J.—

This was an action for pre-emption under the *Thesawalamai*. The plaintiffs claimed to have purchased an undivided 1/2 share of two properties by P 14 dated 17th August 1943 subject to a life-interest in their predecessor-in-title Arunachalam. Three months later, Arunachalam conveyed his life-interest to them by P 15 dated 24th November 1943.

The plaintiffs' complaint was that the 7th and 8th defendants had purchased the remaining half-share of the properties *either* from the 4th and 6th defendants (by P 18 dated 21st November 1943) *or* from the 1st and 2nd defendants (by P 8 dated 22nd November 1943). They were presumably uncertain as to whether the title to this share had in truth belonged to the purported vendors under P 18 or to the purported vendors under P 8, but they claimed that in either event the conveyance had been executed without notice to them in derogation of their rights as "partners" under the *Thesawalamai*. They accordingly asked for a decree for pre-emption (binding on both groups of purported vendors) whereby, on payment of such consideration as may be fixed by the Court, they should be substituted as purchasers of this share in the place of the 7th and 8th defendants who were admittedly "strangers".

The learned District Judge entered a decree (1) declaring the plaintiffs entitled to pre-empt the share conveyed to the 7th and 8th defendants under P 8 dated 22nd November 1943 (i.e. on the basis that it was the 1st and 2nd defendants who previously had title to this share), (2) declaring that the 4th and 6th defendants had no title which they could have conveyed under P 18.

I shall assume (without deciding) for the purposes of this appeal that the learned Judge's findings as to title were correct. We are also bound by an earlier judgment of this Court (reported in *51 N.L.R. 500*) rejecting the plea that this action was bad for misjoinder of parties and causes of action.

Mr. Chelvanayakam submitted for our consideration the argument (which was supported by Mr. Perera) that, even upon the basis of the learned Judge's findings, the plaintiffs did not possess at the relevant date (i.e. 22nd November 1943 when P 8 was executed) the requisite qualifications entitling them to exercise rights of pre-emption under *Part 7 section 1* of the *Thesawalamai* (Cap. 51). Admittedly they were

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not the " heirs " of either group of vendors who had purported to sell a share of the property to the 7th and 8th defendants ; nor were they adjacent landowners with hypothecary rights over the common property. The only question, therefore, is whether on 22nd November 1943, by virtue of the earlier conveyance P 14 dated 17th August 1943 in their favour, they were " partners " who could impugn the sale of the share to a " stranger " by the other " partners ". I have already pointed out that their title to that property was at that time subject to the rights of Arunachalam who (according to the learned judge's findings) in fact continued to exercise them until he transferred his life-interest to the plaintiffs *after the date of the impugned sales.*

The question is whether a person whose title to a share in a common property is limited by rights of occupation enjoyed to his exclusion by someone else is a " partner " within the meaning of *Part 7 Section 1* of the *Thesawalamai.* The view which I have formed is that in this context the word " partners " is necessarily confined to co-owners who exercise (or are at least entitled to exercise) *plenum dominium* over the common property. Voet has explained why the Roman Dutch law has rejected the *jus retractus legalis* (based on custom)—because " it is a deviation from the common law and also to freedom of commerce " (18.3.9) ; in another passage, he describes it as " a thing odious or at least not to be aided by favourable interpretation ". In Ceylon, as I observed in *Sivapiragasam v. Vellaiyan* [1], there is no justification for extending the principle of a customary law (under the *Thesawalamai*) *beyond the purposes which it is intended to serve.*

The rights of pre-emption recognised by the *Thesawalamai* trace their origin to the methods of cultivation originally adopted by the persons whom it governed. If an owner desired to sell his property, his " heirs " had a prior claim to purchase it so that it might continue to be enjoyed and cultivated for the benefit of the family as a unit. Similarly, co-owners could, by exercising their right of pre-emption, exclude " strangers " from the intimate relationship of the co-parcenary group. Again, the only form of mortgage known to the *Thesawalamai* was a transaction whereby the creditor possessed and enjoyed his debtor's land (or share) until the loan was repaid ; for that reason, the mortgagee neighbour was entitled to pre-empt the land rather than permit it to go to a stranger. In each instance, therefore, the underlying principle is perfectly clear. I am therefore satisfied that a person who himself has no present right to claim admission within the " community " lacks the essential qualification for demanding the exclusion of some other " stranger " from the enjoyment (by purchase) of co-proprietary rights.

From a practical point of view, a member of a co-parcenary unit of cultivators would always know who precisely were the " partners " in the enterprise whereby they collectively enjoyed the profits of the common property by their joint exertions. But, particularly in former times when no modern system of registration of titles was in force, persons subject to the *Thesawalamai* would have found it virtually impossible to trace the identity of strangers claiming interests in the common property (short of full co-proprietorship) who had not previously been admitted

[1] (1954) 55 N. L. R. 300.

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into the group of co-sharers. Indeed, I doubt if transactions whereby a man who purchased a share in land subject to a life-interest in favour of someone else were ever contemplated at a time when these customary laws were first introduced into the province of Jaffna. I conceive therefore that the rights of pre-emption preserved by the *Thesawalamai* should not be extended so far as to meet situations which were entirely foreign to that system of law.

Nagalingam J. has pointed out in the earlier appeal in this case (*51 N.L.R. 500*) that a co-owner's right of pre-emption under the *Thesawalamai* " must be deemed to be based upon an implied contract whereby the co-owners are jointly bound to one another, and the co-owners in this view of the matter become joint contractors in regard to the enforcement of this obligation ". This analysis admirably suits a system of cultivation whereby persons work together on the common land and share the profits accruing from their joint exertions, each of them recognising the desirability of ensuring that, if possible, the " partnership " based on mutual confidence should be preserved as an entity even if one of its members desires to break away. But the theory of an implied contract would be reduced to an absurdity if we were to assume that it equally applies to persons like the plaintiffs who were in fact complete strangers to the actual " partnership ". I fail to see how a true " partner " can reasonably be required by custom to give notice of his intentions to an implied quasi-" partner " of whose rights he was totally unaware.

In my opinion, the facts which the plaintiffs claim to have established at the trial themselves destroy the foundation of their cause of action, and for this reason I would allow both appeals and dismiss the plaintiffs' action with costs in both courts. The plaintiffs did not possess the requisite qualifications for pre-empting the 7th and 8th defendants' share on 21st or 22nd November, 1943, and it is therefore unnecessary to adjudicate upon the other disputes as to title which arose at the trial.

FERNANDO A.J.—

I agree. I would like to add that *Selvaratnam v. Sabapathy* [1], which was cited for the respondents does not deal with the question now under consideration. That was a case where the claim of the plaintiffs to be co-sharers was disputed on the ground that, their mother being yet alive, they were not entitled to the share claimed by them and therefore not entitled to a right of pre-emption. Reference was made to *section 9 of Part I* of the *Thesawalamai* and to the custom that the sons divide the acquired property of the parents when the latter become incapable by age of administering it. It was held that in accordance with this custom the plaintiffs had become entitled to their mother's share in the property, and their duty to maintain her did not disentitle them to the right of pre-emption. In that case, unlike in the present one, the plaintiffs had title and possession unqualified by the reservation in favour of someone else of a life-interest in the property. They were *de facto* " partners " of the other co-owners in a very complete sense.

Appeals allowed.

[1] (1924) 2 *Times* 139.

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1953 *Present :* **Swan J.**

N. SOLOMON PERERA, Petitioner, *and* THOMAS FERNANDO, *et al.*, Respondents

S. C. 562—Application in Revision in M. C. Colombo, 33,031

Search warrant—Disposal of property taken thereunder—Requirement of notice to parties—Criminal Procedure Code, ss. 29, 77, 419.

Under section 419 of the Criminal Procedure Code an order for disposal of property brought into Court by an accused person in consequence of the issue of a search warrant can only be made after due notice to both complainant and accused.

APPLICATION to revise an order of the Magistrate's Court, Colombo.

M. M. Kumarakulasingham, for the complainant petitioner.

H. W. Jayewardene, for the accused respondents.

Cur. adv. vult.

March 9, 1953. SWAN J.—

In this case the petitioner charged the respondents with theft of a lorry. The learned Magistrate issued a search warrant returnable on 13.11.1952. On 11.11.1952 the respondents produced the lorry in Court and the learned Magistrate made order allowing them to keep the lorry pending trial on giving security (personal) in a sum of Rs. 1,000.

The petitioner asks this Court to revise the order made by the learned Magistrate on the ground that it was made without notice to him. Mr. Jayewardene for the respondents contends that notice was unnecessary, that under Section 77 of the Criminal Procedure Code the Court had to " impound " the production, or return it to the accused who produced it. I do not think that Section 77 has any application. That Section provides for the impounding of documents. In my opinion Section 419 applies ; and the Court should not have made any order without hearing what the complainant had to say. In *Costa v. Pieris* [1] de Silva A.J. held that an order for disposal of property seized under a search warrant could only be made after due notice to both complainant and accused. I think it makes no difference whether the property is seized and produced, or voluntarily brought into Court by the person against whom the search warrant has been issued.

Mr. Jayewardene submits that in view of the affidavit tendered by the 2nd accused-respondent I should not interfere. But the facts stated in that affidavit can only be considered at a proper inquiry where both parties are present. I set aside the order made by the learned Magistrate. The case will be remitted to the lower Court for an order to be made after inquiry of which notice must be given to both the complainant and the accused.

Sent back for further inquiry.

[1] *(1933) 13 C. L. Rec. 73.*

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1955 *Present :* **de Silva J.**

MRS. D. E. C. JAYASINGHE, Appellant, *and* F. GOOLAM HUSSEIN *et al.*, Respondents

S. C. 151—C. R. Colombo, 38,628

Rent Restriction Act, No. 29 of 1948—Section 9 (1 and 2)—" Sub-letting "—Applicability of the term to transfer of a business for a stipulated period.

Where a tenant who carries on a business in the rented premises transfers the business to a third party for a stipulated period without obtaining the landlord's consent in writing, such transfer does not amount to sub-letting within the meaning of section 9 of the Rent Restriction Act if the possession of the premises by the transferee is only incidental to the transaction relating to the business.

APPEAL from a judgment of the Court of Requests, Colombo.

H. V. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, and *D. R. P. Goonetilleke*, for the 1st defendant appellant.

R. R. Crossette-Thambiah, Q.C., with *H. W. Tambiah* and *N. C. J. Rustomjee*, for the plaintiffs respondents.

Cur. adv. vult.

February 16, 1955. DE SILVA J.—

In this action, the plaintiffs who are the landlords of premises bearing No. 151, 5th Cross Street, Colombo, sought to eject the two defendants on the ground that their tenant, the 1st defendant, had sub-let the premises on the notarial agreement P4 dated 11th June, 1951, to the 2nd defendant without obtaining their consent in writing, in contravention of the provisions of Section 9 (1 and 2) of the Rent Act of 1948. They also contended that the 1st defendant was a non-occupying tenant and was therefore not protected by the relevant provisions of the Rent Act. The 1st defendant filed answer denying that she had sub-let the premises to the 2nd defendant. She also denied the truth of the averment that she was a non-occupying tenant. The 2nd defendant resisted the claim of the plaintiffs on the same grounds and maintained that there was a misjoinder of parties and causes of action. The learned Commissioner of Requests held in favour of the 1st defendant on the question of non-occupancy. He, however, held that the 1st defendant had sub-let the premises to the 2nd defendant on P4 and that therefore the plaintiffs were entitled to eject the 1st defendant. The issue relating to the misjoinder of parties and causes of action was answered in the affirmative, but the learned Commissioner stating that he was entitled to delete the name of the 2nd defendant proceeded to consider the case as against the 1st defendant only. Accordingly he entered judgment for the plaintiffs against the 1st defendant as prayed for on the ground of sub-letting. From this judgment the 1st defendant has appealed.

The 1st defendant's husband carried on a grocery business in the premises in question under the name and style of " R. Jaglas Fernando &

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Sons". He died in the year 1930 and thereafter his widow, the 1st defendant, continued the business in the same premises and under the same business name. The plaintiffs became the owners of these premises in or about the year 1948, and the 1st defendant became their tenant from that time at a monthly rental of Rs. 175·42. The 1st plaintiff has stated that when he came to know that the 1st defendant had sub-let the premises to the 2nd defendant on P4 he gave notice on 14.3.'52 to the 1st defendant terminating the lease.

The main question for determination is as to whether or not P4 is in effect a letting and hiring of the premises in suit. By this document the 1st defendant claiming to be the owner and proprietor of the business carried on under the name, style, and firm " R. Jaglas Fernando & Sons " of No. 141, 5th Cross Street, Colombo, purported " to sell and deliver " to the 2nd defendant " the goodwill of the said business together with the furniture and fittings appertaining thereto and in the schedule hereto fully and particularly described ", for a period of 5 years commencing from 1.6.'50 for a consideration of a monthly payment of Rs. 600 which is described as " a commuted share of the profits " subject, *inter alia*, to the following conditions :—

(*a*) If the purchaser failed to pay to the vendor the monthly payment of Rs. 600 for 3 consecutive months or he committed a breach of any of the other conditions the vendor reserved the right to cancel the agreement after giving notice, and take over the business.

(*b*) The vendor was to pay regularly and punctually the house rent in respect of the premises No. 141 " and shall assure unto the said purchaser the quiet and vacant possession of the said premises " during the said period of 5 years.

(*c*) The vendor shall not be liable for any debts or liabilities incurred by the purchaser in respect of the business.

(*d*) " The said purchaser binds himself and his aforewritten to carry on the said business under the aforesaid name of 'R. Jaglas Fernando & Sons' and under no other name nor shall the said purchaser assign these presents to any person or persons whomsoever without the written consent thereto of the said vendor first had and obtained. "

(*e*) At the end of the said period of 5 years the purchaser was to reconvey and deliver the goodwill of the said business with the furniture, fittings, &c.

(*f*) If the purchaser failed to reconvey and deliver the goodwill of the business and the furniture, fittings and movables as agreed he was to pay the vendor at the rate of Rs. 100 per day as liquidated damages until "the said goodwill, the furniture, fittings and other movables are re-conveyed and delivered and vacant and quiet possession of the said premises No. 141 . . . . are given to the said vendor." If the purchaser was not able to carry on the business he was entitled to terminate the agreement by giving 6 months notice to the vendor.

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According to the defendants the agreement P4 is not a sub-lease of the premises but a transaction relating to the business "R. Jaglas Fernando & Sons". What matters is not the label that parties assign to a document but its real nature which can be gathered from its contents and the attendant circumstances. The 1st defendant states that she entered into the agreement P4 as she found that it was not possible to carry on the business single-handed. Prior to the agreement her two sons were helping her in conducting the business but she lost their services about this time as one of them proceeded to England and the other started a business of his own. She was also medically advised not to strain herself too much. It is for these reasons she says that she entered into the agreement P4. Her explanation is reasonable and appears to be true.

This agreement P4 on the face of it is a transfer of the business for a stated period subject to conditions and covenants some of which I have set out earlier. But, Dr. H. W. Thambiah for the appellants submits that it is in fact a tenancy agreement in the guise of a sale of the business. In support of this agreement he relies on the covenant by which vacant possession is assured to the purchaser and also on the undertaking of the latter to give over possession of the premises on the termination of the agreement. On the other hand there are several other covenants which go to show that this is a genuine transaction relating to the business in which the possession of the premises is involved only incidentally. Dr. Thambiah's submission that the sale of the business is a mere blind to conceal the letting and hiring of the premises is not borne out by the facts. If this was in fact a contract of tenancy one would have thought that the purchaser would be entitled to make use of the premises for any kind of business at his option. In this instance the purchaser is not vested with any such right. According to the terms of the agreement it is obligatory on the purchaser to carry on the identical grocery business under the name "R. Jaglas Fernando & Sons". A breach of that obligation would immediately entitle the vendor to terminate the agreement and take over the business. It is not suggested that the purchaser is carrying on any other business in these premises. The vacant possession that has been assured to the purchaser is what was necessary to give effect to the main object of the agreement, namely, the conduct of the business by the purchaser during the stipulated period. It is in evidence that even after this agreement was entered into the 1st defendant is continuing to have her notarial office in the premises. It has not been suggested to the 2nd defendant in cross-examination that she is having her office there on an independent agreement with the 2nd defendant. The fact that the 1st defendant still has her office in this building is proof that the 2nd defendant was given vacant possession only to the extent necessary for him to carry on the business. In these circumstances it is not unreasonable to hold that the 1st defendant has not in fact given over exclusive possession of the entire premises or a definite portion of it to the 2nd defendant. A fundamental requirement of a tenancy is that the tenant must have the exclusive possession of the premises let. In this case that condition has not been satisfied. It was also argued that the fact that according to the agreement the 1st defendant was not

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to share the losses incurred in the business is an indication that this transaction was a mere contract of tenancy. That does not necessarily follow. It may well be that the business is a flourishing one and the 2nd defendant was satisfied that he would be able to earn a handsome profit from it. The agreement describes the sum of Rs. 650 payable monthly to the 1st defendant as a commuted share of the profits. There is no material to warrant the inference that this is a mis-description of the amount payable. The suggestion that the sum in question is only black-market rent has no foundation.

If P4 created a contract of tenancy the 2nd defendant would be entitled to the protection of the Rent Restriction Act and refuse to vacate the premises, if he so wishes, at the termination of the agreement. But is the 2nd defendant in fact entitled to set up such a claim ? In my view he is not entitled to do so. On this point the judgment of Nagalingam S. P. J. in *Charles Appuhamy v. Abeyesekera* [1] is relevant. The plaintiff in that case " let, demised and leased " on the document P1 of 1950 to one Edwin Silva the hotel and tea kiosk known as the "Kandy Restaurant " carried on in the premises No. 39, Brownrigg Street, Kandy, for a period of 3 years. Edwin Silva with the consent of the plaintiff assigned his rights to the defendant. At the end of the period of 3 years the defendant failed to give over the " Kandy Restaurant " to the plaintiff who then sued the defendant. The defendant then took up the position that he was a tenant of the premises and claimed the protection of the Rent Restriction Act. In rejecting this claim Nagalingam S. P. J. held that P1 was not a contract of tenancy but an agreement relating to the management, control and conduct of a business. It is true that in the agreement P1 relied on in that case no vacant possession of the premises was specifically assured to the lessee but that such possession was contemplated is clear from the terms of the agreement and possession was in fact delivered to him. In that case the delivery of possession of the premises to the lessee was considered to be ancillary to the agreement relating to the business. In the instant case too it is clear that possession of the premises was given to the 2nd defendant merely for the purpose of running the business in terms of the agreement P4, for the mutual benefit of the two defendants. The 1st defendant handed over the business to the 2nd defendant as a going concern and the latter was to give it back to the former on the termination of the agreement in a similar condition. To achieve this object the 2nd defendant had to obtain possession of the premises, but, such possession was not given to him on the basis of a tenancy. He is occupying the premises only as a licensee to enable him to conduct the business during the stipulated period. The issues regarding sub-letting must therefore be answered in the negative.

Accordingly I allow the appeal and dismiss the plaintiffs' action. The 1st defendant is entitled to costs in both Courts.

Appeal allowed.

[1] *(1954) 56 N. L. R. 243.*

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[PRIVY COUNCIL]

1954 *Present:* **Lord Asquith of Bishopstone, Lord Keith of Avonholm and Mr. L. M. D. de Silva**

HOLLAND COLOMBO TRADING SOCIETY, LTD.
Appellant, *and* S. M. K. ALAWDEEN *et al.*, Respondents

PRIVY COUNCIL APPEAL No. 30 OF 1953

S. C. 311—D. C. Colombo, 20,182

Contract—Sale of goods—C. I. F.—Bill of lading—Tender of goods—Tender of documents.

(i) Although a written contract for the sale of textile goods cited, on the face of it, a price in terms " c.i.f. Colombo " and " Payment " was expressed to be by " Cash against documents ", Clause I diverged sharply from the typical c.i.f. terms in so far as it provided for " Payment to be made in cash on or before arrival of the goods . . . . Any tender or delivery of the goods, or of the bill of lading or of such delivery order or other document or documents as will enable the buyers to obtain possession of the goods shall in every case constitute a valid tender or delivery ". Clause 4 stated, *inter alia*, that " Notwithstanding that the price of the goods may be expressed to be fixed on c.i.f. or equivalent terms, the buyers shall not be entitled to demand nor shall the sellers be bound to tender or deliver to the buyers any insurance policy, bill of lading invoice or other document or documents whatsoever but any such tender or delivery as described in Clause 1 hereof shall be a good and valid tender or delivery ". Under Clause 2, on receiving notice of the arrival of the goods the buyers undertook to pay all landing or similar charges and remove the goods from the " ship or wharf or store " within two days, and presumably to pay the price which was payable " on " (if not paid before) arrival.

The sellers shipped the goods at Rotterdam on the s.s. " Laurenskerk " taking a bill of lading from its owners for the transit from Rotterdam to Colombo. The Bill of Lading provided, *inter alia*, that the carrier could, if he thought it necessary or expedient, arrange for the goods to be transhipped at any stage of the voyage under a fresh contract with the subsequent carrier. It purported to absolve the owners of " Laurenskerk " from all liability in respect of the goods if transhipped, as from the time of transhipment. It was also subject to the Hague Rules of October, 1923, " unless otherwise provided for in this Bill of Lading ".

Near Genoa, an explosion occurred on board the " Laurenskerk " and the goods were transhipped to the s.s. " Triport ". There was no evidence that there was a contract of carriage with the " Triport " or that the " Triport " issued bills of lading to the " Laurenskerk " or to anyone at all in respect of the goods transhipped into her. On arrival at Colombo the " Triport " did not wait for presentation of any document. She had the goods landed and placed in a customs warehouse at the Port, and departed. The buyers, however, refused to take delivery of the goods in spite of notice given to them by the sellers not only as soon as the " Triport " reached Colombo harbour but also when the goods had been placed in the customs warehouse. There was also evidence that, on February 26, 1948—shortly after the transhipment and before the " Triport " reached Colombo—and subsequently, the sellers demanded payment from the buyers against documents and that the tender of the documents was rejected by the buyers. In the circumstances the sellers instituted action

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2—J. N. B 44995-1,592 (6/55)

for damages for non-acceptance of the goods, and the issues, stated shortly, were (1) whether there was a valid tender by the sellers to the buyers of documents against which they were bound to pay the purchase price, or, alternatively (2) whether there was a valid tender of the goods themselves, creating an obligation to pay such price.

Held, (*a*) that a contract containing the formula " c.i.f. " is not necessarily such in substance or effect. The contract of sale in the present case was clearly not a c.i. f. contract.

(*b*) that, in view of Clause 2 of the contract, there was a valid tender of the goods themselves, entitling the sellers to payment of the contract price. The sellers were not bound to clear the arrived goods from the customs warehouse before offering them to the buyers.

Semble : As the contract was not a c.i.f. contract, the real question, quoad documents, was whether there was a sufficient tender of documents within the terms of the actual, non c.i.f. contract. The tender of the Bill of Lading issued by the " Laurenskerk " was a good documentary tender under this particular contract.

Obiter : Assuming that the contract was c.i.f., the Bill of Lading offered on February 26, 1948, and re-offered subsequently was not a document against tender of which the buyers were bound to pay. A Bill of Lading with a transhipment clause is not necessarily a bad tender under a c.i.f. contract : but it must in some way give " continuous documentary cover " in respect of the goods over the whole transit ; and a Bill of Lading issued by a shipowner who by the transhipment terms in it disclaims all liability in respect of the goods in the event and as from the time of transhipment, gives no such " continuous " cover. Further, the Bill of Lading was not so affected by the Hague Rules as to become part of a good documentary tender under a c. i. f. contract.

(ii) By Clauses 26 and 27 of the aforementioned Bill of Lading it was provided as follows :—

" 26. *Law of Application.*—In so far as anything has not been dealt with by the provisions of this Bill of Lading the Law of the Netherlands shall apply.

27. *Jurisdiction.*—All actions under this contract of carriage shall be brought before the Court at Amsterdam or Rotterdam and no other Court shall have jurisdiction with regard to any such action unless the carrier appeals to another jurisdiction or voluntarily submits himself thereto. "

Held, that the Clauses might well be important if the action were one between shipper and carrier based on the Bill of Lading viewed as a contract of carriage or affreightment. But in proceedings between seller and buyer, the exclusive jurisdiction of Dutch Courts and the residual application of Dutch law would not be attracted, the action not being on the contract of carriage but on that of sale.

APPEAL from a judgment of the Supreme Court reported in *54 N. L. R. 289.*

A. A. Mocatta, Q.C., with *Stephen Chapman*, for the plaintiff appellant

P. A. Quass, Q.C., with *Carl Jayasinghe*, for the defendants respondents.

Cur. adv. vult.

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July 21, 1954. [*Delivered by* LORD ASQUITH OF BISHOPSTONE.]

The plaintiffs are appellants on this appeal and were sellers to the defendant-respondents under a written contract for the sale of textile goods. On 7th December, 1949, they obtained against the respondents from the District Judge in Colombo, judgment for Rs. 13,000 as damages for non-acceptance of the goods in question. On 18th August, 1952, the defendants, the buyers, on appeal, obtained a judgment of the Supreme Court reversing this judgment. The plaintiffs now appeal to this Board against the decree of the Supreme Court.

The issues in the case stated shortly are (1) whether there was a valid tender by the plaintiffs to the defendants of documents against which they were bound to pay the purchase price, or, alternatively, (2) whether there was a valid tender of the goods themselves, creating an obligation to pay such price.

The contract between the plaintiffs as sellers and the defendants as buyers consisted of a lengthy written proposal by the defendants (referred to in the evidence as an "indent" and dated 5th September, 1947) and a short note by the Plaintiffs accepting that proposal without qualification (dated 25th September, 1947).

The terms of the contract are accordingly to be sought in the so-called indent of 5th September, 1947. This document contained on one side of it a comparatively short entry, on the other a voluminous aggregation of printed conditions. The short entry on the one side was as follows :—

"DESCRIPTION OF GOODS

Indent No. HCTS/85

Commodity : 300 pieces 43 inches × about 40 yards White Shirtings (Dutch) 'Lucine'.

Price : 40d. per yard c.i.f. Colombo.

Payment : Cash against documents.

Shipment : October/in one lot, January, 1948.

Licence : Against Dealers Textile Licence No. 914/C 914

Marks : H.C.T.S.
S.S.K.H.A.
& SONS

COLOMBO

Among the printed conditions on the other side the following are the most material and those italicised are those which in their Lordships' view have an intimate bearing on this case :—

"1. Payment to be made in cash on or before arrival of the goods and I/we shall not be entitled to call for or await tender before payment ; any giving of credit or acceptance of a promissory note for the

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amount due to be entirely in your discretion and interest at the rate of—per cent. per annum to be charged by you after the expiration of two days from the receipt of notice of arrival whether credit is allowed or not. Any tender or delivery of the goods or of the bill of lading or of such delivery order *or other document or documents as will enable me/us to obtain possession of the goods* shall in every case constitute a valid tender or delivery. You are not responsible for loss sustained through the late arrival or non arrival of documents. (The italics here and below are their Lordships'.)

2. On receiving notice from you that the goods or any part of them have arrived, I/we shall remove the same from the ship or wharf or your store or any place named by you within two days of such notice at my/our expense and risk and I/we shall pay all customs duties, dues, landing, warehouse and other customary charges. On all goods of which delivery is not taken within such time I/we shall pay insurance at a rate of not less than $\frac{1}{4}$th per cent. and godown rent at the rate ruling for bonded warehouses.

. . . . . .

4. The goods to be insured against loss and such risks as you may think best for my/our interest and I/we undertake to pay the premiums in respect of such insurance. I/we further agree to bear all loss or damage to the goods which is not recoverable under such insurance. You or your agents or the manufacturers or suppliers of the goods are at liberty to effect the insurance in any manner which you or they may desire including insurance under a policy covering other goods not belonging to me/us and insurance under a floating policy. *Notwithstanding that the price of the goods may be expressed to be fixed on c.i.f. or equivalent terms, I/we shall not be entitled to demand nor shall you be bound to tender or deliver to me/us any insurance policy, bill of lading, invoice or other document or documents whatsoever but any such tender or delivery as described in clause 1 hereof shall be a good and valid tender or delivery.* In the event of my/our suffering loss recoverable from the insurer, you shall be at liberty either to deliver to me/us a policy under which the goods are insured or to claim the amount of the loss from the insurer on my/our behalf.

. . . . . .

11. The expression ' bill of lading ' herein shall include any document issued as or purporting to be a bill of lading containing an acknowledgment by the ship owners or their agents of the receipt of the goods whether on board the ship or for shipment or otherwise and whether alone or with other goods. "

It will be gathered from the provisions recited above that though the provisions on the face of the document cite a price in terms " c.i.f. Colombo " and " Payment " is expressed to be by " Cash against

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documents ", this is not in substance a c.i.f. contract. A contract containing the formula " c.i.f. " is not necessarily such in substance or effect. (*The Julia*[1]). Clause 4 proclaims as much in the passage beginning " Notwithstanding that the price of the goods may be expressed to be fixed on c.i.f. or equivalent terms " ; and the words, already quoted, which follow. Clause 1 again diverges sharply from the typical c.i.f. terms in so far as it provides for " *Payment to be made in cash on or* before arrival of the goods, ... Any tender or delivery of the goods, or of the bill of lading or of such delivery order or other document or documents as will enable us to obtain possession of the goods shall in every case constitute a valid tender or delivery ".

The natural meaning of Clause I taken by itself, is that the sellers are to have an option to tender documents (no doubt the only means of obtaining payment during the transit), or to tender the goods themselves once they have arrived.

Clause 2 seems to be in the main an amplification of the words " tender or delivery of the goods ", and to deal with the rights of the parties after the goods have arrived. On receiving notice that the goods or any part of them have arrived, the buyers must, under Clause 2, pay all landing and similar charges, and remove them from the " ship or wharf or store " within two days ; and presumably pay the price which is payable " on " (if not paid before) arrival. It is no doubt implied in the obligation to remove the goods *from the ship* that the buyers should be furnished with some document which would enable them to secure delivery from the ship. In the present case this exigency did not arise since at the material time the goods had, before any demand was made on the ship, already been landed from it, and were in a customs house in the port. In such a case there would no doubt again be an implied obligation on the sellers, acting under Clause 2, to enable the buyers to perform their obligation under this clause, viz., the obligation to remove the goods from the " wharf or store ". But whether that would involve supplying the buyers with a bill of lading or some other and what document, or merely with non-documentary evidence of title, is a question with which their Lordships will deal later. To continue the narrative of the facts :—

On 29th January, 1948, the plaintiffs shipped the goods at Rotterdam on the s.s. Laurenskerk taking a bill of lading from its owners for the transit from Rotterdam to Colombo.

The relevant terms of the Bill of Lading include the following :—

By Clauses 26 and 27 it is provided as follows :—

" 26. *Law of Application.*—In so far as anything has not been dealt with by the provisions of this Bill of Lading the Law of the Netherlands shall apply.

[1] *(1949) A. C. 293.*

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27. *Jurisdiction.*—All actions under this contract of carriage shall be brought before the Court at Amsterdam or Rotterdam and no other Court shall have jurisdiction with regard to any such action unless the carrier appeals to another jurisdiction or voluntarily submits himself thereto."

These Clauses might well be important if the action were one between shipper and carrier based on the Bill of Lading viewed as a contract of carriage or affreightment. But the present proceedings are between seller (shipper) and buyer: and in so far as in relation to such proceedings the Bill of Lading is merely a document passing between seller and buyer, the exclusive jurisdiction of Dutch Courts and the residual application of Dutch law would not be attracted, the action not being on the contract of carriage but on that of sale. These Clauses can accordingly be ignored for the present purpose.

By Clause 2—

"This Bill of Lading is subject to:

(*a*) The Hague Rules of October, 1923, *unless otherwise provided for in this Bill of Lading;*"

Clause 16 of the Bill of Lading provides as follows:—

"16. *Forwarding and Transhipment.*—The cargo or any part thereof may, at the option of the carrier and as often as may from any cause be deemed expedient, be carried in a substituted ship or lightered and/or landed and/or stored for the purpose of oncarriage in the same or other ship or by any other means of conveyance.

The responsibility of the carrier shall be limited to the part of the transport performed by him on the ship under his management and no claim will be acknowledged by the carrier for damage and/or loss arisen during any other part of the transport, even though the freight for the whole transport has been collected by him.

The shipper authorizes the carrier to enter into contracts on his behalf for the precarriage and/or oncarriage of the goods and/or storing, lightering, transhipping, or otherwise dealing with such, prior to, or in the course of, or subsequent to the carriage in his ship without responsibility for any act, neglect, or default on the part of the carrier even though the terms of such contracts be less favourable in any respect whatsover to the shipper than the terms of this Bill of Lading."

Such was the Bill of Lading issued by the Master of the s.s. Laurenskerk on behalf of its owners, a Dutch Shipping Coy. referred to in the B/L as the "Carrier", to the plaintiffs at Rotterdam on 29th January, 1948. Their Lordships will resume the narrative at that point and pursue it to its end before dealing with the legal issues to which it gives rise.

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The Laurenskerk left Rotterdam laden with the material goods on 29th January, 1948, and bound for Colombo : but met with misfortune. At some time about the middle of February, near Genoa, she caught fire or suffered from the effects of an explosion. She transhipped the goods to the s.s. Triport. The Triport carried them on to Colombo, arriving there on the 2nd April, 1948 (Clause 16). It will be remembered that the transhipment Clause in the Laurenskerk's Bill of Lading purported to absolve that vessel's owners from all liability in respect of the goods if transhipped, as from the time of transhipment. The same Clause gave the Laurenskerk's owners—the "Carrier"—authority on behalf of the shippers to negotiate a contract of carriage with the oncarrying ship. But there is no evidence that she did so, or that the Triport issued Bills of Lading to the Laurenskerk or to anyone at all in respect of the goods transhipped into her.

On arrival at Colombo the Triport did not wait for presentation of any document. She had the goods landed and placed in a customs warehouse at the Port, and decamped without more ado.

It is necessary to advert to what was happening meanwhile in Colombo.

Before the arrival on 2nd April of the Triport, but after the casualty to the Laurenskerk and the transhipment—actually on 26th February, 1948—the sellers' Colombo agents demanded payment from the buyers against documents. Their demand was made in the following letter :—

"26th February, 1948.

Messrs. S. S. K. Haja Alawdeen,
99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85—300 Pieces White Shirtings (Dutch)

Referring to our letter of the 13th instant, we have received the documents relating to the above shipment from our London office with instructions to present them to you for payment.

We are forwarding you herewith our Invoice No. 13,096 for Rs. 25,742·72 covering the shipment and shall be thankful to have your cheque by return to enable us to hand you the necessary documents.

The carrying steamer, we gather from the local Agents, is expected here on or about the 28th instant.

Yours faithfully,

(Sgd.) (Illegibly)"

The buyers, in answer to this and subsequent demands, rejected the tender of the documents and refused payment on the wholly untenable ground that the contract of sale provided that the goods must *arrive*

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before the end of January ; whereas it is obvious, and is now conceded, that the goods need under that contract only be *shipped* before the end of that month. It is not surprising to learn that the market had fallen. The sellers continued to press the buyers for payment. The correspondence which followed in the next few weeks or months speaks for itself. Their Lordships cite the following further letters from the sellers' Colombo branch to the buyers :—

" 3rd April, 1948.

Messrs. S. S. K. Haja Alawdeen & Sons,
99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85.

Further to our letter of the 9th ultimo, we write to advise that the 6 bales of White Shirtings shipped by s.s. 'Laurenskerk ' against your above indent have arrived, transhipped by the s.s. ' Triport ' which steamer is in harbour.

Please let us have your remittance by return for the amount of our bill so that we may hand over documents to you without further delay.

Yours faithfully,

Sgd. (Illegibly) "

(Before the next letter the ship appears to have discharged the goods)

" 12th April, 1948.

Messrs. S. S. K. Haja Alawdeen & Sons,
99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85—Six Bales White Shirtings *ex* s.s. ' Triport '

We refer to our interview in connection with the above and note that you are expecting your proprietor, who is stated to be arriving from India very shortly, and that you would arrange for taking up the documents on the arrival of this gentleman.

Meantime we would point out that the goods which are lying at your risk at Wharf are already on rent, and we shall be thankful to know the definite date when your proprietor in India is expected to arrive.

Yours faithfully,

Sgd. (Illegibly)

for Holland-Colombo Trading Society Ltd. "
" Our Ref : HP/BE.

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17th April, 1948.

Messrs. S. S. K. Haja Alawdeen & Sons,
99, Second Cross Street, Colombo.

Dear Sirs,

Indent No. HCTS/85—Holland-Colombo Trading Society Ltd.

We are instructed by our clients Messrs. Holland-Colombo Trading Society Ltd., in regard to the above indent for 300 pieces white shirting which goods have, as already intimated, arrived in Ceylon but have not been taken delivery of.

We enclose our client's bill for Rs. 25,742·72 being the amount due thereon. Should you fail to make payment of the amount due herein by the 20th instant, our clients will have no option but to sell the goods in terms of the indent against you at your risk and on your account and claim any damages they may sustain.

Yours faithfully, "

(This letter is not from the sellers themselves but from the sellers' proctors)

The sellers received no answer to any of these three letters other than what transpired at the interview referred to in the letter of 12th April. On 5th May they instructed auctioneers to sell the goods against the contract, and on 6th May notified the buyers of such their intention, and of their right to damages in respect of any loss on the sale. After one abortive auction (11th May) the goods were sold on 11th June for Rs. 14,052·84, i.e., at a loss (which as to amount is not disputed, if there is liability at all) of Rs. 13,697·06. (In the interval the goods had been formally "entered" in the warehouse books, on 31st May, 1948, by the plaintiffs as having arrived " in the vessel Triport from Rotterdam ".)

Right up to the last letter in the record—dated 10th September, 1948, from the proctors for the buyers—the point is still relied on by the latter that the goods arrived in Colombo too late ; though the fact of transhipment is relied on also, latterly.

Their Lordships revert to the two issues which they have indicated at the outset as raised by this litigation, namely :—

(*a*) Was there a valid tender of documents, entitling the plaintiffs—the sellers—to payment of the contract price ? Alternatively,

(*b*) Was there a valid tender of the goods themselves, entitling the plaintiffs to such payment ?

By their Plaint of 6th October, 1948 (paragraph 5), the plaintiff sellers, after reciting the facts, claimed *inter alia* that the defendants had wrongfully and unlawfully failed or refused to accept the said goods. By paragraphs 5 and 6 of the Answer the defendants (apart from raising bad points) deny all averments in paragraph 5 of the Plaint. Issues

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were framed, the pertinent ones being Nos. 11 and 12, viz :—" 11 : Did the defendants refuse to accept the said goods ?" " 12 : Were the defendants justified in refusing to accept the said goods ? "

On these issues the District Judge found in favour of the plaintiffs, answering No. 11 "Yes " and No. 12 " No ". The learned Judge was much influenced by the fact that the defendants' ground for refusing to take delivery was throughout the invalid ground that the goods did not arrive in Colombo by the end of January, 1948. Their Lordships do not view this as in itself a decisive factor.

On appeal, the judgment of the Supreme Court, reversing that of the District Judge, was delivered by Gratiaen, J. His ground for so deciding was that while the contract gave the plaintiffs an option to demand payment on fulfilment of either of two conditions, they fulfilled neither. The *first* condition—tender of the goods—could, in his view, only be fulfilled if the plaintiffs cleared the arrived goods from the custom house and then offered them to the defendants. The plaintiffs had not done this.

The *second* and alternative condition, so he held, could only be fulfilled by tender of the documents specified in Clause 1 of the contract : but such document or documents must, so the learned Judge held, entitle the defendants to enforce delivery of the goods *from the ship in which they arrived at Colombo*, and in this case (there having been transhipment) there was no document which the plaintiffs could offer, issued by the Triport or binding upon that vessel.

As to the first of these conditions the learned Judge appears to their Lordships to have overlooked the provisions of Clause 2 of the contract : which seem not to limit a valid tender of the goods themselves to a tender of them after the plaintiffs have "cleared " all customs and landing charges, but on the contrary, assumes that the defendants may be bound to take delivery of arrived goods and pay these charges themselves. Their Lordships will revert to this point later.

There is in their Lordships' view more substance in the Supreme Court's suggestion under the *second* head—tender of documents : namely, that the Bill of Lading offered on 26th February when the goods were still in transit and re-offered subsequently was not a document against tender of which the defendants were bound to pay.

Their Lordships repeat that this is not a c.i.f. contract. It was argued for the appellants that even if it had been, there would have been a sufficient documentary tender to satisfy such a contract. Their Lordships are not of that opinion. A Bill of Lading with a transhipment clause is not necessarily a bad tender under a c.i.f. contract : but it must in some way give " continuous documentary cover ", in respect of the goods over the whole transit (*Hansson v. Hamel and Horley* [1]) ; and a Bill of Lading issued by a shipowner who by the transhipment terms in it disclaims all liability in respect of the goods in the event and as from the time of transhipment, gives no such " continuous " cover. It was argued for the appellants that the defect was cured by Clause 2 (*a*) of the Bill of Lading which incorporates the Hague Rules ; and that the effect of their

[1] *(1922) A. C. 36.*

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incorporation is to override, and impliedly delete from the Bill of Lading the peccant transhipment provisions. But the Hague Rules are only incorporated " unless otherwise provided in the Bill of Lading ", hence the provisions of the Bill of Lading prevail in case of conflict. It is true that Clause 2 (*b*) makes all " compulsory provisions " of the law to which the carriage might be subject prevail over contrary stipulations in the Bill of Lading. The only relevant " compulsory provisions " in this case are the Hague Rules themselves and these are not in the present case " compulsory ". For although by 1948 they had been incorporated in the English Carriage by Sea Act, 1924, that Act only applies to transit from United Kingdom ports, not to a transit from e.g., Rotterdam : and (if Netherlands law be relevant) at the time in question the " Hague Rules" would appear not to have been incorporated into the Statute Law of the Netherlands (Scrutton Charterparties pp. 440-441). Hence their Lordships are of opinion that the Bill of Lading is not so affected by the Hague Rules as to become part of a good documentary tender under a c.i.f. contract.

Their Lordships have dealt with this point at length in deference to the considerable body of learned argument which was directed to it. In fact the contract clearly not being a c.i.f. contract, the real question, quoad documents, was whether there was a sufficient tender of documents within the terms of the actual, non c.i.f. contract. As to documents, it is important to bear in mind that the rights primarily involved are rights as between seller and buyer, not rights as between shipper and carrier. Under this contract deliberate pains seem to have been taken to provide that a document which does not necessarily transfer effective rights under a contract of carriage or " affreightment ", shall be a sufficient tender as between seller and buyer, provided it " enables " the buyer to obtain delivery of the goods. Would the Bill of Lading—the only relevant document in this case—if it had been taken up on 26th February by the buyers when first tendered, or after that but before arrival of the ship, have enabled the buyer, on its arrival, to obtain delivery ? True it is, (*a*) the Bill of Lading was issued not by the Triport, the vessel in which the goods arrived, but by the Laurenskerk, (*b*) by its express terms the Laurenskerk Bill of Lading excludes liability on the part of its owners for damage to the goods except as to that part of the transit which was covered by the Laurenskerk, viz., Rotterdam to Genoa, (*c*) as a vehicle of rights in respect of any destruction of or damage to the goods on the residue of the transit—Genoa to Colombo—the Bill of Lading was a broken reed. But these infirmities all relate to the Bill of Lading in its character as a contract of carriage. It does not seem to their Lordships to follow that under the terms of this very special contract between seller and buyer the actual Bill of Lading employed would not qua document evidencing title have enabled the buyer to obtain delivery from the ship if it had been presented on the ship's arrival. The matter was never put to the test since the buyers had on an unjustifiable ground refused to take up the Bill of Lading from the time of its first tender onwards, and the ship in fact landed the goods in the Customs House without presentation of any document or evidence of title, no doubt doing so

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"for whom they might concern" or for anyone who could satisfy the Customs of his title. Their Lordships are by no means satisfied that the tender of the Bill of Lading, though it would not have been a good tender between seller and buyer under a c.i.f. contract, in respect of which the validity of the Bill of Lading qua transferable contract of carriage is crucial, was not a good documentary tender under this particular contract. They consider that if the Bill of Lading had been taken up when tendered, and presented to the ship when the goods arrived, it would most probably have enabled the buyers on such arrival to obtain de facto possession from the master of that vessel. The master must have been abundantly aware of the material facts relating to this shipment. He knew the goods were originally shipped on the Laurenskerk. He knew how they had been transhipped on to the Triport at Genoa. He knew their identity, marks and history. He must have expected someone in Colombo to be in possession of the Bill of Lading issued by the Laurenskerk, and that that person would be the person entitled to the goods. Hence there are some grounds for thinking that this Bill of Lading would under this unusual contract have been a good documentary tender.

It is, however, unnecessary to decide this difficult point. Since their Lordships are of opinion that there was a valid tender of the goods themselves on the 3rd April, the 17th April and later. They have already indicated that it is in their view wrong to hold as the Supreme Court did that no good tender of the arrived goods could be made unless and until the sellers had cleared them from the Customs House and paid all dues and charges. So to hold is to ignore Clause 2 of the Contract of Sale. No doubt if the sellers' co-operation was necessary to enable the buyers to obtain delivery from the Customs House, there was an implied condition that it should be forthcoming in the form, e.g., of giving evidence of title. The sellers themselves procured the delivery of the goods from bond for sale by auction by providing the auctioneers with no other document of title but the Bill of Lading (Letter P1, Record page 88). They had regularly offered the Bill of Lading to the buyers. There is not the slightest doubt that the sellers could and would have used or furnished this (or any other necessary) evidence of title in their possession to procure delivery to the buyers and that their efforts to that end would have been as successful in favour of their buyers as they were in favour of their own auctioneers.

A great many authorities were cited to their Lordships in the course of the very helpful argument of Counsel. If these are not referred to in the preceding observations it has not been because they have not been carefully considered, but because the contract and the circumstances in this case were so special as to make most of the authorities unhelpful.

In the result their Lordships will humbly advise Her Majesty that the appeal should be allowed, the decree of the Supreme Court set aside, and the decree of the District Court restored. The respondents must pay the appellants' costs of this appeal and of the appeal to the Supreme Court.

Appeal allowed.

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[COURT OF CRIMINAL APPEAL]

1954 *Present :* **Gratiaen J. (President), Weerasooriya J. and Sansoni J.**

KANAPATHIPILLAI, Appellant, *and* THE QUEEN, Respondent

APPEAL NO. 63 OF 1954, WITH APPLICATION NO. 123

S. C. 3—M. C. Batticaloa, 15,926

Evidence—Dog trained in criminal investigation—Its behaviour and reactions at scene of crime—Relevancy as evidence—Evidence Ordinance, s. 11 (b).

Very convincing expert evidence should be placed before a Court which is invited to conclude that the mere behaviour of a Police dog by itself renders the existence of any relevant fact in a criminal trial so " highly probable or improbable " as to justify the application of Section 11 (*b*) of the Evidence Ordinance.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

G. E. Chitty, with *G. L. L. de Silva*, *J. C. Thurairatnam*, *A. S. Vanigasooriyar* and *Daya Perera*, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 31, 1955. GRATIAEN J.—

This was an appeal against a conviction for murder. At the conclusion of the argument we quashed the conviction and ordered a fresh trial. The reasons for our decision must now be stated.

The case against the appellant was based on circumstantial evidence, and there was a large body of relevant and admissible evidence which, if believed by the jury, would doubtless have been sufficient to support the conviction. The prosecution, however, was permitted to lead certain other items of evidence which should not have been admitted, and unfortunately the learned Commissioner of Assize specially directed the jury to take these matters into consideration as being of sufficient weight (if true) to strengthen the case against the appellant. I refer to the evidence of Mr. V. K. Kandiah, Sub-Inspector of Police, concerning the behaviour and reactions of a dog named " Tarzan " at the scene of the crime on the following day.

" Tarzan ", described by Sub-Inspector Kandiah as a " Police dog ", had been accompanied to the scene by a Sub-Inspector who was stated to be " a specially trained Police dog-handler " (whatever that may mean). According to the evidence, certain experiments were then carried out

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to which "Tarzan" reacted by "running about the locality" and "proceeding" in certain directions. The precise significance of these reactions was entirely a matter for speculation and conjecture because, in the very nature of things, "Tarzan" himself was not in a position to explain them to the jury. Nor did any witness professing to be an expert interpreter of the behaviour of dogs offer any theory (reliable or otherwise) for the consideration of the Court. All that we do know is that, after having sniffed a muzzle-loader (with which the murder is alleged to have been committed) "Tarzan" first ran up to a certain bush and later halted at the foot of a mango tree. At neither of these places was anything found which remotely incriminated the appellant.

Let us assume (although it was not proved at the trial) that "Tarzan" has been specially trained to assist Police officers in the detection of crime. We do not for a moment discount the usefulness of trained thoroughbred dogs in the field of criminal investigation. For instance, an important clue may be discovered by an animal which would point to the identity of the offender; but in such a case, it is the positive evidence brought to light rather than the manner of its discovery that constitutes relevant and admissible evidence of the offender's guilt. But we have not yet reached that state of knowledge which would enable us to place reliance on the apparent suspicions of an animal as to the identity of the perpetrator of a crime. At present, therefore, very convincing expert evidence should be placed before a court which is invited to conclude that the mere behaviour of a Police dog by itself renders the existence of any relevant fact in a criminal trial so "highly probable or improbable" as to justify the application of Section 11 (*b*) of the Evidence Ordinance.

In some countries, apparently, evidence of the tracking of a suspected offender by a well-trained and well-tested bloodhound of good breed has been cautiously admitted by judges as furnishing some evidence of a man's guilt. But, *Wigmore on Evidence* (*Vol : 1 pages 635–6 Section 177*) warns us that in actual usage, this kind of evidence is "apt to be highly misleading to the danger of innocent men, and, amidst the popular excitement attendant upon a murder and the chase of the suspect, all the facts upon which the trustworthiness of the inference rests are apt to be distorted in the testimony. Moreover, the very limited nature of the inference possible is apt to be overestimated". These observations are in complete accord with the rule of prudence (which is not strictly a proposition of law) that evidence ought not to be admitted if its reception would probably cause prejudice which is quite disproportionate to its true evidential value. In this country, it may perhaps be safer for the present to leave such evidence (even if it can be proved by expert testimony to possess some limited relevancy) completely out of consideration by jurors or even by a Judge sitting alone to exercise criminal jurisdiction.

The evidence of Sub-Inspector Kandiah regarding the behaviour and reactions of "Tarzan" should for several reasons have been ruled out at the trial, and we are far from satisfied that the jury's verdict was not unduly influenced by these extraneous considerations.

Fresh trial ordered.

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1954 *Present :* **Rose C.J., Gunasekara J. and Fernando A.J.**

M. J. ABEYWARDENE, Petitioner, *and* C. A. DHARMAPALA, Respondent

Election Petition Appeal—Hakmana Election Petition, No. 19 of 1953

Parliamentary Election—Corrupt practice—Publication of documents—Omission to state name and address of publisher—" Inadvertence "—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 58 (1) (c), 73A—Amending Act No. 26 of 1953, ss. 3, 4.

The petitioner sought to unseat the respondent on the ground that he had published or caused to be published certain pamphlets and hand-bills which did not bear upon their face the name and address of the publisher. The evidence disclosed that the respondent, who was his own election agent, entrusted the publicity side of his campaign to a committee of supporters whose names and addresses were published to the electorate in a document. In regard to the impugned documents, while there was no express reference to any publisher as such, there appeared an entry from which it could reasonably be inferred that the documents were sponsored by the committee. Moreover, the omissions in question afforded no material benefit to the respondent.

Held, that the omissions complained of were of a trivial nature and arose from inadvertence within the meaning of section 73A of the Parliamentary Elections Order in Council.

APPEAL in Hakmana Election Petition No. 19 of 1953.

S. Nadesan, Q.C., with *A. K. Premadasa* and *J. Senathirajah*, for the petitioner appellant.

G. E. Chitty, with *Walter Jayawardene*, *R. A. Kannangara*, *A. S. Vanigasooriyar* and *Carl Jayasinghe*, for the respondent.

Cur. adv. vult.

September 20, 1954. ROSE C.J.—

The petitioner sought to unseat the respondent on the grounds that he had been guilty of intimidation, bribery, exercise of undue influence, making false statements of fact about the rival candidates, and the printing or causing to be printed various hand-bills and pamphlets, which did not bear upon their face the name and address of the printer and publisher. At an early stage of the proceedings before the learned Election Judge the charges of intimidation and undue influence were abandoned and the matter was contested upon the remaining allegations.

In appeal learned counsel for the appellant did not press the issues as to bribery and the making of false statements of fact about the candidates, the only issue remaining for our consideration being that relating to the publication of pamphlets and hand-bills.

Amongst the matters complained of by the petitioner were a number of bucket lamps, constructed of paper and card-board, which were designed for the illumination of private houses and temples during the Wesak celebrations which took place some two or three weeks before the polling day. These lamps, it was stated in evidence, were manufactured by the

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Matara Merchants Limited, and bore the imprint of that press, but there was no reference to any publisher or to any person on whose behalf the bucket lamps were ordered. Upon the lamps were inscribed the slogan " a vote for the elephant is a vote for Dharma ". The elephant was the chosen symbol in the election campaign for the respondent and the slogan itself is a harmless pun upon the respondent's name.

The remaining documents complained of, which took the form of handbills and pamphlets, were printed either by the Indra Press or Matara Merchants Limited, and the learned Election Judge found that in every case the imprint of one or other of these presses was present. In addition while there was no express reference to any publisher as such, there appeared an entry relating to " The committee for the success of Mr. Dharmapala " from which the learned Election Judge held, and we see no reason to dissent from his view, that it could reasonably be inferred that the documents in question were sponsored by the committee.

Section 58 (1) of the Ceylon (Parliamentary Elections) Order in Council, 1946 (as amended, with retrospective effect from January 1, 1952, by Section 3 of Act No. 26 of 1953) reads as follows :—

" (*a*) . . . .
(*b*) . . . .

(*c*) being a candidate or election agent, prints, publishes, distributes or posts up or causes to be printed, published, distributed or posted up any advertisement, handbill, placard or poster which refers to any election and which does not bear upon its face the names and addresses of its printer and publisher,

(*d*) . . . .
(*e*) . . . .
(*f*) . . . .

shall be guilty of a corrupt practice . . . . "

Section 4 of the Ceylon (Parliamentary Elections) (Amendment) Act, No. 26 of 1953, reads as follows :—

" The following new section is hereby inserted immediately after section 73 of the Principal Order and shall have effect as section 73A of that Order :—

73A. Upon the trial of an election petition respecting an election under this Order, a candidate or an election agent shall not be found by the election judge to have committed a corrupt practice referred to in Section 58 (1) (*c*), in relation to any advertisement, handbill, placard or poster, if the candidate or election agent satisfies the judge that the omission of the names and addresses referred to in section 58 (1) (*c*), or any such name or address, as the case may be, arose from inadvertence or from some other reasonable cause of a like nature and did not arise from any want of good faith. "

The learned Election Judge found that the omissions in question were due to inadvertence, or to some other reasonable cause of a like nature. As regards the facts relating to these matters, the Judge has found that the

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respondent, who was his own election agent, entrusted the publicity side of his campaign to a committee of supporters whose names and addresses were published to the electorate in a document R9. This committee were given some general instructions by the respondent to the effect that they should in their pamphlets and hand-bills disclose the source from which they emanated. It also appears that the respondent advised them to consult a Proctor. Apart from that general instruction, the respondent would seem not to have concerned himself with the contents or form of the documents produced by his committee except that it appears on one occasion that he was shown some completed pamphlets, after they had been distributed in the electorate, and had expressed no displeasure.

It is further to be noted that the omissions complained of by the petitioner afforded no material benefit to the respondent. The bucket lamps and the pamphlets and documents in question were not of a defamatory nature and the expenditure in connection with their production was properly included in the respondent's return of election expenses. Moreover, I consider that the references to the Indra and Matara Merchants presses afforded sufficient identification for all the practical purposes contemplated by the Elections Order-in-Council. Further, the references in the various pamphlets and hand-bills to the "Dharmapala Committee" could, in my view, reasonably have been held to have afforded a sufficient indication to the electors not only that it was the committee that had published the documents on which their name appeared but also, having regard to the document R9 to which I have previously referred, of the identity of the persons forming the committee.

In effect, therefore, there had been a substantial compliance with the requirements of the Order-in-Council and the omissions—if omissions there were—were clearly of a most trivial nature, which afforded no material benefit to the respondent. That being so, it seems to us that the learned Election Judge was fully entitled on the material available to him to be satisfied that the omissions complained of were due to the inadvertence of the relevant persons, that is to say, the candidate himself and the committee who conducted his publicity campaign, and did not arise from any want of good faith.

Having regard to the basis on which the learned Election Judge came to his conclusion on this part of the case, it seems to me to be unnecessary to consider the further point which was argued before us by learned counsel for the respondent, that having regard to the course of dealings between the respondent and his committee, it could not reasonably be held that the respondent had either printed or caused to be printed the allegedly offending documents.

For these reasons the appeal is dismissed with costs.

GUNASEKARA J.—I agree.

FERNANDO A.J.—I agree.

Appeal dismissed.

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1955 *Present:* **Gratiaen J. and Pulle J.**

W. M. H. C. RODRIGO, Appellant, *and*
K. V. NARAYANASAMY, Respondent

S. C. 349—D. C. Colombo, 5,664 L

Co-owners—Amicable partition—Right of way—Express grant or reservation necessary.

When land which is owned in common has been amicably partitioned, a former co-owner is not, as a general rule, entitled to claim a right of way over a portion allotted to another co-owner unless it has been expressly granted or reserved in the cross-conveyances executed by the co-owners, even though a well-defined footpath had existed prior to the severance of the common property.

APPEAL from a judgment of the District Court, Colombo.

N. K. Choksy, Q.C., with *Eric Amerasinghe*, for the defendant appellant.

H. W. Jayewardene, Q.C., with *E. Gunaratne* and *P. Ranasinghe*, for the plaintiff respondent.

Cur. adv. vult.

February 8, 1955. GRATIAEN J.—

This is an appeal against a judgment declaring that the defendant is not entitled to a right of way over the plaintiff's contiguous allotments of land depicted as D1, E1 and F1 in the plan filed of record.

The defendant and his sister Jane Wijetunga had admittedly been co-owners of a larger land including lots D1, E1 and F1. In order to implement an agreement to partition the land, two contemporaneous notarial deeds of exchange P5 and P7 were executed in 1944. By P5 the defendant conveyed the entirety of his undivided interests in lots A, B, D1, E1, and F1 to Jane Wijetunga and she in turn conveyed to him all her interests in lots C, C3, D, E, F and G by P7. Each of them accordingly became (to the exclusion of the other) the sole owner of separate land comprising the several allotments conveyed by P5 and P7 respectively. At a later date, the plaintiff succeeded to Jane Wijetunga's rights by purchase.

It is admitted that, before the date of the amicable partition referred to there was a well-defined footpath which proceeded across lots D1, E1 and F1 and then continued beyond F1 until it reached a main highway leading to Colombo. This footpath had previously been used by both the defendant and Jane Wijetunga in the exercise of their rights of common ownership. The defendant's claim is that, upon a true construction of the conveyances P5 and P7 in his favour, he either acquired or reserved to himself a servitude entitling him to continue to use this particular section of the footpath (with which this action is alone concerned) as owner of the dominant tenement comprising his contiguous

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allotments C, D, E, F and G. His alternative submission that he had acquired the alleged servitude by certain other means was abandoned at the trial and does not now arise for our consideration.

The terms of the conveyance P7 by Jane Wijetunga in favour of the defendant did not expressly purport to grant him the servitude which he claims to have acquired ; it is even more significant that the servitude was not expressly reserved in his favour in the contemporaneous deed P5 whereby his interests in D1, E1, F1 were, without express qualification, conveyed to his sister. Nevertheless, it was argued at the trial that the servitude was either granted by implication (under P7) or reserved by implication (under P5). In my opinion, the rejection of these submissions by the learned Judge was perfectly correct.

Under the Roman-Dutch Law, a servitude cannot as a general rule be granted by mere implication—*Meiyappa Chettiar v. Ramasamy Chettiar* [1]. Similarly with regard to the grant of an easement under the English Law. The exceptions to the general rule fall within the same principle in both systems. In the ultimate analysis, of course, the question always turns on the true meaning of a particular written instrument.

The argument that Jane Wijetunga's conveyance P7 had by implication granted a right of way over lots D1, E1 and F1 (as servient tenements) in favour of lots C, D, E, F and G (as dominant tenements) could only have succeeded upon convincing proof that the use and enjoyment of lots C, D, E, F and G would otherwise be rendered virtually ineffectual. It was not sufficient to show that the footpath had in fact been used before the partition took place ; the defendant had also to establish that its continued use after the severance of the common property was, even if not absolutely essential, at least "reasonably necessary for the reasonable and comfortable enjoyment of the part granted"—i.e., of lots C, D, E, F and G,—per Bowen. L. J. in *Bayley v. G. W. R. Co.*[2] The evidence in fact indicates that there were other reasonable and equally convenient means of access from these allotments to the main highway.

In the circumstances of the present case, the failure of the defendant to reserve the servitude in his favour in express terms in the cross-conveyance P5 not merely affords a very strong additional argument against his claim ; it conclusively destroys his case. The deeds of exchange were contemporaneously executed in order to implement a mutual agreement between the co-owners. They must be read together in order to ascertain the common intention of the parties, and in this case an implied grant of a servitude should not be read into the terms of P7 unless its implied reservation in P5 can be inferred with equal propriety.

A reservation of a servitude by a grantor in his own favour must generally be made in express terms—*Wheeldon v. Burrows* [3]. "Two well-established exceptions relate to (servitudes) of necessity and mutual (servitudes) such as rights of support between adjacent buildings. But these two specific exceptions do not exhaust the list which is indeed

[1] *(1939) 41 N. L. R. 324 at 327.* [2] *(1884) 26 Ch. D. 434 at 453.*

[3] *(1879) 12 Ch. D. 31.*

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incapable of exhaustive statement, as the circumstances of the particular case may be *such as to raise a necessary inference that the common intention of the parties must have been to reserve some (servitude) to the grantor, or such as to preclude the grantee from denying the right consistently with good faith*"—per Jenkins L. J. in *Sandom v. Webb* [1]. The Court there held that a claim based on an implied reservation of an easement must fail unless the grantor can show that the facts were "not reasonably consistent with any other explanation". It is idle to suggest that the defendant has satisfied this formidable test. I would therefore dismiss the appeal with costs.

PULLE J.—I agree.

Appeal dismissed.

1954 *Present:* **Nagalingam S.P.J.**

P. RAMASAMY KONE *et al.*, Appellants, *and* GINIGATHENA POLICE, Respondent

S. C. 1,056–1,059—M. C. Nawalapitiya, 9,913

Excise Ordinance—Section 44—Possession of unlawfully manufactured liquor—Proof.

In a prosecution under section 44 of the Excise Ordinance for possessing unlawfully manufactured liquor the Excise Commissioner or the proper licensing authority must furnish evidence excluding the possibility of the liquor seized having been manufactured under a licence.

APPEAL from a judgment of the Magistrate's Court, Nawalapitiya.

A. B. Perera, with *J. C. Thurairatnam*, for the accused-appellant.

E. H. C. Jayetileke, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 25, 1954. NAGALINGAM S.P.J.—

This is an appeal by the four accused-appellants from their convictions under Section 44 of the Excise Ordinance for that they had in their possession 600 bottles of a liquor described as "Jeevanamirtha Asavam" which the prosecution contends comes under the category of an excisable

[1] (1951) 1 Ch. D. 808 at 823.

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article and that it had been unlawfully manufactured. The point taken on their behalf is that there is no proof that the liquor in the bottles was unlawfully manufactured.

Under Section 44 of the Excise Ordinance, it is for the prosecution to establish, firstly, that the excisable article, possession of which is the subject of the charge, is liquor containing alcohol, and secondly, that that liquor had been manufactured without a permit from the proper authority.

The evidence before Court in regard to these elements was furnished by a report of the Government Analyst. The Government Analyst states that the liquor in the 600 bottles found in the possession of the appellants contains 5·8 per cent. by volume of alcohol. The first element, therefore, is clearly established, namely, it is an excisable article in that it is a liquor containing alcohol. In regard to the second element, namely, that the liquor was manufactured unlawfully, there are no facts established from which a Court can say that the liquor was unlawfully manufactured. The report of the Government Analyst merely states further that the bottles of liquor seized do not fall under any one of the following categories :—

(*a*) Approved brands of imported liquors.
(*b*) Arrack.
(*c*) Gin.
(*d*) Toddy.
(*e*) Beers, Wines, Polpala decoction and Tea Ciders manufactured under licence issued by the Excise Commissioner.

The report of the Government Analyst does not go further and say that it is not a liquor which has been manufactured under licence issued by the Excise Commissioner. It may be true to say that it is not a Beer, Wine, Polpala decoction or a Tea Cider manufactured under licence issued by the Excise Commissioner, but that does not negative that it may be a liquor which is neither a Beer, nor a Wine, nor a Polpala decoction, nor a Tea Cider that had been manufactured under licence granted by the Excise Commissioner. When the Government Analyst said that the liquor seized is not manufactured under licence issued by the Excise Commissioner, he is giving utterance to some information which he has probably obtained from the Excise Commissioner himself. The Government Analyst cannot say of his own knowledge what licences have been issued by the Excise Commissioner. It is possible that the liquor seized may have been manufactured under a licence of which the Government Analyst may be ignorant. The Excise Commissioner or the proper licensing authority should have been called to furnish evidence excluding the possibility of the liquor seized having been manufactured under a licence, so that in the result there is a total absence of any evidence that the liquor seized was unlawfully manufactured.

I find that my brother Swan J. also arrived at a similar conclusion in *Surabiel v. Ekanayake* [1] in which he observed that " the Analyst has not been called and there is no apparent reason why he has excluded only certain liquors and beverages ". This difficulty was attempted to be

[1] *(1954) 56 N. L. R. 167.*

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solved by suggesting there may be regulations or notifications specifying the various categories of liquor for the manufacture of which licences had been issued. Learned Crown Counsel stated that there were no such regulations and no document published from which it could be gathered as to what liquors had been authorised to be manufactured. In the absence of any such evidence, the observations I have made stand firm, namely, that there is no proof that the excisable article, namely, that the bottles of liquor seized had been unlawfully manufactured.

In this view of the matter, the convictions must be set aside, which I do hereby, and I acquit the accused.

Appeal allowed.

1955 *Present :* **Gratiaen J.**

V. E. B. DE SILVA, *et al.*, Petitioners, *and* MERVYN FERNANDO, Respondent

S. C. 256—Application in revision in C. R. Panadure, 13,782

Court of Requests—Costs—Taxation as between party and party—Witnesses' expenses —Discretion of Court—Civil Procedure Code, Part 3 of Schedule II.

Under Part 3 of Schedule II of the Civil Procedure Code, a party who has been awarded costs in a decree in his favour in the Court of Requests is not entitled to claim a sum paid to a lawyer-witness to compensate him for the loss of his professional income while attending the Court in obedience to summons.

APPLICATION to revise an order of the Court of Requests, Panadure.

Cecil de S. Wijeratne, for the plaintiffs petitioners.

Vernon Wijetunge, for the defendant respondent.

Cur. adv. vult.

January 24, 1955. GRATIAEN J.—

This application relates to a dispute concerning the taxation of costs as between party and party in an action in the Court of Requests of Panadure. The respondent, who had been awarded costs in a decree in his favour against the petitioner, claimed that sums amounting to Rs. 157·50 paid to two witnesses were permissible items in his bill of costs. The witnesses concerned were proctors, but had given evidence at the trial as private citizens, so that no question of payment of fees to expert witnesses arises for consideration.

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Both witnesses resided within 4 miles of the precincts of the Court, so that they were liable to attend the Court on summons without pre-payment or guarantee of travelling or other expenses. Nevertheless, the learned Commissioner allowed the retention in the taxed bill of costs of " batta " at the rate of Rs. 31·50 per day to each witness. He stated that it was customary in his Court to allow the payment of "batta" at this rate to lawyer-witnesses, and that he did not wish to interfere with " the usual practice ".

The scale of costs as between party and party in actions in the Court of Requests is laid down in Part 3 of the Second Schedule of the Civil Procedure Code. " Witnesses' expenses " are no doubt payable " as the Commissioner may determine " ; but in this case the payments do not purport to represent any " expenses " incurred by either witness, but were made apparently to compensate him to some extent for the loss of his professional income while attending the Court in obedience to the summons. That is not an expense which the unsuccessful party to a litigation can be compelled to meet. I therefore allow the application and disallow these items aggregating Rs. 157·50 from the respondent's bill of costs. The respondent must also pay to the petitioner the costs of this application and the costs of the relevant proceedings in the lower Court.

Application allowed.

1954 *Present:* **Gratiaen J. and Fernando A.J.**

D. P. PALISENA, Appellant, *and* K. K. D. PERERA, Respondent

S. C. 58—D. C. Ratnapura, 9,081

Land Development Ordinance (Cap. 320)—Permit-holder—His right to maintain actio rei vindicatio.

A permit-holder under the Land Development Ordinance enjoys a sufficient title to enable him to maintain a vindicatory action against a trespasser.

APPEAL from a judgment of the District Court, Ratnapura.

H. V. Perera, Q.C., with *E. A. D. Atukorale*, for the plaintiff appellant.

H. W. Jayewardene, with *G. P. J. Kurukulasuriya* and *P. Ranasinghe*, for the defendant respondent.

Cur. adv. vult.

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July 16, 1954. GRATIAEN J.—

On 24th January 1947 the Government Agent of the Sabaragamuwa Province issued in favour of the plaintiff a permit under the provisions of the Land Development Ordinance (Cap. 320), in respect of certain allotments of Crown land. The plaintiff has sued the defendant, whom he alleges to be a trespasser on the land, for ejectment and for consequential relief. The defendant raised a number of defences to this claim, including a plea that in any event a " permit-holder " under the Ordinance was not entitled, as against a third party, to relief of the kind asked for.

The case went to trial on a number of issues but, after a considerable volume of evidence had been led, the learned District Judge decided the action against the plaintiff on the ground that the plaint did not, in his opinion, disclose a remedy against the defendant. The basis of the decision was that " a permit-holder is only a licensee who is entitled to possess the land with the leave and licence of the Crown and at the will and pleasure of the Crown ", and was therefore " not entitled to ask for a possessory decree or to ask that a (third party in possession) be ejected from the land ".

The learned judge has misunderstood the scope of the remedy asked for by the plaintiff and failed to appreciate the nature of a permit-holder's rights under the Land Development Ordinance. This was not *a possessory action* in which a person complaining of dispossession can in certain circumstances, without proof of his title, obtain a decree for the ejectment of a person who has dispossessed him otherwise than by due process of law. This is *a vindicatory action* in which a person claims to be entitled to exclusive enjoyment of the land in dispute, and asks that, on proof of that title, he be placed in possession against an alleged trespasser.

It is very clear from the language of the Ordinance and of the particular permit P1 issued to the plaintiff that a permit-holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings. The fact that the alleged trespasser has prevented him from even entering upon the land does not afford a defence to the action ; it serves only to increase the necessity for early judicial intervention.

I would set aside the judgment under appeal. If the averments in the plaint be established, the plaintiff is entitled in law to a decree of the kind asked for. It is indeed regrettable that, at the conclusion of the trial, the learned judge did not record his findings upon all the issues. Had that been done, it might well have been possible for us to give a final decision in an action which was instituted nearly 5 years ago. As things now stand, the record must be returned to the lower Court with a direction that the case be tried *de novo* before another judge. The appellant is entitled to the costs of this appeal and of the abortive trial in the Court below.

FERNANDO A.J.—I agree.

Appeal allowed.

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[COURT OF CRIMINAL APPEAL]

1955 *Present:* **Gratiaen J. (President), Pulle J. and Weerasooriya J.**

K. DON GEERIS APPU, Appellant, *and* THE QUEEN, Respondent

APPEAL 13, WITH APPLICATION 19

S. C. 45—M. C. Polonnaruwa, 19,734

Trial before Supreme Court—Failure of prisoner to disclose his defence before trial—Liability to be cross-examined on it—Summing-up—Misdirection—Criminal Procedure Code, s 160.

It is improper to cross-examine a prisoner in regard to his failure to disclose his defence before trial, in the course of the statutory statement made by him under section 160 of the Criminal Procedure Code.

In a trial for murder, the prisoner gave evidence stating that the offence was in fact committed in his presence by one of the witnesses for the prosecution. In spite of protest by his Counsel questions were permitted by Court to be put in cross-examination conveying to the Jury that the defence raised by the prisoner was false by reason of the fact that in his statutory statement he had merely said " I am not guilty " and had not stated that the deceased was stabbed by the witness for the prosecution.

Held, that the cross-examination was improper and that the trial Judge, having failed to uphold the objection against it, should have warned the jury most explicitly, in the summing-up, that the accused was well within his rights in not elaborating his defence at the time he made the statutory statement and that he did not thereby put himself in peril of having his defence rejected.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

A. B. Perera, with *J. C. Thurairatnam*, for the accused appellant.

A. C. Alles, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 14, 1955. PULLE J.—

The prisoner, K. Don Geeris Appu, was found guilty by a verdict of five to two of having on the 13th July, 1954, committed murder by causing the death of one H. T. Podiappuhamy and was sentenced to death. One of the grounds urged against the conviction was that the learned trial Judge permitted inadmissible questions to be put to the prisoner during his cross-examination, in spite of objection raised by his counsel, on the statement made by him to the Magistrate before commitment under section 160 of the Criminal Procedure Code. It was further submitted that the Judge omitted to tell the jury in his charge that they should not draw any inference unfavourable to the prisoner on that part of the cross-examination and that such omission amounted to

2——J. N. B 45217-1,592 (6/55)

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such a misdirection as to justify the conviction being set aside. At the close of the argument we quashed the conviction and sentence and ordered a re-trial and announced that the reasons for the decision would be put down later in a written judgment.

The question arises as follows : The prosecution relied on the evidence of three witnesses who stated that on the night of the 13th July, 1954, they saw the prisoner stabbing the deceased on the high road leading to a village called Giritale at a spot a short distance away from the boutique belonging to the deceased. One of these witnesses was R. Charles Appuhamy. His version of the incident was that the deceased called at his house at about 8·30 or 9 p.m. As they were engaged in conversation he heard words of abuse being uttered in a loud tone. This apparently was a reference to a part of the incident spoken to by the other two witnesses according to whom the prisoner went up to the boutique armed with a knife and uttered threats that he had come to murder the deceased. The deceased on hearing the shouts left the company of Charles Appuhamy and went towards his boutique, although Charles Appuhamy tried to persuade him to stay back. Then Charles Appuhamy also went in the same direction and he saw the prisoner moving towards the deceased and stabbing him. The prisoner then approached Charles Appuhamy with the knife in hand but the latter ran away. The prisoner admitted his presence at the scene of the stabbing but stated that he saw the deceased being stabbed by Charles Appuhamy. Shortly before, the prisoner was walking on the road on his way home after an unsuccessful attempt to meet the deceased in his boutique. He then heard a talk. It was Charles Appuhamy abusing the deceased in filthy language. He hurried to the spot and then he saw him stabbing the deceased. The deceased leaned on him and fell to the ground. The prisoner then ran away. It was also part of the defence that the prisoner and the deceased were good friends and that, on the other hand, incidents had occurred calculated to create a state of enmity between the deceased and Charles Appuhamy.

The part of the cross-examination of the prisoner to which exception has been taken is recorded as follows and it referred to the prisoner's statutory statement, " I am not guilty ".

" *Q.* You say you are innocent in this case ?

A. Yes.

Q. You were asked in the Magistrate's Court whether you had anything to say in answer to the charge ?

Mr. Pereira : I object to that question.

Q. This is the first time that you are coming out with the story that Charles Appuhamy stabbed the deceased ?

A. I told the Magistrate who came to the scene. He told me . . . .

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Q. We do not want what the Magistrate told you. You filed a list of witnesses.

Mr. Pereira : This is not permitted at all. I can submit the highest authority on the subject. When an accused person exercises a privilege that the law allows him the Crown has no right to comment on it.

Crown Counsel : He has submitted two lists of witnesses which are part and parcel of the record. The name of the Magistrate is not on either of them. I am entitled to comment on it, on the fact that he is trotting out this story for the first time in this court.

Mr. Pereira : The failure on the part of an accused to elaborate on his plea of not guilty cannot be the subject matter of comment, much less of interrogation. "

No ruling was given on the objection. The trial Judge was merely content to observe that he would tell the jury that the Crown had to prove the guilt of the prisoner. The point that the prosecution was apparently seeking to make was that inasmuch as the prisoner did not tell the Magistrate that he saw Charles Appuhamy stabbing the deceased his defence should be rejected as false and a verdict found on the basis that the three alleged eye witnesses called by the prosecution should be believed. The learned Judge omitted to advert to this topic in his charge. In regard to the evidence given by the prisoner in cross-examination all he said was,

" Then he was cross-examined and those questions put to him in cross-examination must be still fresh in your memory. Those questions were put only last afternoon. The case itself has gone on from Thursday last week and that is why I marshalled before you the evidence of some of the witnesses so that you might recall their evidence, but the evidence of the accused is too fresh in your memory for me to quote what he said in cross-examination. "

Comments made by Judges to juries on the failure of an accused person to disclose his defence at an early stage, either when cautioned by the Police or in the course of a statutory statement to a committing Magistrate, have been the subject of many decisions of the Court of Criminal Appeal in England. Among them are *R. v. Naylor* [1], *R. v. Littleboy* [2] and the comparatively recent cases of *R. v. Leckey* [3], *R. v. Tune* [4] and *R. v. Gerrard* [5]. A local case is *R. v. Don Robert* [6] in which, among others, *R. v. Naylor* [1] and *R. v. Littleboy* [2] were considered. Although in the present case no comment of any kind was made in the charge to the jury, the propriety and the effect of the questions put to the prisoner regarding his statutory statement must be determined in the light of the principles laid down in those cases.

[1] *23 Cr. A. R. 177.*
[2] *(1934) 2 K. B. 408.*
[3] *29 Cr. A. R. 128.*
[4] *29 Cr. A. R. 162.*
[5] *(1948) 1 All E. R. 205.*
[6] *(1940) 42 N. L. R. 73.*

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In *R. v. Naylor* [1] in answer to the statutory question which is identical in form with that in section 160 of the Criminal Procedure Code the prisoner stated, " I don't wish to say anything except that I am innocent ". Commenting on these words the Recorder in his summing-up stated,

" Now you would imagine a purely innocent young man accused of house-breaking and having these words put to him ' Do you wish to say anything ? '—Surely if he is an innocent man one would think he would give some explanation of where he was, and what he was doing at the particular time, and would make his defence then and there. But he says nothing. "

The Court of Criminal Appeal held that these comments were improper and amounted to a misdirection. Hewart, L. C. J., said,

" When one looks at the words of the formula which must be deliberately framed, it is quite obvious that they were intended to convey and do convey to the prisoner the belief that he is not obliged to say anything unless he desires to do so. Now if those words are really to be construed in this sense, that, having heard them, an accused person remains silent at his peril and may find it a strong point against him at his trial that he did not say anything after being told he was not obliged to say anything, one can only think that this form of words is most unfortunate and misleading. We think that these words mean what they say and that an accused person is quite entitled to say : ' I do not wish to say anything except that I am innocent ' ".

The principle laid down in *Naylor's* case[1] was followed in *R. v. Leckey* [2] where the trial Judge repeatedly told the jury that they might draw an inference of guilt by reason of the silence of the prisoner on two occasions when questioned by Police officers. In delivering the judgment of the Court of Criminal Appeal Caldecote, L. C. J., said,

" We think this amounted to a misdirection, and it is proper ground on which the verdict, subject to one other question, should be quashed. If it were not so, it must be obvious that a caution may be indeed a trap instead of being a means for finding out the truth in the interests as much of innocent persons, as it is in the interests of justice against guilty persons. An innocent person might well, either from excessive caution or for some other reason, decline to say anything when charged and cautioned, and if it were possible to hold that out to a jury as ground on which they might find a man guilty, it is obvious that innocent persons might be in great peril. "

In our opinion the questions put to the prisoner were improper inasmuch as they were intended to convey to the jury that the defence raised by him was false by reason of the fact that in his statutory statement he did not state that the deceased was stabbed by Charles Appuhamy. In these circumstances it was the duty of the Judge to have upheld the objection. Having failed to do so at that stage, he should

[1] *23 Cr. A. R. 177.* [2] *29 Cr. A. R. 128.*

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certainly have warned the jury most explicitly that the prisoner was well within his rights in having stated, " I am not guilty " and that he did not thereby put himself in peril to have his defence rejected. As no ruling was given on the objection there was, indeed, a special duty cast on the Judge to safeguard the defence against the wrong impression which the jury must almost certainly have received during the cross-examination as to the prisoner not elaborating his defence at the time he made the statutory statement. The omission to direct the jury on the lines indicated amounted to a misdirection entitling the prisoner to have the conviction set aside.

Nothing that we have said is intended to qualify or restrict any legitimate comment the prosecution may make to the jury on the statutory statement of an accused person. There is all the difference between asking a prisoner to explain why he did not outline his defence in his statutory statement and, in a proper case, like one in which the defence at the trial is one of *alibi*, in submitting to the jury that if the defence of *alibi* had been raised earlier the prosecution would have had an opportunity of testing it. *Vide R . v. Littleboy* [1] and *R. v. Don Robert* [2].

For the reasons set out in this judgment we quashed the conviction and sentence and ordered that the prisoner be re-tried.

Fresh trial ordered.

1955 *Present :* **Gratiaen J. and Sansoni J.**

H. PEMANANDA THERO, Appellant, *and* M. THOMAS PERERA, Respondent

S. C. 387—D. C. Kurunegala, 6,133

Buddhist Temporalities Ordinance (Cap. 222)—" Controlling Viharadhipati "—Meaning of expression—Sections 2, 4 (1) and (2), 20, 22, 29 (1).

In the case of a temple which was exempted from the operation of section 4 (1) of the Buddhist Temporalities Ordinance (Cap. 222) the management and the title to the property of the temple are vested in the priest who is the principal bhikkhu in the line of pupillary succession from the first incumbent of that temple. The " controlling viharadhipati " need not be resident in the temple.

" At no time in the history of Buddhist temples in this Island has a priest who had no right to the incumbency of the temple been invested with the title to, or the power to manage, the temporalities of the temple. "

" In enacting Cap. 222 there was no intention on the part of the legislature to draw a distinction between a Viharadhipati and an incumbent. "

Sumana Therunnanse v. Somaratne Therunnanse (1936) 5 C. L. W. 37 and *Chandrawimala Therunnanse v. Siyadoris* (1946) 47 N. L. R. 304, not followed.

[1] *(1934) 2 K. B. 408.* [2] *(1940) 42 N. L. R. 73.*

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APPEAL from a judgment of the District Court, Kurunegala.

H. V. Perera, Q.C., with *S. W. Jayasuriya*, for the defendant appellant.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for the plaintiff respondent.

Cur. adv. vult.

March 5, 1955. SANSONI J.—

The plaintiff in this action claimed a declaration that he was entitled to a leasehold interest in a certain land belonging to the Tekawa Vihare under a deed of lease executed in 1946. He complained that while he was in possession as lessee he was ousted by the defendant in 1948. He asked to be restored to possession and for damages. The lease was executed by Gorakadeniya Pemananda Thero who described himself as " Controlling Viharadhipati " of the Vihare, with the written sanction and approval of the Public Trustee, for a term of 15 years. That Vihare has admittedly been exempted from the operation of section 4 (1) of the Buddhist Temporalities Ordinance, Cap. 222. The defendant Helamade Pemananda Thero claimed that he was the Adhikari Bhikkhu or Viharadhipati of that Vihare since his tutor Tekawa Ratnajothi Thero died in 1927, the latter having succeeded Tekawa Sumangala Thero in that office ; he claimed that he was the Controlling Viharadhipati and the proper authority to possess and lease the property belonging to the Vihare. He said that the plaintiff's lessor had been merely residing in the temple and looking after it with his permission. It was common ground that Gorakadeniya Pemananda gave up his robes in 1948 and the defendant thereupon took possession of the leased land.

The learned District Judge held that the defendant was the successor in title of Tekawa Sumangala the former Viharadhipati. Although the plaintiff's lessor was not in that line of succession, the learned Judge decided that he functioned as the *de facto* Viharadhipati from 1935 to 1948, while being in control of the temple and its temporalities during that period, and was therefore the Viharadhipati. He gave the plaintiff judgment as prayed for in the plaint save for a reduction of the quantum of damages. The question that arises in this appeal is whether Gorakadeniya Pemananda who was not the lawful incumbent of this Vihare could rightly have claimed to be the Controlling Viharadhipati as the term is defined in section 4 (2) of the Ordinance. Nothing, of course, turns on the fact that the Public Trustee sanctioned the lease in question, since under section 29 (1) of the Ordinance it is only the trustee or Controlling Viharadhipati who is empowered to lease lands belonging to a temple, and if the lessor did not hold that office the lease would be void.

The term " Viharadhipati " is defined in section 2 as meaning " the principal bhikkhu of a temple other than a dewale or kovila whether resident or not ", and section 4 (2) reads, " The management of the property belonging to every temple exempted from the operation of the

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last preceding sub-section but not exempted from the operation of the entire Ordinance shall be vested in the viharadhipati of such temple hereinafter referred to as the ' controlling viharadhipati ' ". It becomes clear that the first qualification required of a " Controlling Viharadhipati " is that he should be the Viharadhipati of the temple ; he receives the statutory label " Controlling Viharadhipati " only because the temple is exempted from the operation of section 4 (1) and the management of its property vests in him as Viharadhipati instead of in a duly appointed trustee. Section 20 similarly provides that all the movable and immovable property of the temple shall vest in the controlling Viharadhipati in such a case ; by section 18 he is empowered to sue for the recovery of such property and to be sued ; by section 22 he is empowered to enforce all contracts and all rights of action in favour of the temple, all these being extensive powers which only a duly appointed trustee can exercise in the case of temples which have not been exempted from the operation of section 4 (1). It seems to have been assumed in the case of *Sumana Therunnanse v. Somaratana Therunnanse* [1] that the term " Controlling Viharadhipati " would include any bhikkhu—be he the principal bhikkhu or not—so long as he exercised control over the affairs of the temple. The *ratio decidendi* of that case is that an Incumbent or Adhikari Bhikkhu who lived away from a temple and did not control its affairs could not be the controlling Viharadhipati. The judgment of Soertsz A.J. in that case was cited with approval by de Silva J. (Howard C.J. agreeing) in *Chandrawimala Therunnanse v. Siyadoris* [2]. In the latter case, the plaintiff priest who was not and did not claim to be the lawful incumbent of a temple claimed to be its controlling Viharadhipati and to have the right to possess the properties belonging to the temple. He sued for declaration of title to a land as Sanghika property of the temple. De Silva J. said :—" The next question which requires consideration is whether the plaintiff could maintain his action as he was not the lawful incumbent of the temple . . . . . The plaintiff's tutor Sarananda had been Viharadhipati from 1928 and the plaintiff has succeeded him as such Viharadhipati. In the circumstances I agree with the learned Judge that this case falls within the principle laid down in the case of *Sumana Therunnanse v. Somaratana Therunnanse* (5 C. L. W. 37) and that the plaintiff is entitled to maintain this action ". That case therefore raised the question whether one who is not the incumbent of a temple can be its Viharadhipati or controlling Viharadhipati. Now one should not lose sight of two essential matters in the statutory definition of " Viharadhipati ", viz., (1) he must be the *principal bhikkhu* of the temple ; (2) he *need not be resident* in the temple. No emphasis can properly be placed on the epithet " controlling " ; it was chosen by the draftsman as a convenient word to describe the principal bhikkhu who fills the role of a trustee. With respect, I think these judgments have overlooked these matters and must be regarded as having been pronounced *per incuriam*.

It is useful also to consider the question in the light of the earlier Ordinances and a few cases which seem to have a bearing on it. The Ordinance

[1] *(1936) 5 C. L. W. 37.* [2] *(1946) 47 N. L. R. 304.*

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in force just prior to the enactment of Cap. 222, which was enacted in 1931, was the Buddhist Temporalities Ordinance, No. 8 of 1905. Section 2 of that Ordinance defined "Incumbent" as "the chief resident priest of a temple". Ordinance No. 8 of 1905 repealed and replaced No. 3 of 1889, which had also been passed to provide for the better regulation and management of the Buddhist Temporalities in this Island. Section 2 of Ordinance No. 3 of 1889 defined "Incumbent" as "the chief resident priest of a Vihare". There was therefore only one meaning to be attached to the word "Incumbent" between the years 1889 and 1931; it stood for the chief resident priest of a temple. What is more, the definitions in the Ordinances of 1889 and 1905 expressed what has always been understood by the word "Incumbent" whenever that word was considered in judgments of this Court. A priest claiming to be the incumbent (or Adikari Bhikkhu) of a temple had to establish that he had "*a right to the presidency*", as de Sampayo J. has termed it, as against all other priests *in the line of pupillary succession from the first incumbent.* The right to succeed to an incumbency is generally determined by seniority or by valid nomination by the previous incumbent, but as was held in *Saranankara Unnanse v. Indajoti Unnanse* [1] "the office of Adhikari is single and indivisible. He is, indeed, *primus inter pares*, but his rule is monarchical . . . . An Adhikari may, it is true, nominate all the pupils to succeed him, but they can only succeed one at a time".

Prior to the enactment of the Buddhist Temporalities Ordinance the endowments of a temple were vested in the incumbent and, to quote from the judgment of the Privy Council in *Dhammananda v. Ranasinghe* [2] "property dedicated to the Vihare (was) the property of the incumbent for the time being for the purposes of his office, including his own support and the maintenance of the temple and its services", words which are quoted almost verbatim from the judgment in the old case of *Rathanapala Unnanse v. Kerritiagala Unnanse* [3]. After 1889, however, they were vested in trustees appointed under the Ordinances though the presiding priest or incumbent has the control and administration of the Vihare itself (per Ennis J. in *Davarakkitta v. Dhammaratne* [4]). At no time in the history of Buddhist temples in this Island has a priest who had no right to the incumbency of a temple been invested with the title to, or the power to manage, the temporalities of the temple. I am unable to accept the suggestion that the Ordinance of 1931, Cap. 222, had the far-reaching effect of conferring an important legal status on one who may not even claim to be, and who is not in law, the chief priest of a temple. Instead of the words "the chief" in the earlier definitions of "incumbent" the definition of "Viharadhipati" contains the words "the principal" and the only other change effected is that a Bhikkhu could be a Viharadhipati whether he was resident in the temple or not—a change which was probably made because a priest can be an incumbent of more than one temple. In effect, therefore, a Viharadhipati after 1931 is the presiding priest who was known as an incumbent before 1931, with the difference that he need not be resident in the temple of which he claims to be the

[1] (*1919*) *20 N. L. R. 385.*
[2] (*1939*) *39 N. L. R. 567.*
[3] (*1890*) *2 S. C. C. 26.*
[4] (*1921*) *21 N. L. R. 255.*

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Viharadhipati. Bearing in mind that the expression " chief priest (or bhikkhu) of a temple " has always been the definition of the word " incumbent " and substantially the same expression has been used to define the word " Viharadhipati ", it seems only reasonable to assume that the legislature meant the new expression to be the equivalent of the old expression " incumbent ". Another consideration which leads me to the same conclusion is the presumption referred to in Maxwell's " Interpretation of Statutes " (10th Edition, page 81),

> " Presumption against Implicit Alteration of Law.
>
> One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness ".

To attach any importance to the circumstances that a priest who is not the chief priest in the line of pupillary succession is actually living in a particular temple and managing its affairs while the chief priest is living elsewhere would be to lose sight of the most important elements of the definition of a Viharadhipati. It seems clear, therefore, that in enacting Cap. 222 there was no intention on the part of the legislature to draw a distinction between a Viharadhipati and an incumbent. I suggest that this is the fallacy underlying the reasoning in *Chandrawimala Therunnanse v. Siyadoris* (*supra*). I find support for this conclusion in the judgment of Canekeratne J. in *Punchibanda v. Dharmananda Thero* [1]. The learned Judge said " The bhikkhu may be the presiding officer of a Vihare, or a resident priest, or a non-resident priest (*agantuge*); the presiding priest is known as the Viharadhipati; sometimes he is called the incumbent (the incumbency is called the *adhipatikama*) in some cases the *adhikhari bhikkhu* ". Later in the judgment he says :— " A Viharadhipati is one who can lawfully claim to be the head of the Vihare; one, generally, who can show that he is the pupil of the last incumbent or that he is in the line of pupillary succession ". I do not consider the judgment of Dias S.P.J. in *Algama v. Buddharakkita* [2] to be against this view. On the contrary the learned Judge cited with approval the judgment of Canekeratne J. in *Punchibanda v. Dharmananda Thero* already referred to. But in dealing with the words " any Viharadhipati " in section 32 he considered that the context required that both those who claim to be and those who are functioning as Viharadhipatis were covered by those words, having regard to the purpose of the section.

These considerations lead me to the conclusion that the correct construction to be placed on the provisions of the Ordinance is that it was intended, in the case of a temple which was exempted from the operation

[1] (*1948*) *48 N. L. R. 11.* [2] (*1951*) *52 N. L. R. 150.*

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of section 4 (1), to vest the management and the title to the property of such a temple in the priest who is the principal bhikkhu in the line of pupillary succession from the first incumbent of that temple.

For these reasons I hold that the lease in favour of the plaintiff conveyed no right to him. I would therefore set aside the judgment under appeal and dismiss the plaintiff's action with costs in both Courts.

GRATIAEN J.—I agree.

Appeal allowed.

1954 *Present:* **Gunasekara J. and Fernando A.J.**

M. M. NUHMAN *et al.*, Appellants, *and* ABDUL NAKEEM *et al.*, Respondents

S. C. 134—D. C. Colombo, 6,094 L

Fideicommissum—" Power of appointment ".

A fideicommissary deed of gift in which the *fideicommissarii* were all the children of the *fiduciarius* and their descendants, contained the following Proviso :—

" Provided always that nothing herein contained shall prevent the said I.M.S. (the *fiduciarius*) by Deed or Testamentary disposition to give and grant the said premises or any part thereof to any person or persons whomsoever he pleases but the same must be given and granted strictly under and subject to all the restrictions as are hereinbefore expressed ; otherwise such grant shall be null and void. "

Held, that the Proviso did not create a " power of appointment " within the recognised meaning of that expression, but only conferred on the *fiduciarius* a right of disposition which in certain eventualities would have the effect merely of postponing the enjoyment of the fideicommissary interests.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *L. G. Weeramantry* and *E. R. S. R. Coomaraswamy*, for the 8th-13th defendants appellants.

H. W. Tambiah, for the plaintiff respondent.

H. W. Jayewardene, Q.C., with *M. L. de Silva* and *M. S. M. Nazeem*, for the 1st–7th defendants respondents.

Cur. adv. vult.

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September 7, 1954. FERNANDO A.J.—

We are called upon in this appeal to interpret a deed of gift executed in 1866 by one Lebbena Marikar in favour of his son Samsudeen. Set out below are relevant extracts from the provisions of the deed :—

" I do hereby give, grant, assign, transfer, and set over unto the said Lebbena Marikar Samsudeen his heirs, executors, administrators and assigns as a gift absolute and irrevocable, but under and subject to the terms and conditions hereinafter set forth and described the following premises to wit. . . . "

" To Have and Hold the said premises with all and singular the appurtenances thereunto belonging valued at one thousand five hundred pounds unto him the said Lebbena Marikar Samsudeen his heirs executors administrators and assigns for ever on the following conditions to wit : that the said property hereby given and granted or any part or portion thereof shall not be sold, mortgaged or otherwise alienated, by the said Lebbena Marikar Samsudeen but that the same shall be held possessed and enjoyed by the said Lebbena Marikar Samsudeen during his lifetime and that after his death by his children lawfully begotten and their descendants under the bond of Fidei Commissum and shall never in any manner be alienated. That the rents issues and profits of the said property shall not be liable to be attached seized or sold for any debt or other liabilities of the said Lebbena Marikar Samsudeen nor for the debts or liabilities of any other person or persons who may succeed thereto.

Provided always that nothing herein contained shall prevent the said Lebbena Marikar Samsudeen by Deed or Testamentary disposition to give and grant the said premises or any part thereof to any person or persons whomsoever he pleases but the same must be given and granted strictly under and subject to all the restrictions as are hereinbefore expressed ; otherwise such grant shall be null and void. "

In purported pursuance of the powers conferred on Samsudeen by the Proviso in the deed, he subsequently by deed P2 (No. 1532 of August, 1910) made a gift of a portion of the land to his son Nakeem subject to the condition " that the same shall be held possessed and enjoyed by the said Samsudeen Hadjiar Mohamed Nakeem during his lifetime and after his death by his children lawfully begotten and their descendants under the bond of Fidei Commissum and shall never in any manner be alienated and that the rents issues and profits of the said property shall not be liable to be attached seized or sold for any debt or other liabilities of the said Samsudeen Hadjiar Mohamad Nakeem nor for the debts or liabilities of any other person or persons who may succeed thereto and subject also to the said life rent or possessory interest of the said Lebbena Marikar Samsudeen Hadjiar ".

Samsudeen (the fiduciary) had six sons and five daughters and he apparently executed the deed P2 upon the footing that the Proviso in the deed P1 entitled him to nominate any one of his children to hold the property and that in that event the Fidei Commissum would continue to attach for the benefit only of the descendants of the chosen nominee.

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Nakeem (the donee on P2) died in 1944. The plaintiff and the 1st-6th defendants, all of whom are children of Nakeem, seek to partition among themselves the portion of land gifted to Nakeem by P2 ; but the 8th-13th defendants who are some of the other grandchildren of Samsudeen contend that despite the execution of the deed P2 all the children of Samsudeen and the descendants of those children became entitled to the land on the death of Nakeem.

The learned District Judge has held that the deed P1 created a valid Fidei Commissum but that the Proviso enabled Samsudeen " to select from the class mentioned therein certain Fideicommissaries whom he wished to appoint " and that accordingly the deed P2 by which Samsudeen made a gift to the chosen son Nakeem subject to a fideicommissum in favour of Nakeem's descendants was valid. This would mean of course that the interests of the other children of Samsudeen and their descendants were extinguished upon the execution of P2.

Mr. Perera has argued *firstly* that the deed P1 created a valid fideicommissum in favour of all the children of Samsudeen and their descendants, and that the Proviso cannot be construed in such a manner as to defeat the conditions imposed in the fideicommissary clause : and *secondly* that the Proviso can be given an interpretation consistent with the intention of Lebbena Marikar to create an interest in favour of all Samsudeen's children and their *descendants*. There are undoubtedly cases in which a deed creating a fideicommissum does contain a provision under which the fideicommissum can be extinguished or become inoperative, for example, where the donor authorises the fiduciary or some other person to exclude one of the fideicommissary heirs in the event of marriage without consent or abandonment of religion. But Mr. Perera's contention is that such a power of exclusion to be effective must be clearly and unambiguously expressed, and that the Proviso in the deed under consideration is not so expressed. Mr. Perera has also relied on the case of *Hadjie v. Fernando* [1] in which this Court dealt with a deed executed by the self-same Lebbena Marikar also in 1866 which was in terms identical with P1. In that case also one fiduciary made a gift in pursuance of the Proviso, but she there expressly declared that the gift would be subject to the conditions imposed by the original deed of 1866 in her favour. In the result in that case, the effect of her deed was only to create a temporary interest in the property, and not to exclude permanently any of the designated fideicommissary heirs.

Mr. H. W. Jayewardene, who appeared for the 1st-7th defendants respondents, rightly pointed out that the judgment in the case cited, only incidentally interpreted the effect of the Proviso, for the reason that the person to whom the fiduciary there transferred the property and the successors in title of that person had in any event acquired prescriptive title effective against the single individual who came within the category of the designated fideicommissary heirs. Nevertheless the judgment of de Sampayo J. in so far as it purported to interpret the conditions in Lebbena Marikar's deed is of great persuasive value.

[1] *(1919) 6 C. W. R. 367.*

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The Proviso which enabled the fiduciary " by Deed or Testamentary disposition to give and grant the premises to any person whomsoever ", makes it clear that the grant must be "strictly under and subject to all the restrictions as are hereinbefore expressed, otherwise such grant shall be null and void ". The view taken by the learned District Judge was that the Proviso conferred on the fiduciary a power of appointment and both he as well as the two counsel who argued the case for the respondents at the appeal appeared to think that it was a power to select from among the designated class of fideicommissary heirs, i.e., the children of Samsudeen. Professor Nadaraja in his book " The Roman Dutch Law of Fideicommissa " at p. 57 refers to the various forms of the so-called " Power of appointment " in the following terms :—" The power of appointment conferred on the fiduciary may be either general, without limitations on his choice, or special, where the power can only be exercised in favour of certain persons or a class. Special powers may be of different kinds. Thus, the testator may designate the fideicommissaries himself leaving the fiduciary only the power of determining the distribution among those indicated, or he may designate a number of individuals or a class or classes from which the fiduciary may choose the actual beneficiaries, or he may leave to the fiduciary the power not only of choosing the beneficiaries out of those indicated but also of determining the shares of the beneficiaries so chosen. Where the power is general with no express limitations on the fiduciary's choice of the fideicommissaries, he may nevertheless not appoint himself ".

It seems to me that the Proviso which we have to construe does not fall within any of the forms there mentioned ; nor does the Proviso amount to a power of disinherison or revocation which falls to be regarded as akin to a power of appointment.

De Sampayo J. in the case to which I have already referred was of opinion that the transfer by the fiduciary in pursuance of the Proviso would have the effect either of enabling the transferee to hold the property during the lifetime of the transferor or (presumably for the reason that the Proviso refers to a transfer by *testamentary disposition*) a right to hold the property during the transferee's lifetime, and that in either event the property would ultimately vest in the children and descendants of the fiduciary, i.e., in the designated fideicommissary heirs. He seemed to prefer the view that the transfer would be effective during the lifetime of the transferee and not merely during the lifetime of the transferor. I have with great respect come to the same conclusion. The deed P1 contains language which unambiguously expresses an intention to create a fideicommissum and the form in which the fideicommissary clause has been drawn is almost impeccable. There is a clear gift over, to be effective on the death of Samsudeen and an equally clear designation of the fideicommissaries, i.e., the children of Samsudeen lawfully begotten and their descendants. There is then a prohibition against alienation and a provision (even though ineffective) that the property is not to be liable to attachment or seizure. Having regard then to the fact that the Proviso itself explicitly preserves in force the restrictions previously expressed it can properly be regarded only as an exception to the prior prohibition

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against alienation. Samsudeen was given the right despite the prohibition againt alienation to give or grant the property strictly under the restrictions, which would, despite a transfer by Samsudeen remain in full force. Whether the transfer would be effective to postpone the interests of the fideicommissary heirs only until Samsudeen's death or else until the death of the chosen transferee, is not material in the present case, for the reason that this action has been filed after the death of Nakeem who was the transferee on P2. All the descendants designated in P1 as fideicommissary heirs had a right to succeed to the property at the latest on the death of Nakeem. It is to my mind quite clear that the Proviso created no "power of appointment" within the recognised meaning of that expression, but only conferred a right of disposition which in certain eventualities would have the effect merely of postponing the enjoyment of the fideicommissary interests.

For these reasons I am of opinion that the deed P2 was null and void in so far as it purported to deprive the designated fideicommissary heirs of their interests in the property. The judgment and decree appealed from must be set aside and the case remitted to the District Court in order that a decree may be entered, after such further steps as may be necessary, in accordance with the interpretation given to the deed P1 in this judgment. The plaintiff must pay to the 8th–13th defendants their costs of appeal and costs of contest in the District Court. Other costs will be in the discretion of the District Court.

GUNASEKARA J.—I agree.

Judgment set aside.

1955 *Present :* **Sansoni J.**

M. K. AMBALAVANAR *et al.*, Appellants, *and*
A. NAVARATNAM, Respondent

S. C. 63—C. R. Kayts, 7,155

Maintenance—Destitute parent—Right to maintenance from children.

The Roman Dutch Law rule that children are liable to support their parents who are in indigent circumstances obtains in Ceylon.

APPEAL from a judgment of the Court of Requests, Kayts.

C. Renganathan, for the plaintiffs appellants.

No appearance for the defendant respondent.

Cur. adv. vult.

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April 6, 1955. SANSONI J.—

The two plaintiffs are the parents of the defendant, who is their eldest son. Admittedly the defendant has not been maintaining the plaintiffs, and in this action they plead that they are in indigent circumstances and ask that the defendant be ordered to pay them a monthly sum for their maintenance. Several issues were framed at the trial but the learned Commissioner dismissed the action on the purely legal ground that in Ceylon today a child is under no legal liability to maintain his parents. He held that there is no evidence that such a liability was ever part of the law of Ceylon, even though the authorities cited at the trial seemed to establish that such a liability existed under the Roman Dutch Law.

I think the first question to be decided is whether under the Roman Dutch Law children are liable to support their parents who are in indigent circumstances. It is enough to quote from the judgment of Tindall, J. A., in *Oosthuizen v. Stanley*[1]—"The liability of children to support their parents, if these are indigent (*inopes*), is beyond question ; see *Voet 25.3.8; van Leeuwen Cens. For. 1.10.4.* The fact that a child is a minor does not absolve him from his duty, if he is able to provide or contribute to the required support ; see *In re Knoop* (10 S. C. 198). Support (*alimenta*) includes not only food and clothing in accordance with the quality and condition of the persons to be supported but also lodging and care in sickness ; see *Voet 25.3.4, van Leeuwen, Cens. For. 1.10.5 ; Brunnemann, in Codicem 5.25.* Whether a parent is in such a state of comparative indigency or destitution that a court of law can compel a child to supplement the parent's income is a question of fact depending on the circumstances of each case. I find, in an old Scottish case quoted by Fraser (*Parent and Child, 3rd ed. p. 137*) and in *Green's Encyclopaedia of Scots Law* (*vol. I., p. 300*), that a widow having an annual income of £60 was held to be not entitled to claim additional aliment from a son who had an income of £1,500 a year. No doubt the higher value of money 80 years ago was an important factor in the failure of the parent's claim in that case. However, though each case must depend on its own peculiar circumstances, that decision supports the view, I think, that the parent must show that, considering his or her station in life, he or she is in want of what should, considering his or her station in life, be regarded as coming under the head of necessities. It must also be mentioned that a parent is not entitled to claim support from a child if the parent is able to maintain himself by working ; see *2 Holl. Cons. No. 279.*" Van Leeuwen says in the passage referred to "As children are entitled to support from their parents, so also are parents entitled to be supported by their children who are in wealthy circumstances. I say, by their children who are in wealthy circumstances, for children who are in poverty are not bound to support their parents. So that there is between relatives in the ascendant and descendant lines an inherent duty of mutual support ".

Several other cases to the same effect have been cited in *Spiro's Law of Parent and Child* (*1950*), *page 247* and the learned author comments :— "The duty of support prevailing between parents and children may, therefore, be said to be reciprocal, and here again South African Law

[1] (*1938*) *A. D. at page 327.*

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differs from the Common Law in England and in the United States of America where neither parent nor child is bound to support the one or the other ".

The enactment of the Maintenance Ordinance, Cap. 76, has no bearing on this matter since it does not purport to deal with the entire law of maintenance but only with the maintenance of wives and children. The absence of any reference in the Ordinance to the maintenance of parents by their children therefore seems to be no argument at all. Bonser, C. J., in *Subaliya v. Kannangara*[1], Wood Renton, J., in *Justina v. Arman*[2], and Schneider, A. J., in *Lamahamy v. Karunaratne*[3] have taken the view that that branch of Roman Dutch Law which dealt with maintenance did form a part of the law of this Island while Ennis, A. C. J., in *Lamahamy v. Karunaratne*[4] doubted if the Roman Dutch Common Law in this respect was ever introduced into Ceylon. Is the rule in question, then, part of the law of Ceylon?

Now the question as to how much of that system of law was imported into Ceylon was considered in *Samed v. Segutamby*[4], where Bertram, C. J. said that the propositions that the Roman Dutch Law pure and simple does not exist in this country in its entirety, and that it is not the whole body of Roman Dutch Law, but only so much of it as may be shown or presumed to have been introduced into Ceylon that is now applicable here, do not apply to fundamental principles of the Common Law enunciated by authorities recognized as binding wherever the Roman Dutch Law prevails. "Such principles" he said, "may in course of time become modified in their local application by judicial decisions, but it would be only by a series of unbroken and express decisions that such a development could take place". Jayawardene, A. J., in the same case, speaking of the Roman Dutch Law on the subject of damage by fire, used words which, I think, are appropriate in this connection also :—" But there is no decision by which this Court has declared that the Roman Dutch Law on the subject of damage by fire is inapplicable in this Colony by its being obsolete or for any other reason. It is not a special or local law which is only suited to conditions in Holland and unsuited to local conditions. It is a law of general application, and it cannot be suggested that it was not imported to Ceylon. This law is to be found in the works of institutional and other writers on the Roman Dutch Law recognized in Ceylon and appealed to in the Colony upon all questions of Roman Dutch Law. As this Court said in 1835: 'If the right exists, it is not the less law because hitherto suitors may not have thought it expedient to exercise it' ". Undoubtedly the rule which requires children to maintain their indigent parents obtains in South Africa and I think it may be properly regarded as a fundamental principle of our Common Law. It is also interesting to find two cases decided in the District Court of Jaffna in 1803 reported in *Mutukisna's Thesawaleme p. 572*, where parents who were in indigent circumstances successfully claimed maintenance from their children. In my opinion the rule that children are liable to support their parents who are in indigent circumstances obtains in Ceylon.

[1] *(1899) 4 N. L. R. 121.*
[2] *(1908) 12 N. L. R. 263.*
[3] *(1921) 22 N. L. R. 289.*
[4] *(1924) 25 N.L.R. 481 at page 497.*

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I therefore set aside the order of dismissal and send the case back in order that the parties may lead evidence on the other issues of fact and law already framed and any further issues which may be raised on the pleadings. The appellants are entitled to the costs of this appeal. All other costs will abide the result of the action.

Order set aside.

1954 *Present:* **Nagalingam S.P.J. and de Silva J.**

S. WASEELA UMMA, Petitioner, *and* C. S. M. SALLY *et al.*, Respondents.

S. C. (*Application*) *214—D. C. Matara, 22,166.*

Revision—Order of Supreme Court calling for record—Jurisdiction of lower Court thereafter to continue proceedings.

When, in an application in revision, the Supreme Court calls for the record of the proceedings in question, the Judge of the lower Court must forward the record immediately and has no jurisdiction to continue the proceedings; a judgment or order pronounced by him thereafter in contravention of this rule is *ultra vires*.

APPLICATION to revise certain proceedings of the District Court, Matara.

H. W. Tambiah, for the 6th defendant petitioner.

Vernon Wijetunge, for the 1st defendant respondent.

Cur. adv. vult.

December 21, 1954. NAGALINGAM S.P.J.—

This is an application for the exercise of the powers of revision vested in this Court in regard to certain proceedings had in a partition action before the learned District Judge of Matara.

The petitioner who makes this application is the 6th defendant in the action. She was represented by a Proctor but no answer on her behalf was filed. On the date of the trial she was absent but her Proctor entered appearance on her behalf. She relies upon deeds to establish the claim that she is entitled to about 1/5th of the land sought to be partitioned, but the deeds do not appear to have been in the custody of the Proctor on the date of the trial and in fact the Proctor for the 6th defendant, beyond entering appearance on her behalf, seems to have done little or nothing for her.

The plaintiffs' pedigree set out a devolution of title which allotted to the 6th defendant certain shares, and though the intermediate deeds were not produced by the plaintiffs, the 1st plaintiff did however produce the deed in favour of the 6th defendant and a perusal of that deed would have

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shown that the 6th defendant had been conveyed the interests which the plaintiffs had allotted to the 2nd, 3rd, 4th and 5th defendants. Even the learned Judge's attention does not seem to have been called to the contents of the deed marked 6D1. That deed on a perusal would have disclosed the earlier deed on the basis of which title was conveyed and to which the plaintiffs in their pedigree had made reference. At the conclusion of the trial the learned Judge reserved his judgment.

The petitioner explains her default at the trial has been due to her serious ailment about that period and on her recovery it was that she made this application to this Court to have the proceedings of the trial vacated and to permit her an opportunity of proving her claim. That the learned Judge himself could have given the petitioner no relief is obvious. An appearance had been entered by Proctor on her behalf and on the record at any rate there is nothing to indicate that she was in default and in fact, in law, she was not in default. What she seeks to set right by her application is the somewhat detrimental appearance put in on her behalf by her Proctor, although, no doubt, he did it in her best interests.

The application made by the petitioner came up before this Court and on the 29th May this Court ordered notice to issue and directed the record to be called for. On the 30th May the Registrar sent a letter to the learned District Judge calling for the record, but the record was not forwarded till the 16th June. Judgment had not been pronounced in this case at the date the letter of the Registrar calling for the record was received by the learned Judge, but he appears to have delivered judgment on the 12th June and thereafter forwarded the record.

An interesting question arises whether the learned Judge had jurisdiction to enter judgment after this Court had ordered notice on the parties and called for the record. I think it is axiomatic to say that it is the duty of every Judge of a lower Court to comply with and carry out the orders of this Court. I do not think the learned Judge was aware that this Court had called for the record of the case at the date he delivered his judgment. It seems to me that the record probably was with the learned Judge, he having reserved his judgment, but the letter calling for the record may have remained in the office without the fact that such a letter had been received being brought to his notice, and only after the learned Judge had delivered judgment and returned the record to the office, were steps taken to conform to the order of this Court.

Mr. Wijetunge sought to contend at one stage of his argument that the learned Judge had jurisdiction to continue the proceedings though this Court may have called for the record, but cited no authority in support of his contention. Though there is no express authority in point, the case of *Edward v. de Silva* [1] is one which sheds some light on this question. In regard to the question of jurisdiction of an inferior Court to continue proceedings after a petition of appeal addressed to this Court had been filed, Soertsz A. C. J. expressed himself thus :—

> "Now, the ordinary rule is that once an appeal is taken from the judgment and decree of an inferior Court, the jurisdiction of that Court

[1] *(1945) 46 N. L. R. 342.*

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in respect of that case is suspended except, of course, in regard to matters to be done and directions to be given for the perfecting of the appeal and its transmission to the Court of Appeal. As Lord Westbury, Lord Chancellor (1864), observed in *Attorney-General v. Sillem*[2] ' the effect of a right of appeal is the limitation of the jurisdiction of one Court and the extension of the jurisdiction of another '. It follows as a corollary that on that right being exercised the case should be maintained *in statu quo* till the appellate Court has dealt with it and given its decision. "

It is contended by Mr. Wijetunge however that in the case of an appeal while the position set out in the passage cited cannot be but regarded as the true one, yet in the case of an application for revision the principle would be different. I cannot see that a distinction in principle can be made out. When this Court by its order of the 29th May, 1953, directed notice to issue and directed the Registrar to call for the record, this Court had acquired seisin over the case and acquired jurisdiction over it, immediately effecting thereby a limitation of the jurisdiction of the District Judge to continue subsequent proceedings.

That this principle cannot be doubted would be apparent if one examines it in relation to a criminal case. It will be manifest that where this Court in the exercise of its revisionary powers calls for a record in a criminal case, should the Magistrate not forward it immediately but retain the record in order to enable him to continue further proceedings, any attempt on the part of this Court to control and direct the proceedings in the lower Court would be nullified. In fact this Court has laid down the principle that where a sale ordered by the District Judge is stayed by this Court, and before the order staying the sale could have been communicated to the auctioneer carrying out the sale, or even to the Court, the sale had in point of fact been carried out, the sale was nothing more than a nullity.

I am therefore of opinion that the judgment pronounced by the learned Judge on the 12th June was *ultra vires* and must be set aside. In the result the true position would be that there is no final judgment pronounced in this case.

The next question is whether the petitioner has made out a sufficient case to entitle her to the relief she claims. She has filed an affidavit setting out that she was seriously ill on the date of trial and has supported her averment by the production of a medical certificate in which a medical practitioner says that the petitioner was critically ill. This is a land case and she has produced the deeds upon which her title is based. No reason has been suggested why she should have deliberately refrained from attending Court after she had retained a Proctor and when she was in possession of the document which prima facie established her title. She could have gained nothing by delaying the proceedings. There is no counter-affidavit filed tending to impeach any of the averments made by her in her affidavit.

[2] *11 Eng. Repts. at p. 1208.*

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It was however suggested by Counsel for the respondent that though she may have been ill, her husband should have at least informed the Proctor of her illness and caused the Proctor to move for a postponement of the trial. While I am not prepared to say that that would have been a very proper course of conduct to have been pursued, there is nothing in these proceedings to indicate that the husband was in fact living in the house at the relevant date. Besides, I am not sure that where the wife is a *feme sole*, as in the Muslim Law, the laches on the part of the husband could be taken into consideration for the purpose of denying the wife her legal rights. I do not think the argument would have been advanced had the husband himself been seriously ill, by contending that the wife in those circumstances should have herself gone about and sought the protection for her husband of his rights.

It is not denied that if the petitioner is not given relief in these proceedings she can obtain no relief whatsoever. She would have lost her property and not even had the right to institute an action for damages.

In all the circumstances I am satisfied that this is a fit case for the exercise of the powers of revision of this Court and in the exercise of those powers I would set aside the proceedings had on the date of trial as well as the judgment and remit the case to the learned Judge for a fresh adjudication.

The petitioner, however, will pay to the plaintiffs the costs of the abortive trial, but she will be entitled to the costs of this application.

DE SILVA J.—I agree.

Application allowed.

1954 *Present :* **Sansoni J.**

L. A. LEWIS SINGHO *et al.*, Appellants, *and* P. D. P. A. LIYANAGE (S. I., Police), Respondent

S. C. 738–742—M. C. Colombo South, 55,427

Unlawful possession of house-breaking instruments—Several accused—Possession of implements by one accused —Inference of common possession—Penal Code, s. 449.

Where several persons are charged under section 449 of the Penal Code with having in their possession without lawful excuse instruments of house-breaking, evidence of possession of the implements by one of them is evidence of possession by each if there can be no doubt as to their common purpose of using the implements for house-breaking.

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APPEALS from a judgment of the Magistrate's Court, Colombo South.

E. D. Cosme, with *O. M. da Silva*, for the 1st accused appellant.

Ian de Zoysa, for the 2nd and 3rd accused appellants.

4th and 5th accused appellants in person.

M. Kanagasunderam, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 16, 1954. SANSONI J.—

The five appellants were charged and convicted of having committed an offence under section 449 of the Penal Code, in that they were found having in their possession without lawful excuse instruments of house-breaking, to wit :—a jemmy, a crowbar, a saw, a pair of gloves, four masks, three swords, a dagger, a clasp knife, an electric torch and a bunch of seventeen keys. The evidence of the Police Officers who arrested the 1st to 3rd accused at 4 a.m. established that four or five persons armed with swords got into car bearing No. Z 8108 near the house of the 5th accused. The car drove off. Five Police Officers later waited in ambush at a point on the High Level Road and when this same car approached they stopped it by placing the Police car across the road. When the occupants of car No. Z 8108 got out, the 1st accused who was armed with a sword and dagger, the 2nd accused who was armed with a sword and the 3rd accused who was carrying a bunch of 17 keys were arrested. Two other occupants ran off but they were identified as 4th and 5th accused. They were identified by the head-lights of the Police car and the witnesses say that they were carrying swords. All the accused gave evidence denying that they travelled in this car or that they were arrested when they were together. They stated that the various weapons and instruments and other productions were never in their possession. The learned Magistrate rejected the evidence of the accused and accepted the evidence of the Police Officers.

The only matter urged before me was that none of the articles found on the persons of the accused were instruments of housebreaking and they were therefore wrongly convicted. I agree that the swords and dagger found on the 1st and 2nd accused are not instruments of house-breaking ; and they must therefore be acquitted if they are liable only for such weapons as they had on their persons. The bunch of seventeen keys bears a neutral character and the onus was on the prosecution to prove that their possessor had the intention of using them for house-breaking. Such intention can, in my opinion, be established by evidence of the surrounding circumstances and the circumstances proved in this case speak only too eloquently. None of the seventeen keys, I might mention, was found to fit any almirah in the 3rd accused's house. One

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should also consider the objects found on the floor and the seats of the car—a sword, a jemmy, a crowbar, a saw, four masks, a torch, a clasp knife and a pair of gloves. No explanation was offered by the accused for the presence of this collection.

But the question still remains whether all these accused can be convicted of having all these articles in their possession. They cannot if the offence charged is one which renders a person liable only to the extent of the instruments he himself has in his possession ; but they can if the possession of one or more of them can be held to be possession of all of them. This very point was considered in the case of *R. v. Thompson*[1]. Two accused named Thompson and Jones were charged with committing an offence under section 58, 24, 25 Vict. C. 96, which is framed in very similar terms to our section 449. The evidence was to the effect that both accused were found together, Thompson having on his person a candle and twenty lucifer matches while Jones had a crowbar and a knife. Jones pleaded guilty. It was contended for Thompson that a candle and matches were not housebreaking implements, and he could not be said to be in possession of the implements found on Jones. The jury had been directed that if they were of the opinion that both accused were together with the same object and for the purpose of housebreaking, Thompson would be guilty. Thompson was convicted. The Court of Crown Cases Reserved considered, in appeal, whether the possession of housebreaking implements by one of two persons for a common object is the possession of each. Kelly C. B. in delivering the unanimous judgment of the Court of five judges affirming the conviction said :— " The possession of one is the possession of all ". Archbold (32nd Edition) at page 665 cites this decision as still authoritative. There can be no question as to the common purpose actuating these accused when they were travelling in the same car on the night in question with all these instruments lying in it.

For these reasons I dismiss the appeals.

Appeals dismissed.

1954 *Present :* **Swan J.**

E. NAVARATNAM, Appellant, *and* VILLAGE COMMITTEE OF KANDUKARA IHALA KORALE, Respondents.

S. C. 5—C. R. Gampola, 8,774

Village Communities Ordinance (Cap. 198)—Section 45 (3) (b)—Acreage tax—" Land which is situated outside a built-up locality ".

The passing of a resolution declaring a particular area to be a built-up locality is not a condition precedent to the imposition of an acreage tax under section 45 (3) (b) of the Village Communities Ordinance.

[1] *11 Cox 362.*

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APPEAL from a judgment of the Court of Requests, Gampola.

H. V. Perera, Q.C., with *A. J. M. Canjemanaden*, for the plaintiff appellant.

Cyril E. S. Perera, Q.C., with *S. W. Jayasuriya* and *Joseph Nalliah*, for the defendants respondents.

Cur. adv. vult.

January 13, 1954. SWAN J.—

The appellant is a resident co-owner of a plantation in Pussellawa called Peragollawatte Estate situated within the administrative limits of the Village Committee of Kandukara Ihala Korale. His complaint is that he was illegally called upon to pay an acreage tax of 50 cents per acre on his holding. He claimed in this action a refund of Rs. 18·48 which according to him was the unlawful levy for the year 1949 and the first two quarters of 1950 on the ground that he had paid the amount under protest.

The case went to trial on the following issues :—

(1) Has the defendant failed to declare the " built up " localities as provided for in section 45 (3) (*a*) of the Village Communities Ordinance ?

(2) Has the defendant failed to comply with the provisions of the Village Communities Ordinance and/or the rules framed thereunder in imposing and levying the Acreage Tax ?

(3) Has the defendant imposed and *levied a Land Tax* in the form of an Acreage Tax only ?

(4) If issues 1, 2 and 3 or any one or more of these are answered in the affirmative is the imposition and levy of the Acreage Tax on Peragollawatta illegal ?

(5) Has the defendant failed to give the notice prescribed by law in respect of the increase of Acreage Tax ?

(6) If issue No. 5 is answered in the affirmative is the imposition and levy of such increase illegal ?

(7) Has the defendant wrongfully and unlawfully levied from the plaintiff a sum of Rs. 18·48 or part thereof ?

(8) Has the defendant imposed and levied the land Tax in the form of an Assessment Tax on all buildings and all lands of the extent of five acres and less within the *said Village area* ?

(9) If the answer to issue No. 8 is in the negative is such discrimination illegal ?

The learned Commissioner answered issues 1, 2, 3, 5 and 7 in the negative and issue 8 in the affirmative. In view of his answers to issues 2 and 3 it was not necessary to answer issue 4 ; likewise with regard to issues 6 and 9 an answer was unnecessary in view of his answers to issues 5 and 8. In the result the appellant's action was dismissed with costs.

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Several points have been taken in the petition of appeal some of which cannot be entertained inasmuch as they involve questions of fact and no leave to appeal on the facts was granted by the Commissioner of Requests or obtained from this Court. Learned Counsel for the appellant has pressed the appeal on only one point, namely that there was no resolution declaring any particular area to be a built-up locality, that such a declaration is a condition precedent to the imposition of an acreage tax.

Section 44 of the Village Communities Ordinance (Cap. 198) (9 of 1924 as amended by 60 of 1938, 61 of 1938, 11 of 1940 and 9 of 1940) provides for the imposition of a capitation tax. This I am given to understand has been abolished. Section 45 (1) provides for the imposition of a land tax in addition to the capitation tax. This must be on a resolution duly passed by the Committee and must receive the approval of the Minister and be duly published in the *Gazette*. Section 45 (3) sets out that the land tax shall consist of *either or both* of the following :—

" (*a*) an assessment tax not exceeding four per centum of the annual value of all buildings and all lands situated in localities within the village area which are declared by the Village Committee with the approval of the Government Agent to be built-up localities ; and

(*b*) an acreage tax not exceeding fifty cents a year on each acre of land which is situated outside a built-up locality and is under permanent cultivation or regular cultivation of any kind other than paddy and chena cultivation ; "

There are certain provisos which are not relevant to the point in issue.

Mr. Perera's contention is that before an acreage tax can be imposed there must be a resolution passed by the Committee after due notice thereof has been given according to the regulations declaring a certain area to be a built-up locality ; until there is such a declaration it is not possible to say that any land to be subjected to the acreage tax is *situated outside a built-up locality* within the meaning and contemplation of section 45 (3) (*b*). With this contention I am unable to agree. It seems fallacious. The two taxes are independent of each other and not interdependent. If Mr. Perera's contention is to be upheld a Village Committee can in no circumstances levy an acreage tax in a locality in which there are no buildings. This would nullify the intention of the legislature when it gave Village Committees the right to impose either an assessment tax or an acreage tax, or where it seemed necessary both an assessment tax and an acreage tax.

The appeal is dismissed with costs.

Appeal dismissed.

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1955 *Present :* **Gratiaen J., Swan J., de Silva J., Sansoni J. and Fernando J.**

E. L. PERERA, Appellant, *and* C. W. MUNAWEERA (Food and Price Control Inspector), Respondent

S. C. 1,176—M. C. Colombo, 57,397

Mens rea—*Applicability to statutory offences—Mistake of fact—Validity of such defence—Penal Code, ss. 38 (2), 72— Control of Prices Act, No. 29 of 1950, s. 8 (1) and (6).*

Section 72 of the Penal Code which enacts that "nothing is an offence which is done by any person . . . who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it" applies to all offences alike, including every statutory offence whose definition does not contain a particular state of mind or knowledge as one of its elements. In the latter case the accused will be entitled to an acquittal if he can prove on a balance of probability that by reason of a mistake of fact, and not by reason of a mistake of law, he had in good faith believed himself to be doing something which was not prohibited by law.

The appellant was charged with having sold a loaf of bread weighing 15¼ ounces at a price fixed for a 16 ounce loaf; this sale at a price beyond the controlled price constituted, it was alleged, a contravention of section 8(1) of the Control of Prices Act. The appellant gave evidence to the effect that he himself believed that the weight of the offending loaf was in fact 16 ounces and that in demanding and receiving 26 cents for its sale, he acted in good faith and intended to charge only what was in truth the controlled price fixed for a 16 ounce loaf.

Held, that it was not open to the trial Court to convict the appellant unless it rejected the appellant's evidence that he believed in good faith, and by reason of a mistake of fact, that he was justified in law in charging 26 cents for a loaf of bread which he honestly but erroneously believed to be 16 ounces in weight.

APPEAL from a judgment of the Magistrate's Court, Colombo. This appeal was reserved for the decision of a Bench of five Judges upon a reference by Rose C.J. in the following terms :—

"The appellant in this case was convicted of selling a loaf of bread which purported to be a pound loaf and which actually weighed only 15¼ ounces, for 26 cents which would have been the appropriate price under the relevant order for a one pound loaf of bread.

"The appellant suggests that no moral turpitude attaches to him in this matter in view of the fact that several hundreds of loaves of bread were baked on this particular morning, and that had the remainder of these loaves been weighed it would have been found

2——J. N. B 45456—1,592 (6/55)

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that all except a negligible quantity would have weighed either the required 16 ounces or slightly more. Evidence was adduced in support of this position and the present appeal was argued on the basis that that evidence should be accepted for the reason that the learned Magistrate in his order appears to have acted on the basis that the factual position as presented by the appellant was correct but that his liability in law was absolute, irrespective of 'mens rea'.

"It is of course quite possible to advance a valid argument in support of either view, and it appears that there are conflicting authorities of this court. Soertsz J. appears to have come to opposite conclusions on the point of the principle involved in two cases, in both of which he was sitting alone. In *Gunasekere v. Dias Bandaranaike* (39 N. L. R. 17) he held that Section 72 of the Penal Code could be availed of by the appellant, whereas in *Perumal v. Arumugam* (40 N. L. R. 532) he held that in relation to a charge under section 28 of the Poisons, Opium and Dangerous Drugs Ordinance the existence of *mens rea* was not an essential element of the offence.

"The view expressed in the former case would seem to derive support from a Full Bench decision that was decided as long ago as in 1921, the case of *Weerakoon v. Ranhamy* (23 N. L. R. 33 at pages 43 and 44).

"Having regard to the importance of this matter from the point of view of the effect that its decision must have upon the efficacy of prosecutions under these various controlling ordinances, and in view of the conflicting authorities, I consider that this is a matter which should properly be referred to a decision of more than one Judge; and in pursuance of Section 48A of the Courts Ordinance, I hereby direct that the matter shall de decided by a Bench of five Judges."

H. V. Perera, Q.C., with *A. B. Perera*, for the accused appellant.—English Law is defferent from the law in Ceylon. In Ceylon there are the General Exceptions in the Penal Code. The question is—is section 72 available to the accused? Our system is statutory and therefore English law cannot be imported into it. *Perumal v. Arumugam* [1] is correct when it says "Section 38 Penal Code makes Section 72 applicable to offences punishable under any law other than this Code"; but is incorrect when it says "it is not an inflexible rule . . .". *Perumal v. Arumugam* [1] is in conflict with the earlier decision of the same Judge in *Letchman v. Murugappa Chettiar* [2] which referred to *Weerakoon v. Ranhamy* [3] and applied section 72. In *Weerakoon v. Ranhamy* [3] the question was whether ignorance is covered by the exception—ignorance implying a mistake of fact as distinguished from pure ignorance. The case was disposed of on the footing that there was ignorance of law, but the Judges considered the applicability of section 72. In *Rex v.*

[1] *(1939) 40 N. L. R. 532.* [2] *(1936) 39 N. L. R. 19.*

[3] *(1921) 23 N. L. R. 33 (F.B.)*

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Ansalavarnar[1] the defence was disbelieved. In *Medudaka v. Muttucarupen*[2]—the headnote is incorrect—de Sampayo A.C.J. applied section 72 as the accused proved his mistake of fact.

In the present case, the evidence of the accused was accepted by the Magistrate. The accused honestly believed that he could sell the loaf at the price he did because of the mistake of fact regarding its weight.

In English Law there is no General Exception ; but there are special provisions in the laws relating to the Sale of Bread that afford various defences—e.g., mistake, accident, driage, and acts of persons not within the defendant's control. Vide :—1954 (Vol. 2) Stone's Justices Manual, p. 2414 and *Trickers (Confectioners), Ltd. v. Barnes*[3].

In the present case, the accused by a practical system tested the weight—though he did not weigh each loaf. He believed that the loaf in question weighed 16 ozs. He *bona fide* thought so. As counter clerk he had no control over the other employees. He issued the ingredients for making a particular quantity of loaves, checked their number when baked and tested the weight of some loaves. When occasionally a short weight loaf was discovered it was converted to toast.

The difference in weight in this case is only $\frac{3}{4}$ oz. There can be no doubt as to the *bona fides* of the accused.

H. A. Wijemanne, Crown Counsel, with *Vincent T. Thamotheram* and *V. S. A. Pullenayagam*, Crown Counsel, for the Attorney General.—The question is whether section 72 permits an accused person to plead a mistake of fact in regard to absolute prohibitions. The observations of Bertram, C. J., in *Weerakoon v. Ranhamy*[4] on the scope of section 72 are *obiter* and not binding on this Court. That case was disposed of on the footing that there was a mistake of law. In any event, those observations are erroneous. The correctness of the principle referred to at p. 43—that the absence of the word "knowingly" shifts the burden of proof—has been doubted by Devlin J. in *Taylor's Central Garages (Exeter) v. Roper*[5].

Section 72 applies only to offences which involve *mens rea*. In the case of an absolute prohibition the prosecution need not prove a mental element. For instances of absolute prohibition vide *Renolds v. G. H. Austin and Sons, Ltd.*[6]. Soertsz J. in *Perumal v. Arumugam*[7] followed the English Law. See also *Buckingham v. Duck*[8]; *Peark's Dairies, Lim. v. Tottenham Food Control Committee*[9]; *James & Son, Ltd. v. Smee*[10]. The definition of "offence" in section 38 cannot enlarge the scope of section 72.

Even if section 72 applies, the accused has not established his defence of mistake. The evidence led by him shows that 5 per cent. of his bread would normally be short in weight, that the bread is subject to driage and that it has less driage if it is double baked. The accused should

[1] *(1922) 1 Times 46.*
[2] *(1923) 1 Times 259.*
[3] *(1955) 1 All England Reports 803.*
[4] *(1921) 23 N. L. R. 33 (F. B.).*
[5] *(1951) 2 T. L. R. 284.*
[6] *(1951) 1 All England Reports 606.*
[7] *(1939) 40 N. L. R. 532.*
[8] *(1919) L. J. K. B. D. Vol 88 p. 375.*
[9] *(1919) L. J., K. B. D. Vol. 78 p. 623.*
[10] *(1954) 3 All England Reports 273.*

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therefore have either weighed his bread before selling or double-baked it. As he did neither he cannot plead a *bona fide* mistake of fact. Moreover, the Price Order C 229 in *Gazette* 10,248 of May 18, 1951 and the Bread Ordinance, Cap. 171, as amended by Ordinance 33 of 1944 casts a legal duty on the accused to weigh the bread before it is sold.

Counsel also cited *Silva v. Attorney General* [1].

Cur. adv. vult.

June 6, 1955. *The judgment of the Court.*—

This appeal was reserved for the decision of a Bench of five Judges under the provisions of Section 48A of the Courts Ordinance.

The appellant was charged with having sold a loaf of bread purporting to weigh 16 ounces, but in fact weighing only 15¼ ounces, at a price which was 1 7/32 cents in excess of the maximum control price fixed under a Food Price Order in force at the time ; this sale, it was alleged, constituted a contravention of Section 8 (1) of the Control of Prices Act, No. 29 of 1950 and was punishable under Section 8 (6) of the Act.

The appellant admitted the bare facts relied on by the prosecution—namely, that the loaf of bread weighed slightly less than 16 ounces and that the price charged was accordingly in excess of the controlled price. He gave evidence, however, to the effect that, as a responsible person employed by a reputable bakery, he had taken all reasonable precautions to avoid selling bread at prices beyond the controlled price ; that he honestly believed that the weight of the offending loaf was in fact 16 ounces, and that, in demanding and receiving 26 cents for its sale, he acted in good faith and intended to charge only what was in truth the controlled price fixed for a 16 ounce loaf. In other words, he set up a defence under Section 72 of the Penal Code the relevant provisions of which are as follows :—

> " 72. Nothing is an offence which is done by any person who . . . . by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it ".

The learned Magistrate did not reject the appellant's version of the circumstances relating to the sale. He took the view, however, that the Food Price Order in question contained words of absolute and unqualified prohibition, and that in regard to such offences, as in England, the defence of " *bona fide* mistake of fact " was not available to an accused person against whom the commission of the *actus reus* had been established. In reaching this conclusion, the learned Magistrate adopted the *ratio decidendi* of Soertsz J's judgment in *Perumal v. Arumugam* [2]. In that case a person charged under Section 28 of the Poisons, Opium, and Dangerous Drugs Ordinance (Cap. 172) explained by way of defence that his possession of an article containing ganja

[1] *(1940) 42 N. L. R. 304 at 309.* [2] *(1939) 40 N.L.R. 532.*

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was due to a *bona fide* mistake of fact. Soertsz J. decided that Section 72 of the Penal Code was not applicable to offences punishable under Section 28 of the Ordinance because :

> " As regards Common law offences, which so far as we are concerned have been made statutory to the extent that they have been codified in our Penal Code, *mens rea* is necessary as Section 72 of the Penal Code indicates. Section 38 makes Section 72 applicable to offences punishable under ' any law other than this Code ' as well, but in my opinion, this does not mean that it necessarily applies to all offences outside the Penal Code. It is not an inflexible rule. Whether it applies or not must as I have pointed out on the authority of the cases I have referred to depend on the particular Legislative Enactment. If I may repeat myself and use the words of de Sampayo J. ' there are many branches of social and municipal legislation in which an act is made criminal without any *mens rea* '. The Poisons, Opium, and Dangerous Drugs Ordinance is such an Ordinance. "

It was argued before us that this decision was wrong, and that it is in conflict with the earlier judgment of the same distinguished Judge in *Letchman v. Murugappa Chettiar* [1]. In that case the accused was charged with plying an omnibus along a route not approved by the licensing authority. His defence was he honestly believed that he had a valid licence authorising him to proceed along the particular route. Soertsz J., in quashing the conviction, said:

> " The accused has given evidence and his defence is that he had not been informed, and he was not aware, that the licensing authority had withdrawn his approval of a section of the route. There is no reason whatever for rejecting the accused's evidence on this point. The only question is whether his defence is good in law. I am of opinion it is. In *Weerakoon v. Ranhamy* [2], a Bench of four Judges considered the question of *mens rea* in relation to our law. They held that Section 72 of the Penal Code which enacts that ' nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it ' applies to all enactments alike, including those enactments which impose absolute obligations. The English Law drew a distinction and made the plea of absence of *mens rea* inoperative in the case of charges framed under ' certain exceptional enactments containing prohibitions which are interpreted as unqualified '. Our law knows no such distinction. "

In our opinion this passage correctly sets out the general principle as to the applicability of Section 72 of the Penal Code not only to offences punishable under the Penal Code but also to offences punishable under all other criminal statutes enacted in Ceylon. Section 38 (2) of the Code unambiguously declares that the word " offence " in Chapter 4 of the Code (dealing with " General Exceptions ") includes " a thing punishable in Ceylon, under any law other than this Code". Accordingly, Section

[1] *(1936) 39 N. L. R. 19.* [2] *(1921) 23 N. L. R. 33.*

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72 equally applies to every statutory offence even if its definition does not contain a particular state of mind or knowledge as one of its elements. *Weerakoon v. Ranhamy* [1]. It is therfore wrong to say that the rule laid down in Section 38 of the Code in its present form is "not inflexible". Where the definition of an offence contains words of absolute and unqualified prohibition, the prosecution need only establish beyond reasonable doubt the commission of the prohibited act, and it is not required in addition to establish that the accused acted with any specific intention or knowledge. But this does not mean that in such a case the accused is to be denied the right to plead any of the general exceptions set out in Chapter 4 of the Code. The accused would therefore be entitled to an acquittal if he proved on a balance of probability that by reason of a mistake of fact, and not by reason of a mistake of law, he had in good faith believed himself to be doing something which was not prohibited by law. The accused must, of course, prove affirmatively the existence of each of these circumstances, and he will not be entitled to the benefit of Section 72 if he fails to do so, or merely leaves that issue in doubt. *The King v. Chandrasekera* [2].

Learned Crown Counsel conceded that these principles are in accord with the rule unanimously laid down by a Full Bench of this Court nearly 34 years ago in *Weerakoon v. Ranhamy* [1]. He invited us, however, to hold that that case had been wrongly decided on this point, and that the general observations as to the applicability of Section 72 of the Code to all statutory offences were *obiter dicta*. We are quite unable to take this view. The observations referred to were considered by all the Judges to be strictly necessary for their ultimate decision, and therefore constituted an essential part of its *ratio decidendi*. The Court unanimously agreed, as a preliminary to its conclusions, that Section 72 of the Code did apply to prosecutions under the Forest Ordinance, but the majority of the Judges then proceeded to hold that on the evidence the mistake relied on was one of law and not of fact. Even if the decision of a Collective Bench properly constituted under Section 51 of the Courts Ordinance is wrong, it cannot subsequently be over-ruled by even a subsequent Collective Bench, far less by a Bench to which an appeal has been referred under Section 48A. Vide *Jane Nona v. Leo* [3].

We were invited to consider the undesirability of Section 38 of the Penal Code making Section 72 inflexibly applicable to offences to which, under modern conditions, Parliament may, in the interests of justice, consider the defence of *bona fide* mistake to be inappropriate. This argument does not impress us. In such a contingency, it is always open to Parliament to enact that, in regard to any particular criminal statute, Chapter 4 of the Penal Code or any part of it shall not apply : Section 38 (2) would then stand repealed or amended to that extent. No such repeal or amendment having been enacted in the case of offences punishable under the Control of Prices Act, No. 29 of 1950, it was not open to the learned Magistrate to convict the appellant without rejecting the appellant's evidence that he believed in good faith, and by reason of

[1] *(1921) 23 N. L. R. 33.* [2] *(1942) 44 N. L. R. 97.*

[3] *(1923) 25 N. L. R. 241.*

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a mistake of fact, that he was justified in law in charging 26 cents for a loaf of bread which he honestly but erroneously believed to be 16 ounces in weight. We allow the appeal and quash the conviction.

(Sgd.) E. F. N. GRATIAEN,
Puisne Justice.

(Sgd.) V. L. ST. CLAIR SWAN,
Puisne Justice.

(Sgd.) K. D. DE SILVA,
Puisne Justice.

(Sgd.) M. C. SANSONI,
Puisne Justice.

(Sgd.) H. N. G. FERNANDO,
Puisne Justice.

Appeal allowed.

1954 *Present :* **Gratiaen J. and Gunasekara J.**

M. JUSTIN DE SILVA, Appellant, *and* P. DON NICULAS, Respondent

S. C. 200—D. C. Negombo, 15,839

Paulian action—Conveyance of property in fraud of creditors—Several colourable transactions—Civil Procedure Code, s. 247.

Alienation of property in fraud of creditors may consist of a series of colourable transactions in respect of the same property.

APPEAL from a judgment of the District Court, Negombo.

N. E. Weerasooria, Q.C., with *H. A. Koattegoda*, for the 1st defendant appellant.

E. G. Wikramanayake, Q.C., with *W. D. Gunasekere*, for the plaintiff respondent.

Cur. adv. vult.

May 10, 1954. GRATIAEN J.—

This is an appeal against a judgment in a " 247 action " declaring that the property in dispute belongs to the plaintiff and is not liable to be seized and sold in execution of a money decree dated 21st February 1950 in favour of the appellant against the 2nd defendant.

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Admittedly the property belonged to the 2nd defendant until he conveyed it by P3 dated 16th June 1949 to his wife the 3rd defendant. She in turn conveyed it by P4 dated 12th November 1949 to the 4th defendant who purported to sell it to the plaintiff by P5 dated 20th March 1950.

The appellant alleges that P3, P4 and P5 were all colourable transactions whereby the 2nd defendant, who at all times continued in occupation of the property, fraudulently contrived to defeat his creditor the plaintiff. He accordingly asked in reconvention that P5 be set aside as having been executed in fraud of creditors.

The learned Judge took the view that the evidence was insufficient to establish the fraud alleged against the plaintiff and the 2nd to the 4th defendants. In my opinion, however, the allegation has been proved beyond reasonable doubt, and the facts established at the trial are quite inconsistent with the theory that P3, P4 and/or P5 were genuine transactions.

Certain dates are very material to the issue of fraud. On 16th June 1949 the appellant sued the 2nd defendant and another person under Chapter 53 of the Civil Procedure Code in D. C. Negombo No. 15,343 for the recovery of Rs. 1,950/77 due to him on a promissory note. *On the same day the 2nd defendant purported to sell this property (which was admittedly his only valuable asset) to his wife the 3rd defendant for a "consideration" of Rs. 500/- which did not pass before the notary.* (The 2nd defendant had himself paid four times this sum when he purchased the property 10 months earlier.) It is not seriously pretended that this was a genuine transaction, and it is quite clear that the 3rd defendant was in truth her husband's nominee. This was the first step in the fraud which he had planned to defeat the appellant's claim.

In the promissory note action, the 2nd defendant was granted leave to defend the action on condition that he deposited security in the sum of Rs. 1,000/–in cash or Rs. 2,000/–by hypothecation of immovable property. He failed to comply with this condition and, in order to gain further time, he filed an appeal to this Court on 12th September 1949. Pending the hearing of this appeal, his wife purported to sell the property to the 4th defendant (a relation of the 2nd defendant). The attesting notary was the 2nd defendant's proctor in the promissory note action, and (if he searched the register of encumbrances as he said he did) *he must have discovered that the appellant had registered a caveat on 4th July 1949 in respect of this property.* No doubt the purported "consideration" passed before the notary, but as the 4th defendant has not had a day's possession of the land since his so-called purchase, I am perfectly satisfied that P4 was also a colourable transaction. This was the second step in the fraud.

The 2nd defendant's appeal in D. C. No. 15,343 was dismissed with costs, and the record was returned to the District Court of Negombo on 28th January 1950. Judgment in favour of the appellant was entered against the 2nd defendant on 21st February 1950. The 2nd defendant was examined under section 219 of the Civil Procedure Code on 16th March 1950 and disclosed no realisable assets against which execution proceedings could be taken. He mentioned however that he had owned the property in dispute until he "sold" it to his wife.

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On 17th March 1950 a writ was issued to the Fiscal to seize and sell the 2nd defendant's property. The final stages of the fraud were then taken in hand. A relative of the 2nd defendant (one Vincent de Paul) instructed notary Payoe to prepare a conveyance from the 4th defendant in favour of a man named Fernandopulle. A draft deed and protocol were accordingly prepared, but Fernandopulle apparently declined to go through with the transaction. At 9.15 a.m. on 20th March 1950 the Fiscal's officer attempted to seize the property, but was forcibly prevented from doing so by the 2nd defendant's wife, who " said that if the seizure notice was affixed on the land she would assault him " (1D13) and eventually " began to cry out saying that if the land was seized she would die on the spot " (1D14). This hysterical demonstration clearly indicates that she regarded the property as still belonging to herself and her husband and not to the 4th defendant. The 4th defendant was not present to protect his alleged title.

In consequence of the incidents which took place at 9.15 a.m. on 20th March, the Fiscal's officer was unable to effect a seizure in pursuance of the writ until two days later. In the meantime, the man Vincent de Paul (who was also closely related to the plaintiff) arrived at notary Payoe's office and said that the plaintiff was prepared to purchase the property in the place of Fernandopulle. Accordingly, the name of Fernandopulle was erased from the protocol and from the draft conveyance, and the plaintiff's name was substituted as purchaser. In all the hurry which took place, the plaintiff " dispensed with a search for encumbrances ".

In spite of this purported purchase, the 2nd defendant and his wife continued to occupy the land. The plaintiff says that they did so permissively, but that he took the produce from the trees. His proctor's unqualified admission to the Court at the claim inquiry, however, was to the effect that the 2nd defendant was in possession.

We have here a strong body of circumstantial evidence which compels one to infer that the plaintiff had merely lent his name to a transaction whereby the 2nd defendant fraudulently attempted to defeat his creditor. In view of all these circumstances, the purported payment of the " consideration " in the notary's presence was, I am convinced, a colourable device. The plaintiff has not led any independent evidence to prove that he possessed sufficient funds of his own with which to make a genuine but speculative purchase at very short notice and without investigation of title, and the 4th defendant has not given evidence from which we can test the reality of his participation in this impugned transactions. The 2nd defendant and his wife did not make the slightest attempt to explain away the many incriminating features of their conduct which calls for explanation.

I would allow the appeal and dismiss the plaintiff's action with costs in both Courts in favour of the appellant. I would also order a decree in favour of the appellant in terms of paragraphs (*b*) and (*c*) of his answer dated 9th October 1950.

GUNASEKARA J.—I agree.

Appeal allowed.

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[COURT OF CRIMINAL APPEAL]

1954 *Present :* **Pulle J. (President), Swan J. and Weerasooriya J.**

S. LUVIS, Appellant, *and* THE QUEEN, Respondent

APPEAL No. 1 OF 1954, WITH APPLICATION 4

S. C. 19—M. C. Chilaw, 1,979

Charge of murder—Plea of sudden fight—Not specifically raised—Disclosure in evidence—Summing-up.

In a trial for murder, although it was an integral part of the accused person's defence that the deceased came by his death in the course of a sudden fight, it was not specifically raised as a defence that the accused was the person who inflicted the fatal injury in the course of that fight.

Held, that, having regard to the evidence, the fact that sudden fight was not specifically raised as a defence did not relieve the trial Judge of the duty of placing before the Jury that aspect of the case.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *G. C. Niles* and *A. K. Premadasa*, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 15, 1954. WEERASOORIYA J.—

The appellant in this case was convicted, on the unanimous verdict of the Jury, of the offence of murder.

The case for the prosecution was that as the deceased was proceeding from a boutique where he had gone to buy a cigarette, the appellant came up to him from the opposite direction and dealt him a blow with his hand on the face which caused the deceased to fall, and thereupon the accused pulled out a pointed weapon from his waist, stabbed the deceased once in the chest saying " I will go away only after killing you ", and ran away carrying the weapon with him. According to the medical evidence the deceased must have died almost instantaneously on receiving this injury which had penetrated the chest cavity and cut the right ventricle of the heart. The prosecution was unable to adduce any evidence as to why the appellant should have delivered this sudden attack on the deceased. There was evidence that the deceased was not a man of good character and that he had at least on one occasion been convicted of an offence for which he received a jail sentence. There was also evidence that shortly before the stabbing the deceased had been drinking some arrack.

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The appellant in giving evidence on his own behalf related a version as to how the deceased could have received the fatal injury which was substantially different from the circumstances as deposed to by the witnesses called by the prosecution. His version was that when he was casually passing the scene of the stabbing he noticed two groups of people who were abusing each other and " getting ready for a fight ", to use his own words ; that in one of these groups was the deceased, that he went up to the deceased and told him to go away and not to quarrel, but the deceased resented his intervention ; and he described the subsequent stages of the incident as follows :—

> " The deceased scolded me dragging the name of my mother. I also returned the abuse in the same terms. He then struck me with his hand and I also struck him in return. Then Sardiris, Sardiel and Martin got hold of the deceased. Then there was a free fight on the road. I then went home . . . . "

The appellant denied that he had a knife or used one on the deceased. The suggestion implied in his evidence was that the deceased came by his death in the course of the fight which took place as he left the scene. In re-examination he stated :—

> " . . . . At the time I left they were surrounding and fighting in a group. One was fallen. That person appeared to be Hendy (the deceased). At the time I left I thought that was Hendy who was fallen. It was after that that I left the scene.
>
> *Q :* Was it due to any blow dealt by you that Hendy fell down ?
>
> *A :* Due to my blow. I cannot say which blow but I dealt blow for blow. He dealt me a blow and I dealt him a blow. I cannot say whether he fell for that blow because the blows began to rain and he fell . . . . "

It appeared to us that from the admissions made by the appellant in the above quoted portions of his evidence, and notwithstanding his denial that he caused the fatal injury on the deceased or that he was even armed with a knife, it was open to the Jury to hold it as established beyond reasonable doubt that the appellant was the person who caused the deceased's death ; and also that more probably than not, and despite the version presented by the prosecution eye witnesses of an almost cold blooded murder, the circumstances in which the appellant came to inflict the fatal injury were those of a sudden fight between him and the deceased in which others too were involved. This was a conclusion which the Jury could all the more readily have reached in view of certain other aspects of the case which were matters of common ground, namely, the absence of a motive and the failure of those same witnesses to give prompt information to the Police after the deceased was killed.

Learned Crown Counsel submitted that the only process by which the Jury could have reached the conclusion envisaged in the preceding paragraph was on an elimination of certain material portions of the evidence, not only of the prosecution but also of the defence, as unworthy of credit, and a piecing together of such other portions of that same

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evidence as appeared to them to represent the truth ; and he further submitted that a conclusion so reached would have been vitiated by the consideration that if the Jury were of the view that the prosecution evidence on such material points as the circumstances in which the deceased came to be stabbed was not true, it would have been their clear duty to reject the entirety of the case against the appellant instead of proceeding somewhat laboriously to form a composite picture of the evidence which represented neither the prosecution nor the defence version.

But while, generally speaking, it is undoubtedly within the competence of a Jury to reject the whole of the evidence of witnesses who are shown not to have spoken the truth on material points, we do not think that in the present case the rejection of the evidence of the alleged eye witnesses called by the prosecution as to the circumstances in which the deceased was stabbed necessarily entitled the appellant to an acquittal since there was before the Jury the evidence of the appellant himself, the admissions in which, taken in conjunction with the other features in the case to which attention has already been drawn, and the evidence of the prosecution witnesses that the fatal injury was inflicted by the appellant, could well have formed the basis of a verdict that even if the death of the deceased had been caused by the appellant with such an intention as would otherwise have constituted the offence of murder, the appellant's offence was nevertheless that of culpable homicide not amounting to murder in that the killing of the deceased was in the course of a sudden fight between himself and the appellant. It is on the premise that the Jury could reasonably have returned such a verdict in this case that learned Counsel for the appellant made the submission that the conviction on the charge of murder cannot be allowed to stand inasmuch as the trial Judge did not deal with that verdict in his charge. In this connection he drew attention to the fact that the directions of the learned Judge in regard to the returning of a verdict that the appellant was guilty of the lesser offence of culpable homicide not amounting to murder were confined to a possible finding by the Jury that the infliction of the fatal injury was not accompanied by a murderous intention.

In the present case, although it was an integral part of the appellant's defence at the trial that the deceased came by his death in the course of a sudden fight, it was not specifically raised as a defence that the appellant was the person who inflicted the fatal injury in the course of that fight, but having regard to the evidence we were satisfied that the fact that such a defence was not specifically raised did not relieve the learned trial Judge of the duty of placing before the Jury that aspect of the case, and following a series of decisions of this Court (of which, to mention two, are the cases of *Rex v. Vidanalage Lanty* [1] and *Rex v. Murugesu* [2]) we set aside the conviction on the charge of murder and substituted therefor the verdict that the appellant was guilty of the offence of culpable homicide not amounting to murder and imposed a sentence of ten years rigorous imprisonment. We now set out the reasons for our order.

Conviction altered.

[1] *(1941) 42 N. L. R. 317.*

[2] *(1951) 53 N. L. R. 469.*

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1954 *Present :* **Gratiaen J.**

T. O. D. JANSEN, Appellant, *and* SANITARY INSPECTOR, DEHIWELA-MT. LAVINIA U. C., Respondent

S. C. 435—M. C. Colombo South, 43,471

Dangerous or offensive trade—Requirement of licence—By-laws—Local Government Ordinance (Cap. 195), ss. 164, 168 (10) (k)—Urban Councils Ordinance, No. 61 of 1939, s. 248.

By-law 1 made by an Urban Council under section 168 (10) (*k*) of the Local Government Ordinance declared the manufacture of tiles or bricks to be included within the category of " dangerous or offensive trades ". By-law 2 prohibited the carrying on of a " dangerous or offensive trade without an annual licence which the Chairman shall issue to all persons complying with the conditions provided for the issue of such licences ". There were, however, no by-laws prescribing the conditions applicable to the manufacture of tiles.

Held, that the requirement of a licence under by-law 2 could not be said to apply to the trade of manufacturing tiles unless and until " the conditions provided for the issue of annual licences " for that particular trade were duly prescribed.

APPEAL from a judgment of the Magistrate's Court, Colombo South.

N. E. Weerasooria, Q.C., with *R. A. Kannangara*, for the accused appellant.

H. W. Jayewardene, with *P. Ranasinghe*, for the complainant respondent

Cur. adv. vult.

March 2, 1954. GRATIAEN J.—

This is an appeal against a conviction for an alleged contravention of a by-law made by a local authority. The appellant was charged with having carried on a " dangerous and offensive trade " (to wit, the manufacture of tiles) on 17th August 1952 within the limits of the Dehiwela-Mt. Lavinia Urban Council " without an annual licence issued by the Chairman of the Council ".

The relevant by-laws were made by the Council in 1929 under sections 164 and 168 of the Local Government Ordinance (Cap. 195) and are still in operation by virtue of section 248 of the Urban Councils Ordinance No. 61 of 1939. The relevant provisions are to the following effect :—

(*a*) by-law 1 declared the " manufacture of tiles or bricks " to be included within the category of " offensive or dangerous trades " ;

(*b*) by-law 2 prohibited *inter alia* the carrying on within the limits of the Council of " any dangerous or offensive trade " without an annual licence from the Chairman, " which licence the Chairman *shall* issue to all persons complying with the conditions provided for the issue of such licences ".

The appellant had, during the year 1950, constructed a cement tile factory in Dehiwela at considerable expense with the formal approval of the Chairman. In March 1951 he was also granted a permit to use Convent Lane

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Dehiwela, for the transportation of manufactured tiles by lorry from the factory site. Shortly afterwards the supply of electricity to the premises was also arranged. Since the factory was first established, the appellant has manufactured approximately 1,000 tiles a day. It is not suggested that the particular process of manufacture adopted by him is *per se* obnoxious or detrimental to the health of residents in the locality, but I appreciate that the council is legally empowered by section 168 (10) (*k*) *bona fide* to " deem " an activity to be " dangerous or offensive " which is not so in fact.

In October 1951 an unexpected development took place. The Chairman peremptorily, and without prior intimation, called upon the appellant " to obtain a licence " to carry on his established " trade " " within a fortnight ". The appellant explained that he was not aware that a licence was required, and asked for information as to the formalities which he should comply with in order to regularise his position. On 3rd November 1951 the Chairman replied that " a licence to run a tile factory at No. 42/5, Peter's Place, Dehiwela *cannot be issued*, as these premises come within a residential area". There the correspondence seems to have ended, and the evidence indicates that the appellant continued to manufacture tiles in his factory without objection from the Council until this prosecution was instituted on 8th August 1952.

The learned Magistrate took the view, although with undisguised regret, that the by-law alleged to have been contravened absolutely prohibited the manufacture of tiles within the limits of the Council except under the authority of a written licence from the Chairman. He accordingly convicted the appellant, but imposed on him only a nominal sentence in view of the quite remarkable conduct of the local authority in having expressly sanctioned the erection of an expensive factory for the manufacture of tiles without disclosing its opinion that the structure could not lawfully be used for the purposes for which it was to be constructed.

While sharing the learned Magistrate's condemnation of the attitude taken up by the local authority, I am glad to say that I have come to the conclusion that, upon a proper construction of the by-law which the appellant is alleged to have contravened, his conviction cannot be sustained.

Section 168 (10) (*k*) of the Local Government Ordinance empowered the Council to promote " public health and amenities " within the limits of its jurisdiction by making by-laws for " the regulation, supervision, inspection and control " (*but not, be it noted, for the total prohibition*) " of trades deemed to be offensive or dangerous by the District Council ". *Prima facie*, therefore, the by-laws previously referred to in my judgment were *intra vires*, but it is necessary to give by-law 2 a reasonable interpretation which restricts its application to the legitimate objects which a conscientious local authority must be assumed to have intended to further.

The by-law prohibits the carrying on of a " dangerous or offensive trade without an annual licence which the Chairman *shall* " (the words are imperative) " issue to all persons complying with *the conditions prescribed for the issue of such licence* ". These words clearly presuppose that, before the by-law can operate in respect of any particular trade, the local

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authority has duly prescribed the conditions under which it may be carried on. If these conditions have been prescribed, a person complying with them would be entitled *as of right* to obtain a licence from the Chairman ; and the licence while in operation, serves as a certificate of compliance with the conditions previously prescribed. If the conditions are subsequently contravened by the licensee, there is power to cancel the licence.

The same set of by-laws meticulously prescribes the conditions under which certain other trades (e.g. bakeries) may be carried on within the limits of the Council. But the prosecuting Inspector has admitted in his evidence that " *there are no conditions in the by-laws which the accused would have to comply with before a licence is issued* ". In such a situation the requirement of a licence is manifestly purposeless.

I do not rule that by-law 2 is *ultra vires*. But in my opinion it cannot be said to apply to *the trade of manufacturing tiles* unless and until " *the conditions provided for the issue of annual licences* " for that particular trade have been duly prescribed. The alternative interpretation suggested on behalf of the Council must be rejected as unreasonable.

According to the correspondence filed of record, the Chairman informed the appellant that a licence to manufacture tiles in a " residential area " could not be issued. That might well have been a reasonable condition to impose in regard to any particular trade which the Council " deems " to be " dangerous " or " offensive ", but according to the evidence, no such condition has in fact been prescribed.

It was argued by Mr. Jayawardena that the charge against the appellant relates to the year 1952, whereas the correspondence deals with a situation which arose in the previous year. I appreciate this point, but the evidence in the lower Court has not established that the position had altered in any respect before the date material to the charge. No by-laws have yet been passed, apparently, prescribing the conditions applicable to the manufacture of tiles within the limits of the Dehiwela-Mt. Lavinia Urban Council, and for that reason by-law 2 is not yet in operation as far as the appellant's " trade " is concerned.

I allow the appeal and quash the conviction.

Appeal allowed.

1954 *Present :* **Sansoni J.**

K. T. N. DE SILVA, Appellant, *and* COMMISSIONER OF MOTOR TRAFFIC *et al.*, Respondents

S. C. 76—Motor Tribunal Appeal 213

Motor Traffic Act, No. 14 of 1951—Sections 88 (1) and 89 (1)—Lorry—Carriage of goods—Public carrier's permit —Effect of words " may be granted ".

The grant of a public carrier's permit under section 89 (1) (*b*) of the Motor Traffic Act is a matter which lies within the discretion of the Commissioner of Motor Traffic. The word " may " in that section has a permissive, and not a directory, meaning.

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APPEAL under section 212 of the Motor Traffic Act.

Cyril E. S. Perera, Q.C., with *N. M. de Silva* and *C. O. S. Siriwardene*, for the appellant.

No appearance for the respondents.

Cur. adv. vult.

December 14, 1954. SANSONI J.—

This is an appeal against an order of the Transport Appeals Tribunal refusing the appellant a Public Carrier's Permit in respect of two lorries. These lorries were licensed under the Motor Car Ordinance No. 45 of 1938 for carrying goods. Section 88 (1) of the Motor Traffic Act No. 14 of 1951 reads :—

(1) Where any two places are conveniently connected by railway, and the shortest distance by road between those places is not less than sixty miles, then, save as otherwise provided in section 89, no permit shall be granted—

(*a*) authorising the carriage between those places ; or

(*b*) authorising any carriage involving or necessitating the through carriage between those places,

of goods by lorry or by a succession of lorries.

Section 89 (1) however relaxes this stringent rule and provides—

(1) Notwithstanding the provisions of section 88, a permit authorising any carriage of the description mentioned in that section (hereinafter referred to as " regulated long-distance carriage ") may be granted—

(*a*) in exceptional circumstances, on the ground that the Commissioner considers it expedient to grant a permit for the carriage of fresh fish, fresh fruit, fresh vegetables or other perishable or fragile articles, having regard to the delay and risk involved in, and the other disadvantages of, the carriage of such articles by railway ; or

(*b*) on the ground that the applicant for the permit is a person who, immediately prior to December 31, 1949, was the holder of a licence or licences authorising the use of a lorry or lorries for substantially the same purposes and in substantially the same area of operation as the purposes and the area, respectively, to which his application relates, so, however, that the permit which may be granted in any such case shall only authorise the use of the same lorry or lorries or other lorries of the same total pay-load ; or

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(*c*) in exceptional circumstances, on the ground of strong economic justification ; or

(*d*) on the ground that the lorries are owned by the Government or any prescribed public authority.

Mr. Perera has pointed out, quite correctly I think, that if any meaning can be given to the word " purpose " in section 89 (1) (*b*) of the Act so far as a lorry is concerned, it is the purpose of carrying goods. Form 19 in the Second Schedule of the Motor Car Ordinance is the form of lorry licence which was in use at that time. It makes no distinction between a lorry which was licensed for the private use of the owner and one which was licensed to ply for hire. Therefore plying a lorry for hire and using it for one's business were not different purposes authorised by licences issued under the Motor Car Ordinance.

But the matter does not end there, for the difficult question that remains to be answered is whether section 89 (1) (*b*) vests a discretion in the Commissioner of Motor Traffic as to whether he would, under the circumstances detailed in sub-section (1), relax the prohibition against the grant of a public carrier's permit contained in section 88, or whether the words " may be granted " mean " shall be granted ". The former interpretation was adopted by the Tribunal, while Mr. Perera contended that the latter is the correct one. I think the view taken by the Tribunal is correct.

It is not always easy to decide whether the word " may " in a statute means " may " or " shall ". " There is no doubt that ' may ' in some instances, especially when the enactment relates to the exercise of judicial or administrative functions, has been construed to give a power to do the act, leaving no discretion as to the exercise of the power when the acts are such as to call for it "—per Blackburn J. in *Bell v. Crane* [1]. But there are also cases where the word is permissive and is used to vest a discretion in a particular authority. I think the principle has been very clearly explained in the case of *R. v. Mitchell* [2]. Ridley J. in that case said " If a right is given to a person and the word ' may ' is used in giving a power to someone in order to effectuate that right, it means that the person to whom the power is given is entitled to act and that he must so act, not because the statement says so—for it only says ' may '—but because it is his duty to act. In that sense it is true to say that the word ' may ' is equivalent to ' must ', but in any other sense I think it is untrue. As Lord Justice Cotton said (in *Nichols v. Baker* [3]) the word ' may ' never can mean ' must ' so long as the English language remains ; it is not that the word means ' must ' but owing to the circumstances in which it is used a duty is placed upon the person, and therefore sometimes it becomes equivalent to ' must ' ". Lord Coleridge J. said in the same case " It is quite clear that originally, apart from the surrounding circumstances, when the word ' may ' occurs in a statute it implies that the power is permissive and not imperative . . . . therefore we are remitted to the surrounding circumstances in order to discover whether or not the word ' may ' should be read as having a permissive meaning, or whether it should be read as having a directory meaning ".

[1] *(1873) 8 Q. B. 481.* [2] *(1913) 82 L. J. K. B. 153.*

[3] *(1890) 59 L. J. Ch. 661.*

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If one considers the matter in the light of these dicta one is first struck by the bearing sections 88 and 89 have on each other. The former section absolutely prohibits the grant of a permit when two places are conveniently connected by railway, the latter section authorises the grant, notwithstanding the provisions of section 88, under certain defined circumstances. It seems to me that the Commissioner, far from being under a duty, is merely given permission, to issue permits under the circumstances detailed in section 89 if he thought fit to do so. For instance, clause (*a*) cannot, by any method of reasoning, be said to vest a right in anybody : it is clearly intended only to enable the Commissioner to grant a permit in exceptional circumstances. Clause (*c*) similarly refers to other exceptional circumstances under which a discretion is given to the Commissioner to act. These considerations show that the words " may be granted " mean just what they say and cannot be construed as " shall be granted ". It is not possible to interpret them differently when clauses (*b*) and (*d*) are being considered, for the words must be given the same meaning throughout the section. I can see no indication of a right given to a person in the position of the appellant. The language of the sections seems to point in the opposite direction. For these reasons I consider that the order of the Tribunal is correct. The appeal is therefore dismissed.

Appeal dismissed.

1954 *Present :* **Sansoni J.**

S. V. SEENIVASAGAM *et al.*, Petitioners, *and*
S. KIRUPAMOORTHY, Respondent

S. C. 154—Application for a Writ of Mandamus

Town Councils Ordinance, No. 3 of 1946—Special meetings of Council—Section 39 (2)—Its provisions are peremptory—By-laws—Scope of their effect— Mandamus—*Alternative remedy—Effect of such remedy in regard to issue of writ.*

Mandamus lies to compel the Chairman of a Town Council to convene a special meeting of the Council in terms of section 39 (2) of the Town Councils Ordinance. Any by-law which is inconsistent with the provisions of the main Ordinance must give way to the latter. Further, an alternative remedy which is provided by a by-law but which is not as convenient, beneficial and effectual as *mandamus* cannot be a bar to the application for *mandamus*.

APPLICATION for a writ of *mandamus* against the Chairman of the Town Council, Kankesanturai.

S. Nadesan, Q.C., with *A. Nagendra*, for the petitioners.

H. V. Perera, Q.C., with *H. Wanigatunga*, for the respondent.

Cur. adv. vult.

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October 20, 1954. SANSONI J.—

This is an application for a writ of mandamus. The respondent is the Chairman of the Town Council, Kankesanturai, and the petitioners are three members of that Council who complain that by their letter dated 6th February, 1953, they requested the respondent to convene a special meeting of the Council in terms of section 39 (2) of the Town Councils Ordinance, No. 3 of 1946, to discuss a particular motion, but he ruled the motion out of order. The petitioners ask that the respondent be commanded to convene a meeting to discuss the motion which was in the following terms :—

> " As there is dissatisfaction among the ratepayers of this Council that there were bribery, corruption, threats and undue influence exercised during the election of the present Chairman of this Council, this Council resolves to request the authorities concerned to appoint an independent commission to inquire into the same and to take suitable action against such offenders so as to maintain the prestige and dignity of this Council."

The election of the respondent as Chairman took place at a meeting held on 10th January, 1953.

Now section 39 of the Ordinance is in the following terms :—

> (1) The ordinary meetings of a Town Council shall be held for the despatch of business upon such day or days in every month as may be fixed by the Council.
>
> (2) The Chairman may convene a special meeting of the Council whenever he may consider it desirable and shall, whenever requested in writing by any two or more members of the Council to convene a special meeting for any purpose specified in such writing, forthwith convene a special meeting for that purpose. Two days' notice of the day appointed for any such special meeting shall be given to, or left at the residence of, each member of the Council.

Mr. Nadesan for the petitioners submitted that the respondent had no power to rule the motion out of order. He based his argument on the peremptory wording of sub-section (2) which, he submitted, does not give the Chairman any discretion at all in the matter. He stressed the change of language from " may " to " shall " and he claimed that the sub-section was quite clear as to the duty cast on the Chairman once he received the request in writing from two or more members. He put his case so high as to claim that the purpose specified by the members need not have anything to do with the administration or business of the Council, but in this part of his argument I think he went further than the necessity of the case demanded. Mr. H. V. Perera on the other hand submitted that a special meeting was not fundamentally different from an ordinary meeting, the only point of difference being that it was a meeting summoned out of turn in order to discuss urgent business, but only business which was relevant to the powers and duties of a Town Council. In this view of the matter he submitted that the by-laws made by this Council pub-

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lished in the *Government Gazette* of June 30th, 1950, applied both to ordinary and special meetings and he relied especially on by-laws 8 (*a*), (*b*), (*c*) and (*d*).

Those by-laws read as follows:—

(*a*) Every notice of a motion shall be in writing signed by the member of the Council giving the notice. Unless such notice has been in the hands of the Secretary five clear days exclusive of Sundays and Government holidays before the meeting of the Council, the motion may not be included in the agenda.

(*b*) All notices of motions shall be dated and numbered as received, and shall be entered by the Secretary upon the agenda in the order in which they are received.

(*c*) Before any notice of a motion is placed on the agenda paper it shall be submitted to the Chairman, who, if he be of opinion that it is out of order, shall order that such motion shall not be included in the agenda and shall cause the giver of the notice to be so informed.

(*d*) Every motion of which notice is given shall be relevant to some question affecting the administration of the Council's affairs.

If these by-laws apply to a special meeting such as the petitioners requested the respondent to convene—and the purpose specified by the petitioners was to discuss a particular motion—then notice of that motion has to be given to the Secretary five clear days before the meeting, it has to be submitted to the Chairman, if the Chairman is of the opinion that it was out of order he can refuse to include it in the agenda, and his opinion is not ordinarily subject to review by this Court. Since the purpose of the special meeting was only to consider the petitioners' motion, if the respondent in the exercise of his discretion was entitled to rule it out of order there was, of course, nothing to be gained by summoning the meeting. It will thus be seen that the main point of dispute in this matter is whether the respondent had a discretion or not in the matter of convening a special meeting for the purpose of discussing this particular motion. The crucial question to be answered in determining this matter is whether by-laws 8 (*a*) to 8 (*d*) apply in this case or not, and on the answer will depend the result of this application.

Now it seems to me that the words of section 39 (2) are free of any ambiguity. They impose an obligation on the Chairman; they vest in him no discretion; and they provide the procedure to be followed with regard to the giving of notice to the members of the Council. Where the meaning of the words of a statute are as clear and unambiguous as those of this sub-section, I do not think it is open to a Court to restrict their meaning. This does not mean that an abuse of the powers given to members cannot be checked if they should try to take undue advantage of this provision. Now with regard to the question whether by-laws 8 (*a*) to 8 (*d*) apply to a special meeting or not, it seems to me that they do not, because all that section 39 (2) requires, once the Chairman has received a written requisition specifying the purpose, is that two days'

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notice of the day appointed for the meeting should be given and that the meeting should be convened for the specified purpose. The purpose should be specified in the notice to be given to each member and there is no agenda paper such as by-law 8 requires the Secretary to prepare beforehand. The other steps which by-law 8 requires the Secretary to take in such preparation therefore have no place where a special meeting is contemplated. Many of the by-laws are desirable and even necessary, and apply to both special and general meetings, because they do not conflict with the provisions of the Ordinance ; their purpose is clearly to ensure that meetings are conducted decently and in order. By-laws 8 (*a*) to 8 (*d*) in my opinion apply only to motions which members wish to submit at ordinary meetings. They are inconsistent with the peremptory provisions of section 39 (2) because, (1) they require notice of a motion to be given to the Secretary, (2) they require five clear days' notice, (3) they vest a discretion in the Chairman in that they confer on him the right to refuse to include a motion in the agenda ; in short they lay down a procedure which is materially different from, and more onerous than, that stipulated in section 39 (2). Consequently the well settled rule that by-laws which are inconsistent with the provisions of the Ordinance will have to give way to the latter will apply—*De Silva v. De Silva* [1]. It is of some interest to find that the Ordinance provides in sections 33 and 35 for special meetings to be convened for two particular purposes, viz., the election of a Chairman and the removal from office of a Chairman. Those sections do not contemplate anything more than notices being issued to the members indicating those particular purposes. They certainly do not contemplate compliance with by-laws 8 (*a*) to 8 (*d*) and I consider that the inapplicability of those by-laws to a meeting convened under Section 39 (2) is equally plain. It may well be that they were never intended, by those who framed them, to apply to special meetings.

I should not wish it to be thought, however, that the words " any purpose " in section 39 (2) include any purpose under the sun, for that would be to construe the sub-section as though it stood in isolation, ignoring the fact that it is part of the Ordinance. It is necessary to give those words a reasonable construction having regard to the other provisions of the Ordinance and, if necessary, to modify their meaning to avoid an absurdity. Although I am not dealing with such a case, suppose two or more members should request the Chairman to summon a meeting to discuss a motion of an entirely scurrilous, or unlawful, nature, or one which could not even remotely concern a Town Council ; I doubt if the Chairman would be bound to convene such a meeting, and it is unlikely that this Court would permit those members to avail themselves of a discretionary remedy like Mandamus to attain such an object. An argument put forward against the grant of the present application was that two or more members may require a special meeting to discuss some outrageous motion which no sensible Chairman could place before a meeting. As I have already indicated, the Court is not powerless to prevent an abuse of its process particularly when the remedy is a discretionary one. There is the rule that a Court will take into account the light in which the relators appear from their behaviour and

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[1] (1943) 44 N. L. R. 337.

conduct and motives and the consequences which the issue of a writ of Mandamus will entail—*Inasitamby v. Government Agent, N. P.* [1]. But the motion which I am dealing with in this case cannot be said to be plainly one which does not fall within the ambit of the words " any purpose ", giving those words a liberal construction in the light of the other provisions of the Ordinance. I am unable to agree with the objection raised on behalf of the respondent that the proposed motion could not possibly come within the purposes contemplated by section 39 (2). In my opinion the Chairman should have complied with the request made of him and convened a special meeting.

Another objection raised for the respondent was that the petitioners had an alternative remedy which they should have exercised and that there was no need for them to seek the extraordinary remedy by way of Mandamus. The remedy referred to is that provided in by-law 1 (*b*) which reads :—

> No business shall be brought before or transacted at any meeting, ordinary or special, other than the business specified in the notice of the meeting, without the permission of the Council.

and by-law 8 (*h*) which reads :—

> Before any motion of which previous notice has not been given is moved in Council it shall be reduced to writing signed by the mover and handed to the Secretary.

In regard to by-law 1 (*b*) it was submitted that the petitioners could have obtained the permission of the Council at an ordinary meeting and then moved the motion in question. But this pre-supposes that the Council would have granted such permission. I cannot see why this Court should deprive the petitioners of a procedure which is clearly indicated in the Ordinance itself. The objection to the procedure under by-laws 1(*b*) and 8 (*h*) is that there are obvious advantages in a procedure which requires that all the members of the Council should be given due notice of the purpose of, and the business to be transacted at, a meeting; such prior notice enables them to attend the meeting if they consider the motion of sufficient importance, while they may not attend an ordinary meeting the notice regarding which does not mention the particular motion ; it also enables them to consider the motion beforehand. That is the reason of the rule which requires due notice to be given of every meeting, and if special business is to be done it is essential that timely and adequate notice of it should be given to all the members. This point has not been considered in *Goonesinghe v. Municipal Council of Colombo* [2]. The alternative remedy suggested should be equally convenient, beneficial and effectual—*Perera v. Municipal Council, Colombo*[3], and it is not in this case.

For these reasons I consider that the application of the petitioners should be allowed with costs.

Application allowed.

[1] *(1932) 34 N. L. R. 33.* [2] *(1944) 46 N. L. R. 85.*

[3] *(1947) 48 N. L. R. 66.*

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1955 *Present :* **Swan J.**

A. CHELLIAH, Appellant, *and* C. M. KADIRAVELU, Respondent

S. C. 26—C. R. Badulla, 14,204

Rent Restriction Act—Section 13—Tenant in arrears of rent—Action in ejectment—Notice to quit is condition precedent.

Section 13 of the Rent Restriction Act does not render notice to quit unnecessary to determine a contract of tenancy where the tenant is in arrears of rent.

APPEAL from a judgment of the Court of Requests, Badulla.

N. Kumarasingham, for the defendant appellant.

H. W. Tambiah, with *H. de Silva*, for the plaintiff respondent.

Cur. adv. vult.

May 19, 1955. SWAN J.—

In this case the plaintiff-respondent sued the defendant-appellant for arrears of rent and ejectment. In the plaint notice to quit was pleaded. It was specifically denied in the answer. Apparently at the commencement of the trial it was argued that no notice to quit was necessary for during the course of the trial the following issue was raised by the proctor who appeared for the defendant :—

(4) Can the plaintiff maintain this action for ejectment in the absence of notice to quit determining tenancy ?

At the trial no notice to quit was produced. The learned Commissioner entered judgment for the plaintiff as prayed for with costs, holding that no notice to quit was necessary because the appellant was in arrears of rent.

Mr. Kumarasingham argued that tenancy can only be determined by notice to quit and that the Rent Restriction Act does not give the landlord any greater rights if the tenant is in arrears of rent. His contention was that section 13 of the Act merely provides that no action in ejectment can be instituted unless the Rent Restriction Board had authorized such an action. There is a proviso to the section that the authorization of the Board is not necessary in certain cases, one of which is when the tenant is in arrears of rent.

Mr. Thambiah maintained that the view taken by the learned Commissioner was right. He relied on the judgment of Basnayake J. in the case of *Wimalasuriya v. Ponniah* [1]. His argument was that just as a landlord can sue a tenant in ejectment without notice to quit where the

[1] *(1951) 52 N. L. R. 191.*

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tenant has sublet the premises in contravention of section 9 of the Act, the landlord can institute an action in ejectment where the tenant is in arrears of rent. Without expressing any opinion as to the correctness or otherwise of the judgment in *Wimalasuriya v. Ponniah* [1] I think that section 13 only refers to circumstances when the authorization of the Board is unnecessary for the institution of an action in ejectment. I do not think it can be construed to mean that notice to quit is unnecessary to determine a contract of tenancy where a tenant is in arrears of rent.

The appeal as far as the claim for ejectment is concerned is allowed. Decree will be entered for the plaintiff-respondent for Rs. 210 and costs in the lower court. The defendant-appellant will be entitled to the costs of appeal. The defendant-appellant will be given credit for any amount deposited to the credit of this case as well as amounts paid to the credit of Case No. 13659 C. R. Badulla on account of rent claimed in this action.

Appeal allowed.

[1] *(1951) 52 N. L. R. 191.*

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1955 *Present :* **Gratiaen J. and Sansoni J.**

EMIL SAVUNDRANAYAGAM, Appellant, *and* COMMISSIONER OF INCOME TAX, Respondent

S. C. 323 and 325—In the matter of a case stated for the opinion of the Supreme Court under the provisions of Section 74 of the Income Tax Ordinance (Cap. 88)

Income tax—C.i.f. contract—Payment of purchase price—Void ab initio*—Liability of the seller or his agent to be taxed in respect of the assumed profits.*

When money is paid by A to B under a mutual mistake as to the substance of the whole consideration, B is not liable to pay income tax in respect of the money received by him.

In a c.i.f. contract for the sale of a large quantity of oil it was stipulated that the purchase price of the goods should be paid by the buyer's Bank to the seller's agent, S, on the presentation by S to the Bank of documents relating to the shipment of the oil. S received payment of the purchase price against certain documents but it was subsequently discovered that a person D, who had been entrusted by S with the matter of shipping the oil, had committed a very serious fraud ; no oil had in truth been shipped, and every document forwarded by D to S in proof of the purported shipment was a forgery.

Held, that as S's mandate was to secure an *actual* fulfilment of the seller's obligations and to obtain the purchase price in exchange for *genuine* documents S was not liable to pay income tax on any money received by him, as commission or dividend, out of the assumed profits derived by the seller from the contract of sale.

CASE stated for the opinion of the Supreme Court under section 74 of the Income Tax Ordinance.

H. V. Perera, Q.C., with *S. Nadesan, Q.C.*, *C. Renganathan* and *N. Nadarasa*, for the assessee (appellant in No. 323 and respondent in No. 325).

T. S. Fernando, Q.C., Acting Attorney-General, with *M. Tiruchelvam*, Deputy Solicitor-General, *V. Tennekoon* and *R. S. Wanasundera*, Crown Counsel, for the Commissioner of Income Tax (respondent in No. 323 and appellant in No. 325).

Cur. adv. vult.

March 4, 1955. GRATIAEN J.—

This appeal (No. 323) comes up by way of a case stated for the opinion of the Supreme Court under section 74 of the Income Tax Ordinance.

The assessee was a director of two private companies called Transworld Enterprises Ltd. (the "T. W. E. Company") and the Eastern Traders Ltd. (the "E. T. Company"). Between August 1950 and October 1950 he entered into negotiations in Colombo with a representative of the Hwa Shih Company (the "Chinese Company") for the supply of a large

2——J. N. B 45571—1,592 (7/55)

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quantity of oil to be shipped direct to them at Tsingtao. Eventually, on 23rd October, 1950, he accepted on behalf of the T. W. E. Company an order to supply 45,000 drums of oil (at various specifications) for 1,230,000 dollars c. i. f., stipulating that the purchase price should be assured in advance by a letter of credit opened in Ceylon, India or Switzerland " in favour of our subsidiary firm, Messrs. Eastern Enterprises Company ". On the same day the representative of the Chinese Company " confirmed " the contract and on 29th November, 1950, the Chinese Company arranged for a reputable Bank in Switzerland to open an irrevocable letter of credit A 27 in favour of the Eastern Enterprises Company whereby the Bank undertook to pay the purchase price against bills drawn by the Eastern Enterprises Company " *accompanied by the following documents:* (1) commercial invoice in duplicate, (2) full set clean on board bills of lading, (3) Lloyd's survey certificate, (4) analyst's certificate of quality, (5) Insurance policy ".

Something must now be stated with regard to the Eastern Enterprises Company. The assessee had apparently arranged that, if a contract could be negotiated for the sale of lubricants to the Chinese Company, the business should be undertaken by a partnership called the Eastern Enterprises Company consisting of the T. W. E. Company and the E. T. Company. This partnership in fact came into existence on 27th October, 1950, and was registered a few days later. The correspondence makes it clear that it was the partnership which thereafter undertook the responsibilities of the seller under the c. i. f. contract and as such became entitled to receive payment of the purchase price upon the due completion of the sale.

On 28th November, 1950, the assessee, armed with a general power of attorney from the partnership, went to Europe in search of someone who was in a position to supply the oil required for shipment to China. He eventually contacted a rogue named Pierre Duval who represented that he was willing and able to ship the entire quantity from Marseilles to Tsingtao for 825,552/50 dollars. The arrangement was that Duval, having shipped the oil should send the relative documents to the assessee who would in turn present them to the Swiss Bank. Having received payment against these documents, the assessee would pay Duval his purchase price leaving a considerable margin of profit for the partnership.

Early in January 1951 Duval informed the assessee that the oil had in fact been shipped as arranged, and he furnished the assessee with the documents in proof of shipment. These documents were presented by the assessee to the Bank together with a bill of exchange drawn on the Chinese Company. On 17th January, 1951, the Bank made full payment to the assessee who in turn settled Duval's account for 804,475 dollars. The balance sum (so it was thought) represented the gross profits earned by the partnership in this fabulous venture. Out of this amount, the following sums were received by the assessee personally in Ceylon currency :—

(1) Rs. 1,110,264 " as commission earned by him for his part in the transaction ";

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(2) Rs. 180,000 as dividends paid out to him and his wife (out of the "profits" from the same transaction) by the T. W. E. Company;
(3) Rs. 5,000 as Director's fees (also paid out of the same "profits").

The assessee's appeal raises the question whether these three payments represented "income" in his hands so as to attract tax under the Ordinance. Before discussing this issue, however, it is necessary to return to the facts as found by the Board of Review.

After the payments and distributions previously referred to had been made it was discovered that Pierre Duval had committed a very serious fraud. No oil had in truth been shipped to China, and every document forwarded by him to the assessee in proof of the purported shipment was a forgery. In the result, the assessee (on behalf of the partnership) had forwarded to the Swiss Bank nothing but worthless documents and received in exchange for them the purchase price of a non-existent consignment of oil. The Board was satisfied, however, that at that time the assessee "believed *bona fide* that the Bank was making payment on genuine documents and became aware of the fraud and forgery for the first time about the end of March or the beginning of April 1951".

There was evidence before the Board to support these findings of fact, and we have therefore no option but to accept them as correct for the purpose of answering the questions of law submitted for our opinion.

The Board decided that the assessee was liable to pay tax on the three payments enumerated by me because (1) in receiving the purchase price from the Bank in terms of the letter of credit A 27 upon documents *bona fide* but erroneously believed at that time to be genuine, the partnership "had done all that they were required to do", (2) the payments made to the assessee by the partnership out of this sum by way of commission, dividends and Director's fees were similarly *bona fide* received and properly earned by him.

Mr. Perera has submitted that the legal inferences drawn by the Board upon the facts as determined by them are insupportable. His argument is that the payments of the purchase price was void *ab initio*, and that no property in any part of the assumed "purchase price" ever passed to the partnership or thereafter from the partnership either to the assessee or (in the case of the dividends) to the assessee's wife. The learned Attorney-General supported the conclusions arrived at by the Board, and argued in the alternative that, even if money became liable to be refunded by the partnership upon the discovery of Duval's fraud, it could not be followed in the hands of the assessee or his wife (they having received it innocently and for value).

I must dissociate myself at the outset from the remarkably cynical theory that the partnership had done "all that it was required to do" in order to "earn" the purchase price either under the contract of sale or under the letter of credit which guaranteed payment upon due compliance with the conditions therein stipulated. The documents which form the basis of the Board's determination make it clear that the partnership had assumed in every respect the obligations of a seller, and that the purchase price could only be "earned" upon presentation of genuine documents

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relating to a genuine shipment. The passing of property in the goods to the buyers and in the purchase price to the seller were intended to take place simultaneously.

I agree with Mr. Perera that in the circumstances of this case the property in the money did not pass to the partnership. The money was paid by the Bank and received by the assessee on behalf of his partners under a common mistake about a matter which was as fundamental in character as one can conceive of in relation to a c.i.f. contract and a letter of credit undertaking to pay the purchase price under a c.i.f. contract. The payment was made under " a mistake or misapprehension as to the substance of the whole consideration, going as it were to the root of the matter ". *Kennedy v. Panama, New Zealand and Australian Royal Mail Co.* [1]. In these circumstances, "the mind of the grantor did not go with the transaction at all ; his mind went with another transaction, and he was meaning to give effect to that other transaction, depending upon facts different from those which were the true facts", per Lord Shaw in *Jones v. Waring and Gillow* [2]. As Lord Sumner pointed out in the latter case, " the passing of property is a question of intention, and just as much so in the case of a payment of money as in the case of the transfer of a chattel ".

The common mistake which the Bank and the assessee (as attorney of the partnership) shared at the time of the payment was of a kind which in the opinion expressed by Lord Atkin in *Bell v. Lever Brothers Ltd.*[3] rendered the transaction and the payment void *ab initio*, so that the Bank's consent to the transfer of the property in the money was nullified. " The mistake prevented there being an intention which the common law regards as essential to the making of an agreement *or the transfer of money* or property". *Norwich Fire Insurance Ltd. v. Price* [4].

Both parties were content to argue the appeal before the Board of Review on the assumption that the English law applied. In my opinion this assumption was justified by the provisions of section 58 (2) of the Sale of Goods Ordinance because the payment was intended to be made as consideration under a concluded contract for the sale of goods. The effect of common mistake upon the validity of the transaction is therefore governed by the rules of the English law. But the controversy seems to be only of academic interest. Even under the Roman-Dutch law, the true position was that the common mistake fraudulently induced by Duval vitiated the payment. " The mere delivery of an article does not transfer its ownership, for this takes place only when a sale *or some other just cause* precedes delivery ". *Digest 41. 1. 31 ; Wessells on Contract in S. Africa*—vol 2, para 3636. See also *Voet 18. 1. 5* and *18. 1. 6* where a clear distinction is drawn between the kinds of " error " which would render a contract void and those which render it merely voidable.

I concede that the case for the taxing authority is not necessarily concluded by the circumstance that the money received from the Bank never passed into the ownership of the partnership. If, for instance, it had been diverted into the hands of a third party who received it in good faith and for value, the third party could thereby (under the English law)

[1] *(1867) 2 Q. B. 580.*
[2] *(1926) A. C. 670.*
[3] *(1932) A. C. 161.*
[4] *(1934) A. C. 455.*

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claim that the money had now become his own property. The rules of Roman-Dutch law are very similar. *Wessells* (*supra*), paras 3712-3716. The question therefore remains whether all or any of the relevant sums subsequently received by the assessee from the partnership by way of commission, dividends and Director's fees can properly be regarded as having become his "income" for taxing purposes, although the money did not belong to the partnership itself at any time.

Let us first consider the sum of Rs. 1,110,264 appropriated by the assessee on 17th January, 1951, out of the assumed profits of the partnership. The Board held that this amount had been "lawfully earned by him as commission" and received by him at a time when he "knew" (i.e., I presume, "believed") that the partnership had "legal title to the money". I find it impossible to adopt this line of reasoning. In my opinion, the determination that the Company and assessee acted *bona fide* rules out the theory that the assessee could have been intended to "earn" his commission merely by obtaining payment for forged documents. His mandate was to secure an *actual* fulfilment of the seller's obligations under the contract of sale and to obtain the stipulated purchase price in exchange for *genuine* documents securing for the seller title in the goods and indemnifying him against risks during shipment. He originally entertained the belief that he had earned his commission, but the truth is that he had not. No doubt he received the money *bona fide*, but not in exchange for anything approximating to the services intended to be rendered by him. Accordingly, the ownership in this part of the fund never passed to him for the same reason that it had previously not passed to the partnership from the Bank.

Similarly with regard to the dividend and the Director's fees. Obviously the intention (to which he was himself privy) was to distribute profits actually earned by the partnership from this particular venture ; but as no such profits were in fact earned, there was no effective transfer of money to the assessee.

The documents produced before the Board established that, after the fundamental error was discovered, the assessee (on behalf of himself and his principals) undertook to refund to the Chinese Company such part of the purchase price as was still within his control. Whether he fulfils that undertaking or not, the fact remains that the money is not (and never was) the property of himself or his principals.

In my opinion, it is unnecessary to give a detailed answer to the specific questions submitted for our opinion. I would reduce the assessment determined by the Board by deleting the sums of Rs. 1,110,264, Rs. 180,000 and Rs. 5,000 in respect of which the assessee was not assessable. He is entitled to the costs of this appeal and to a refund of the sum deposited by him under section 74 (1) of the Ordinance.

There remains the Commissioner's connected appeal (No. 325). The conclusions already arrived at by me leave no room for adopting the argument that the assessment should be increased by the addition of other items representing a further distribution of the imagined "profits."

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of the partnership. Moreover, the learned Attorney-General very fairly informed us that he could not support that part of the case for the Commissioner, whose appeal must therefore be dismissed with costs.

SANSONI J.—I agree.

Appeal No. 323 allowed.

Appeal No. 325 dismissed.

1955 *Present :* **Gratiaen J., de Silva J. and Fernando J.**

D. C. JAYASINGHE, Appellant, *and* BORAGODAWATTA CO-OPERATIVE STORES, Respondent

S. C. 181—D. C. Negombo 16,248

Co-operative Societies Ordinance (Cap. 107)—Section 46 (2) (f)— Award of arbitrator—Procedure for its enforcement—Civil Procedure Code, s 224.

When a party makes application to Court to enforce an arbitrator's award under the provisions of the Co-operative Societies Ordinance notice must first be issued to the party against whom the award is sought to be enforced. In such a case an *ex parte* application under section 224 of the Civil Procedure Code is inappropriate.

Kandy Co-operative Urban Bank v. Senanayake (1937) 39 N. L. R. 352, not followed.

APPEAL from an order of the District Court, Negombo. This appeal was reserved for adjudication by a Bench of three Judges upon a reference made by Pulle J. (Weerasooriya J. agreeing) in the following terms :—

" In this action a Co-operative Society sought to enforce an award in its favour against two debtors. The Proctor for the Society filed a motion on the 28th June, 1951, together with the award, and asked that a writ of execution be issued. The motion was allowed *ex parte* on the 23rd July, 1951, and thereafter notices were issued on the debtors to appear for examination under section 219 of the Civil Procedure Code. The 2nd debtor who is the appellant filed an affidavit dated 3rd December, 1951, in which he stated that he was not possessed of any property excepting his share capital in the Society. He was later examined and he undertook to furnish particulars of deeds by which he had sold certain properties.

" On the 7th October, 1952, the Society moved to take out writ for the amount of the award and costs. Notice was then ordered to be issued and on the 14th May, 1953, the appellant filed an affidavit stating that, since the first application for writ in June, 1951, the Society had failed to exercise due diligence to procure satisfaction of the decree and he specifically pleaded the benefits of section 337 of the Code. Pending inquiry into the objections raised by the appellant, the Society appears to have been advised, in view of the case of *Barnes de Silva v. Galkissa*

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Wattarappola Co-operative Stores Society[1] which was decided on the 18th February, 1953, that a fresh application by way of summary procedure should be made to enforce the award. Accordingly the Society filed a petition and affidavit and prayed for an order nisi on the debtors to shew cause. On the 8th September, 1953, the appellant showed cause by affidavit and when the matter eventually came for inquiry on the 17th June, 1954, learned Counsel who appeared for the Society moved to withdraw the application for order nisi and intimated to court that he would support his application for writ on the original motion of 28th June, 1951. Having heard counsel the learned District Judge allowed the application for writ and the 2nd debtor, Don Carolis Jayasinghe, now appeals from this order.

" It is submitted on behalf of the appellant on the authority of *Barnes de Silva's* case (*supra*) that unless the award was sought to be enforced either by a regular action or by summary procedure the court had no jurisdiction to order the issue of writ and that the fact that the appellant allowed himself to be examined under section 219 of the Code did not and could not have the effect of conferring a jurisdiction which the court did not have. The Society's contention was two-fold. First, that *Barnes de Silva's* case (*supra*) did not lay down that, unless the procedure indicated therein was followed a court would exceed its jurisdiction in issuing a writ of execution to enforce an award. It was also argued that the jurisdiction of the court was not dependent on the applicant following either a regular or summary procedure and the Society relied on the case of *Kandy Co-operative Urban Bank v. Senanayake et al.*[2] in which it was held that there was no legal requirement that notice of an application to execute an award made under the Co-operative Societies Ordinance should be given to the party affected and that the position of a person against whom an award has been given differs in no way from that of judgment debtor under a decree. This case does not appear to have been cited during the argument in *Barnes de Silva's* case (*supra*). As the two cases cited are of equally binding authority and cannot be reconciled we have been invited by counsel on both sides to refer the present appeal for decision by a fuller court. We have also been informed that there are pending other cases in which the same point has been raised.

" Let this case be submitted to His Lordship the Chief Justice for directions as to the constitution of the Bench to hear this appeal. "

H. W. Tambiah, with *P. Somatilakam* and *H. L. de Silva*, for the 2nd debtor-appellant.

E. R. S. R. Coomaraswamy, with *Daya Perera*, for the respondent.

Cur. adv. vult.

June 3, 1955. GRATIAEN J.—

This appeal was referred to a Bench of three Judges in view of a conflict of authority as to the procedure to be followed for the enforcement of a purported decision or award under the provisions of the Co-operative

[1] (*1953*) *54 N. L. R. 326.* [2] (*1937*) *39 N. L. R. 352.*

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Societies Ordinance. Section 46 (2) (*f*) empowers the appropriate authority (namely the Minister of Food and Co-operative Undertakings) to make statutory rules for, *inter alia*, " the enforcement of decisions of the Registrar or the award of arbitrators", and the relevant rule is in the following terms :—

> " A decision or an award shall on application to any civil Court having jurisdiction in the area in which the Society carries on business be enforced in the same manner as a decree of such Court."

In *Kandy Co-operative Urban Bank v. Senanayake* [1] a Bench of two Judges had ruled that there was no legal requirement that notice of such an application should be is ued to the party against whom it was sought to be enforced. It was also decided that an *ex parte* application, substantially in the form prescribed for the execution of a decree of Court under Section 224 of the Civil Procedure Code, would suffice to invoke the jurisdiction of the Court.

In the later case of *Barnes de Silva v. Galkissa Wattarappola Co-operative Stores Society* [2] however, a Bench of two Judges ruled that Section 224 was inappropriate to the preliminary application intended in due course to secure the enforcement of an " extra-judicial decision which a Court of law was empowered, upon proof of its validity, to recognise and enforce as if it were a judicial decree ". The judgment continues at page 328 :—

> " The rule made under Section 46 (2) (*f*) of the Co-operative Societies Ordinance does not lay down the procedure for making such applications, but it is the clear duty of a Court of law whose machinery as a Court of execution is involved to satisfy itself, before allowing writ to issue, that the purported decision or award is *prima facie* a valid decision or award made by a person duly authorised under the Ordinance to determine a dispute which has properly arisen for the decision of an extra-judicial tribunal under the Ordinance. In that event alone would the Court be justified in holding that the decision or award is entitled to recognition and capable, under the appropriate rule, of enforcement as if it were a decree of Court. To achieve that end, a person seeking to enforce an award should be required to apply either in a regular action or at least by petition and affidavit (in proceedings by way of summary procedure) setting out facts which prove that the purported award is *prima facie* entitled to such recognition. The Court should in the latter event enter an order *nisi* or interlocutory order granting the application, and notice thereof should be served on the opposite party so that he may be given an opportunity of showing cause against the proposed enforcement of the award. Then, and only then, would the Court be justified in permitting execution proceedings under the Civil Procedure Code. "

Having considered the matter afresh, we are satisfied that the rule laid down in this later decision is correct, and we respectfully think that the earlier authority (in which the Court did not enjoy the advantage of an argument at which both parties were represented) ought not to be followed.

[1] *(1937) 39 N. L. R. 352.* [2] *(1953) 54 N. L. R. 326.*

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In our opinion, the most convenient and satisfactory procedure to be followed would be for a party seeking to enforce an award to make his preliminary application for recognition of the award by way of summary procedure on the lines indicated in *Barnes de Silva v. Galkissa Wattarappola Co-operative Stores Society* (*supra*).

The principle involved is one of substance and not merely of form. Justice requires that a party who invokes the aid of a Court to obtain the enforcement of an extra-judicial decision purporting to grant him relief against someone else should proceed in two stages : (1) he must in the first instance place sufficient material before the Court to establish that the decision in question had been validly made by a person vested with jurisdiction over the dispute ; and (2) it is only after he has obtained judicial recognition of the extra-judicial decision that he may proceed to take steps to have it carried into execution. It would be quite improper for the Court to grant final recognition to an extra-judicial decision without giving the party alleged to be affected by it an opportunity of challenging its validity.

Applying these principles to the facts of the present case, we are satisfied that the learned Judge should not have ordered execution of the arbitrator's award because the respondent Society had placed no evidence before him to establish its validity. The application was therefore irregular *ab initio*. We accordingly set aside the order under appeal, and send the case back to enable the Society to make a proper application by way of summary procedure, if it so desires, in accordance with the procedure laid down by this Court in *Barnes de Silva v. Galkissa Wattarappola Co-operative Stores Society* (*supra*). The appellant is entitled to the costs of the appeal and of the inquiry in the Court below.

DE SILVA J.—I agree.

FERNANDO J.—I agree.

Order set aside.

1954 *Present :* **Nagalingam S.P.J. and de Silva J.**

K. KANAGALETCHUMY *et al.*, Appellants, *and* A. M. M. MARIKAIR, Respondent

S. C. 256—D. C. Batticaloa 798L

Lease—Non-payment of rent and taxes—Forfeiture.

In the absence of a forfeiture clause or an express condition a lease is not liable to be cancelled for breach of a covenant to pay rent unless (1) the non-payment of rent is deliberate and persistent or contumacious, (2) the lessee is in arrear of rent for two years and (3) the lessor gives the lessee notice of terminating the lease if the arrears are not paid.

An undertaking by a lessee to pay taxes in respect of the leased premises is a condition for the breach of which the lessor is entitled to a cancellation of the lease.

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APPEAL from a judgment of the District Court, Batticaloa.

C. Renganathan, for the 1st and 2nd defendants appellants.

S. J. V. Chelvanayakam, Q.C., with *E. Jayaweerasingham*, for the plaintiff respondent.

Cur. adv. vult.

December 21, 1954. DE SILVA J.—

The two questions which come up for decision in this appeal are (1) In what circumstances is a lessor entitled to a cancellation of a lease for non-payment of rent which the lessee has undertaken to pay and (2) Is a lease liable to be cancelled for a breach of an undertaking to pay taxes, when the indenture of lease itself is silent as to what is to happen in the event of a breach of these covenants ?

The plaintiff-respondent who is the owner of the premises described in the amended plaint leased the same to one Kanapathipillai by bond P 1 dated 26th March, 1948, for a period of 10 years at a rental of Rs. 3,000. That part of this deed which is material to this case reads :—

> " I do hereby declare that the sum of Rs. 1,000 paid by the lessee as advance on this date should always remain with me as deposit, that at the end of every month he should pay me a sum of Rs. 25 as monthly rent and obtain receipt, that he should pay the taxes due to the U. C., effect necessary repairs and put up the buildings required according to his convenience and render proper accounts to me, that at the expiration of the said term of lease I shall repay this money together with the sum of Rs. 1,000 received as advance, that in default thereof he can sue for and recover the same, that I shall settle all disputes and objections that may arise as regards lessee's possession and that the lessee and his substitutes, heirs, executors, administrators and assigns can possess the leased property until the expiration of the said term of lease. Thus declaring and binding myself and my substitutes, heirs, executors, administrators and assigns and giving over lease possession of the said property I have executed this deed of lease.
>
> I the said Murugappar Kanapathipillai the lessee consenting to the above said conditions have accepted this lease."

The lessee died on or about 31st October, 1949, having devised by his last will all his property to his daughter, the 1st defendant, a minor, whose guardian ad litem is the 2nd defendant, her mother. The 3rd

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and 4th defendants are sub-tenants of the 1st defendants, but they have since the institution of this action vacated the premises. No rent or taxes whatsoever has been paid on this lease by the original lessee, or by anyone else. Taxes were paid by the plaintiff during the pendency of the lease.

The plaintiff instituted this action on 2nd February, 1952, for a cancellation of the lease and the ejectment of the defendants to recover arrears of rent and damages. Although the 1st and 2nd defendants in their answer denied the averment in the plaint that the lessee had failed to pay rent or taxes, the learned District Judge held that neither rent nor taxes was paid by the lessee and that therefore there was a breach of covenant which entitled the plaintiff to claim a cancellation of the lease and to recover arrears of rent and taxes paid by him. Against this judgment the 1st and 2nd defendants have appealed. Mr. Renganathan who appears for the appellants contends that the lease cannot be cancelled for the non-payment of rent or taxes in the circumstances of this case.

The finding of the learned District Judge that no rent or taxes was paid by the lessee is not canvassed. The deed P 1 does not contain a forfeiture clause for non-payment of rent or taxes. The undertakings to pay rent and taxes are referred to in P 1 as " conditions ". A " condition " is a stipulation the breach of which gives rise to a right to treat the contract as repudiated. Morice in his treatise " English and Roman Dutch Law " (2nd Edition page 177) states, " If it appears from the terms of the lease that the fulfilment of certain stipulations are conditions of the lease the Courts will enforce forfeiture". He bases this observation on a passage appearing in Kersteman's *Woorderboek under Huur* which reads :—" A lease for a period of successive years contracted on condition that the rent shall be paid without any delay on certain fixed dates, on the lessee proving in default to do so is immediately cancelled and extinguished with all its results and consequences". The words " without any delay " appearing in this passage indicates that time is of the essence of the contract. The language of P 1 does not permit a similar construction being placed on it. If it was understood between two parties to this document that a failure to pay rent was to result in the cancellation of the lease that intention could have been expressed by using such language from which this intention could have been inferred. It is not clear whether the Tamil word in P 1 which has been translated as " conditions " bear the same connotation as the latter word does when used in the strict legal sense. The whole document has to be considered to ascertain the real intention of the parties in regard to the payment of rent. When forfeiture is involved the document has to be construed strictly. If two interpretations can be placed on it the one more favourable to the lessee must be adopted. On proper examination of it, I do not think it is possible to say that the relevant Tamil word even if it has been correctly translated to mean " conditions " was used in respect of rent, in the sense of a stipulation the breach of which gives a right to treat the contract in P 1 as at an end. In my view these words with reference to rent do not signify anything more than a covenant.

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Therefore it is necessary to consider whether according to the common law (Roman Dutch Law) a breach of a covenant to pay rent entitles the landlord to claim a cancellation of the lease.

It is well settled law that it is not in every case of failure to pay rent the landlord is entitled to ask for a cancellation of the lease. To claim such a right the non-payment must be deliberate and persistent or contumacious. That is not all. The lessee must be in arrear of rent for 2 years. For, Voet says that a landlord is entitled to "expel" a tenant when he is "for 2 whole years in arrear of rent" (Commentary on The Pandects 19.2.16). The same view is expressed by Grotius (3.9.11). Mr. Renganathan contends that the tenant should not only be in arrear of rent for a period of 2 years but that the landlord should also give him notice of terminating the lease if the arrears are not paid. Neither Voet nor Grotius expressly refers to the necessity of such a notice, but Huber in his work entitled "The Jurisprudence of My Time", states, "It should, however, be understood that a landlord who wishes to avail himself of this 2 years right, must observe the due order of law, and is therefore obliged to give notice". It is true that here Huber is referring to the law applicable in Friesland, a province of Holland. It is necessary to consider whether this law prevailed in the other provinces of Holland, as well. In South Africa the Courts have constantly followed that this notice on the defaulting tenant was strictly necessary. *Jones v. Colonial Government* [1]. The question whether this notice was required in the other provinces of Holland was considered by de Villiers C.J. and answered in the affirmative in the case *Estate Thomas v. Kerr and another* [2]. In that case, while referring to the decision in *James v. Colonial Government*, he observed: "The Court, however, went further, and finding that no notice of cancellation had been given to the lessee expressed the opinion on the authority of Huber (Hed Recttsc 3 : 9 : 1 and 2) that in the absence of such a notice the Court would not have ordered cancellation if an action for the purpose had been instituted by the Government. Huber's observations apply to the law of Friesland where the departure from the practice and principles of Roman Law was less marked than in the other provinces of the Netherlands, and if, according to him, a notification putting an end to the lease was necessary, it would *a fortiori* have been necessary in the other provinces". Although Voet does not refer to the necessity of this notice when he states that the landlord is entitled to cancel a lease when the tenant is in arrear of 2 years rent, yet later he makes this significant observation: "In those cases in which expulsion of tenants before the expiry of the lease is allowed by the lease or by the laws or by the usages, it has to be observed, that the tenants of rural and urban tenements must not be disturbed without the public authority of a judge, *when they have refused to quit after private warning*" (19 : 2 : 18). The words "when they have refused to quit after private warning", clearly contemplate that notice had to be given to the defaulting tenant before judicial proceedings were instituted. Therefore the requirement of this notice should be considered to be a part of the Roman Dutch Law which governs us. In the instant case the plaintiff did not give notice to the original lessee or the 1st defendant of his intention to

[1] *15 S. C. 245 at 249.* [2] *20 S. C. 354.*

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terminate the lease when 2 years rent was in arrear. It is true that the plaintiff on 15.9.48 gave the notice P 3 to the original lessee informing him that he was in arrear of rent and that he should consider the lease as having been cancelled. But, at that time the lessee was not in arrear of rent for 2 years. That being so, the notice is ineffectual for the purposes of this action. It would appear, however, that it is sufficient to give the notice before the expiry of the 2 years, provided it is stated in it that the lease would stand cancelled in the event of the rent being in arrear for 2 years. Such a notice has to be given within 12 months immediately preceding the expiry of the 2 years. Accordingly the plaintiff is not entitled to a cancellation of the lease on the ground of non-payment of rent.

His remedy should be a claim to recover arrears of rent. In this case the plaintiff set up a claim for rent also. In any event he is entitled to that relief.

In regard to taxes, Mr. Renganathan argued that the lease cannot be cancelled for non-payment of taxes. The lessee gave a solemn undertaking to pay the taxes to be levied by the Urban Council. The non-payment of these taxes would result in drastic consequences to the plaintiff. This agreement to pay the taxes is binding on the lessee although the plaintiff continued to be liable to pay them as far as the Urban Council was concerned. The lessee however failed to fulfil the agreement to pay the taxes. If the plaintiff had not been vigilant enough to pay these taxes himself there was a grave and imminent risk of the leased premises being sold up at the instance of the Urban Council. The taxes had to be paid quarterly. I have not been able to discover the views of Voet or Grotius on this matter, but according to Huber a landlord is entitled to give notice terminating the lease for non-payment of taxes. He states, "We also said above that similarly to the case of quitrent tenure, notice may be given terminating the lease, if the lessee does not pay the land-tax or floreen-schatting, as we call it" (3 : 9 : 14). There is no time limit fixed within which this notice has to be given. In the notice P 3 there is a reference to the failure to observe the conditions of the lease. Although that notice does not expressly refer to the failure to pay taxes it is sufficient, in my view, to notify the lessee of the fact that he had committed a breach of the agreement to pay taxes. This lessee is not entitled to claim equitable relief for his default in the payment of taxes in view of the fact that he had repeatedly and deliberately refrained from paying the taxes. In these circumstances it is not unfair to hold that the undertaking to pay taxes is a condition for the breach of which the plaintiff is entitled to a cancellation of the lease.

The appeal must therefore fail. Accordingly I dismiss the appeal with costs.

NAGALINGAM S.P.J.—I agree.

Appeal dismissed.

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1954 *Present :* **Gratiaen J. and Fernando A. J.**

H. ALIBHOY, Appellant, *and* CEYLON WHARFAGE Co., LTD., Respondent

S. C. 51—D. C. Colombo, 22,279

Carrier by trade—Action for failure to deliver goods—Quantum of proof necessary— Vis major—" *Boat note* "—*Customs Ordinance, s. 40.*

Plaintiff sued defendant, a Company carrying on the business of landing and shipping of goods in the Port of Colombo, for their failure to deliver to the plaintiff a consignment of 436 bags of beans—each bag bearing the identifying mark " I.O.T.C. "—alleged to have been consigned to the plaintiff on the s. s. " June Crest " which arrived at the Port of Colombo.

Held, that before the plaintiff could claim damages from the defendant for loss or non-delivery of goods, he had to prove that 436 bags bearing the identifying mark " I.O.T.C. " were actually delivered out to the defendant at the ship's side.

Held further, that in the absence of proof of negligence, the defendant, as carrier, was not liable to deliver the goods in good condition. In order to establish that the goods had deteriorated through negligence on the part of the defendant, the plaintiff should have tendered evidence of the sound condition of the goods at the time of the consignment and of the improbability of deterioration during transit.

A carrier's obligations towards a consignee discussed.

APPEAL from a judgment of the District Court, Colombo.

V. A. Kandiah, with *G. F. Sethukavalar*, for the plaintiff appellant.

S. J. V. Chelvanayakam, Q.C., with *P. Navaratnarajah*, and *V. Ratnasabapathy*, for the defendant respondent.

Cur. adv. vult.

June 30, 1954. FERNANDO A.J.—

The plaintiff in this action sued the defendant—a Company carrying on the business of the landing and shipping of goods in the Port of Colombo—for their failure to deliver to the plaintiff a consignment of 436 bags of beans alleged to have been consigned to the plaintiff on the s.s. " June Crest " which arrived at the Port of Colombo on January 13, 1947.

I shall assume (the learned District Judge has also done so) that the obligation owed by the defendant Company to the plaintiff is the same as that which was held in *Bagsoobhoy v. Ceylon Wharfage Co., Ltd*[1] to be owed by the same Company to a consignee of goods. Basnayake J. (at p.152) there defined the obligation in the following terms : " *Upon proof of receipt of the goods by the carrier* and their loss or non-delivery to

[1] *(1948) 49 N. L. R. 145.*

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the consignee, the carrier is liable, unless he can bring himself within the exceptions (of *vis major* or *damnun fatale*), the onus of proof being on him. The exceptions are not a valid defence when they have been brought about by the carrier's negligence ".

The principal question which accordingly arose for determination is whether the plaintiff has proved that the consignment of 436 bags bearing the plaintiff's mark " I.O.T.C. " was actually delivered to the defendant at the ship's side. The plaintiff has produced a certified copy of the ship's manifest and two bills of lading P1 and P2 which would clearly establish, *as against the owners or charterers* of the vessel, that 436 bags of beans marked I.O.T.C. consigned to him had been taken on board the " June Crest " at Mombasa. He has also proved that the entire cargo taken on board at Mombasa was consigned to Colombo, which was the first port of call, and that the defendant Company, upon directions from the Port Controller, did receive and land the entire ship's cargo.

On these facts it is argued for the plaintiff that he has proved that 436 bags of beans bearing the mark I.O.T.C. were received by the defendant and that an obligation of the nature defined therefore arose. The case for the defendant Company is that the evidence was insufficient to establish, *as against the Company*, that such bags were actually received, and their case is supported by the following circumstances. The shipper of the goods has not testified to the fact that the bags were duly marked as requested by the consignee. There is no evidence, from the ship's agents, either at Mombasa or at Colombo, that bags *bearing those marks* were received on board or delivered out. The boat notes covering the discharged cargo do not identify the bags by reference to markings (as s. 40 of the Customs Ordinance requires), but only refer to the markings as " various "; the learned Judge has rightly accepted the evidence that the requirement of entering the precise markings on boat notes is not ordinarily observed in regard to cargoes of grain.

I agree with the learned Judge that the ship's manifest and the bills of lading do not constitute evidence, *as against the defendant Company*, that the consignment of 436 bags did actually bear the markings I.O.T.C., and that the Company cannot therefore be held liable to deliver the full quantity of bags *with those markings*. The Company did actually tender delivery of 436 bags out of the quantity remaining unclaimed by other consignees, but the plaintiff declined to accept that tender.

The learned District Judge has decided upon the evidence that the defendant Company did receive at the ship's side 145 bags consigned to the plaintiff and bearing the relevant marks, that this quantity was actually landed on shore, and that the Company failed and neglected to deliver this quantity to the plaintiff. He has held that the Company is liable to pay to the plaintiff the value of the 145 bags which he fixes at Rs. 52 per bag on the basis of the landed cost. In regard however to 60 bags out of that quantity he has fixed damages at a rate equal to 75 per cent. of the value, on the ground that the Company tendered delivery of 60 marked bags which if accepted by the plaintiff could have realised 25 per cent of the landed cost. In regard to these 60 bags, he

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has found that the plaintiff was not bound to accept them because their contents " had nearly perished ", a circumstance for which he was of opinion that the Company must accept liability.

The plaintiff has appealed against the judgment on the ground that his claim in respect of the total consignment of 436 bags should have been allowed. The defendant Company in its cross-objections maintains that the plaintiff's action should have been dismissed, and that in any event there was no proof that more than 60 " marked " bags of the consignment were received by them at the ship's side ; the defendant also denies liability for the alleged " deteriorated condition " of the contents of the 60 bags.

For the reasons already stated, the appeal of the plaintiff must fail, and I have now to consider only the cross-objections raised by the defendant.

The plaintiff himself was absent from Ceylon for part of the period between the arrival and departure of the ship and his interests were being represented by Messrs. Heptulabhoy and Co. One Mohamed Ali, an attorney of that firm, gave evidence to the effect that about 4th February, 1947, he saw a stack of bags bearing I.O.T.C. marks at the Customs Warehouse, that the stack contained about 200 bags, that from droppings on the floor he identified them as containing *Kaffir* beans which was the description of the beans alleged to have been consigned to the plaintiff, and that he took a sample of the beans from the bags. Mohamed Ali also said that he thereafter filled up a bill of entry P 28 which does include reference to the bills of lading P 1 and P 2 covering the plaintiff's consignment. The learned Judge does not accept this evidence as proving that 200 marked bags were actually on the wharf, but he relies on it to support his ultimate conclusion that 145 marked bags were actually received by the defendant. In my opinion it was quite unsafe to rely on Mohamed Ali's evidence on this point. He has not explained why it was that if he saw 200 of the bags and therefore passed the entry for the consignment, he failed to take early delivery of what was available and thus to avoid heavy warehouse charges : he does not even allege that he asked the defendant to give delivery of the part consignment ; nor is there any evidence that he informed either the plaintiff (who returned to Ceylon on February 6th to attend to this very matter) or the defendant that he had seen the 200 bags at the warehouse. His evidence is also inconsistent with the letter (P 6) written by Heptulabhoy and Co. on 8th February in which they complain that " the goods have not been stacked according to marks " and with the plaintiff's statement in his letter P 7 of the 24th February that " I have made all possible efforts to trace the above at the Customs Warehouse, but I have not been able to locate same ". The only reliable inference which can be drawn from these two letters is that their writers were not informed by Mohamed Ali of what he professes to have seen on February 4th.

The ground upon which the learned Judge has relied for his finding that 145 of the marked bags were received by the defendant makes it necessary to refer to the practice of Customs officers in regard to the levy of customs duty on consignments like the one in question. Mr. Subramaniam who

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was Registrar of Customs at the relevant time deposed to the fact that the duty on a particular consignment is assessed only after at least one-third of the consignment has been landed ; that for this purpose the quantity landed is stacked together according to marks ; that a test weighing of two bags taken from the stack is made in order to assess the weight of the whole consignment ; and that the test weight is recorded on the back of the consignee's entry as well as in a " Blue Book ". Mr. Pullenayagam, the Landing Waiter, whose initials appear below the test weight recording in the bill of entry P 28, gave evidence to the same effect. He was sure that one-third of the total consignment covered by the entry for these 436 bags *must have been landed and stacked by reference to marks* at the time when he made the test for the weight recorded by him. Pullenayagam was however not able to recall the actual occasion or to speak directly to the fact that about one-third of the bags had actually been stacked together or that he actually examined a stack of marked bags. It is on this evidence, together with Mohamed Ali's story about the 200 bags, that the learned Judge found that the receipt by the defendant of 145 marked bags (1/3 of the total of 436) has been proved. In my opinion, the presumption *omnia rite esse acta*, which would ordinarily justify such a finding on such evidence, is not applicable in this case owing to the existence of special circumstances to which I shall refer immediately.

There was apparently in the Port of Colombo at the time when the " June Crest " was in harbour severe congestion both of shipping and of cargo ; so much so that the Port Priority Committee on 27th January decided " to stockpile the cargo " from the " June Crest " i.e., to stack without reference to markings, and to advertise the sale of one consignee's cargo in order to make other consignees clear their cargo without delay, and on 5th February even contemplated special legislation to reduce the time limit for clearance of goods ; and on 30th January the Chairman of the Port Commission " beacause of the slow clearance from the harbour premises " authorised the Landing Companies discharging from the " June Crest " and one other ship to charge consignees treble the normal landing rates. The Assistant Manager of the defendant Company, a witness whose evidence was referred to by the plaintiff's Counsel as being entirely reliable, stated that after the decision of 27th January, the cargo from the " June Crest " was to his knowledge stockpiled without reference to marks, and the defendant's Warehouse Superintendent made a similar statement, so that there was clear evidence to the effect that after that day the markings were ignored for stacking purposes. The relevance of this evidence upon the question whether the normal Customs practice was actually followed in this instance appears to have escaped the attention of the learned Judge, and I do not imagine that he would have expressly disbelieved the Company's two witnesses on this point. In the face therefore of positive evidence that stacking by marks had ceased on 27th January, I am of opinion that it was not justifiable to rely on an inference to the contrary which is all that the evidence of the Customs officers affords. Even as to them, this opinion does not involve a disbelief of their evidence. They only speak to the normal practice of stacking by marks before the first weighing, a requirement which might reasonably have been relaxed by them having regard to the severe congestion particularly

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affecting the "June Crest's" cargo and to the fact that Customs duty was leviable on all the consignments (totalling some 50,000 bags) at the identical rate. In these circumstances, identification of markings and contents of the bags was of no real importance for Customs purposes. Moreover, the inference that at least 145 I.O.T.C. marked bags must have been passed by the Customs officers is contradicted by the unexplained failure of Heptulabhoy and Co. to remove that part of the consignment which upon that inference must have been ready and available for delivery on 4th February. I think for these reasons that the finding that 145 marked bags were actually delivered to the defendant's Company cannot be maintained.

It follows that, out of the total quantity of the 436 bags which the defendant Company is alleged to have received from the "June Crest", the only bags proved to have borne the markings I.O.T.C. were the 60 bags traced by the Company and tendered for delivery to the plaintiff. In regard to these, the learned Judge held that the plaintiff cannot be compelled to accept them "because their contents had nearly perished", but in respect of them he allowed the plaintiff only 75 per cent. of their value on the ground that if accepted the plaintiff could have realised about 25 per cent. of their value. The bags were apparently infected with weavils, a circumstance attributed by the plaintiff to the fact that they were found stacked with other weavil infected bags. The question which has here to be decided is whether the defendant Company is liable for the alleged deterioration in the contents of the 60 bags.

The principle laid down by Basnayake J. in *Bagsoobhoy v. Ceylon Wharfage Co., Ltd.* (supra) does not impose on the defendant Company an absolute liability to deliver the goods *in good condition*, and only renders the Company liable for *loss or non-delivery*. In order to establish that the goods had deteriorated through the negligence on the part of the defendant Company, the plaintiff should have tendered evidence of the sound condition of the goods at the time of the consignment and of the improbability of deterioration during transit. Even in an action against the ship owner, the production of the manifest and bills of lading would not to my mind avoid the necessity of evidence of this description. In the absence of such evidence, as well as of other evidence in proof of negligence as having caused the deterioration, the defendant Company cannot be held responsible for the actual condition at the time of tender. Even the vague suggestion, if accepted, that the bags became contaminated by contact with the other infected bags is insufficient evidence of the defendant's negligence, since there is nothing to rebut the possibility that the other infected bags themselves formed part of the plaintiff's own consignment.

I am of opinion that the defendant Company duly carried out its obligation to the plaintiff by tendering delivery of the 60 marked ones which had been traced, and is not therefore liable for any damage suffered by the plaintiff in consequence of his refusal of the tender.

The plaintiff's appeal is dismissed with costs. The cross-appeal of the defendant Company is allowed and plaintiff's action is dismissed with costs.

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GRATIAEN J.—

The facts relevant to this appeal are set out in the judgment of my brother Fernando, with whose conclusion I am in complete agreement. I desire only to make some reference to the legal issues which generally arise in cases of this kind.

It is necessary to analyse the obligation which the company undertook when it was entrusted by the Port Controller with the duty of discharging cargo from s.s. "June Crest" on the arrival of the vessel in Colombo. Abnormal conditions were admittedly prevailing in the port, and a carrier would have found it quite impossible to identify each consignment of the cargo (by reference to the relative shipping documents) as and when it was being passed over the ship's side into lighters. This responsibility was not imposed on the Company by the directions of the Port Controller or by the terms of any contract (express or implied) between the Company and either the owners of the ship or the consignees of the cargo. Some reference has been made to section 40 of the Customs Ordinance which provides that each "boat note" must specify "the marks or other description" of each package unladen from a ship. This requirement was admittedly not meticulously observed. Indeed, it could not have been, without disorganizing completely the work which the Controller required to be carried out as expeditiously as possible in the public interest. It is sufficient to say that even if a carrier's failure to observe this requirement might have constituted a technical breach of the statute, it has no bearing on the question of his civil liability.

The obligations in fact imposed on the company were :

(1) to receive all cargo actually discharged into lighters from the vessel ;

(2) to transport this cargo, as quickly as was practicable, to such of the Queen's warehouses as were allocated for the purpose ;

(3) in due course to deliver at the warehouse to each particular consignee any part of the cargo which could be identified (by reference to the relative documents) as his property provided that the Customs dues and the company's landing charges (at rates fixed by the Controller) were first paid.

What then was the standard of care towards a particular consignee which this particular situation demanded of the company from the time when the cargo was received into the lighters ?

A Bench of two Judges has decided in *Bagsoobhoy's case* [1] that the Roman-Dutch law applied to a case of this kind. We are bound by that ruling. Accordingly, the liability of a carrier by trade (unless enlarged by contract) is not quite so wide when goods are being conveyed in lighters as in the case of a common carrier in England, but is very similar for all practical purposes. He is not an insurer of the goods entrusted to him for carriage ; nevertheless he is liable for their loss or deterioration while in his custody unless he can prove that it was occasioned by *vis major* or *dam-*

[1] (1948) 49 N. L. R. 145.

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num fatale—see *Voet 4. 9. 2.* and *Treglida & Co., v. Sievright* [1]. In other words, the onus is on him to establish that he had taken all due care and not been negligent "—*Fumba v. Dickenson* [2].

It might be asked what, under modern conditions, would constitute *vis major* so as to relieve a carrier by trade of liability. The answer is that this term is not necessarily restricted to " an act of God " or to the consequences of piracy, ship-wreck, thunder, lightning, or hostile action by the Queen's enemies. It is sufficient for the carrier to rebut the initial presumption of negligence (which the law imputes to him) by proving that the loss or deterioration of the goods resulted from some cause which was " utterly beyond his power to prevent "—*per* Buchanan A.C.J. in *Magaga v. Cole* [3]. The standard of care demanded of a carrier by trade is *exacta diligentia* so that he is exempt from liability only if the loss was " purely fortuitous and due to inevitable accident "—*Postmaster-General v. van Niekerk* [4]. It is a question of fact whether *exacta diligentia* was exercised in any particular case.

The origin of a carrier's obligation towards a consignee can in appropriate case be traced to the express or implied terms of contract entered into between them (the consignor being the agent to make it)—*Cork Distilleries Co. v. Great Southern and Western Rly. Co.* [5] which was applied by Jayatilleke J. to the facts which arose in *Cunji Moosa v. City Cargo Boat Co.* [6]. But I find it difficult to read an implied contract into a transaction where, as here, the Port Controller, exercising special powers under Emergency Regulations, himself selects a particular carrier to handle cargo discharged from a vessel in the port and in due course to distribute it between various consignees to whom the carrier must look for payment. In such a situation the duty to exercise *exacta diligentia* is equally imposed, but it seems more logical to trace the obligation to " a peculiar incident of the law relating to carriers " than to the legal fiction of an implied promise. *Wessels on Contract, Vol. 1, para. 258.*

Let us also examine the obligations of a carrier in this and similar situations where the goods, having been landed into the Queen's warehouses, are awaiting delivery to the consignees. If, at any time during this period, the goods are exclusively within the control of the Customs authorities, the carrier's responsibility is for the time being at an end. *Asana Marikar v. Livera* [7] and *Athinarayanapillai v. Ceylon Wharfage Co. Ltd.* [8] If, on the other hand, they remain under the carrier's control *as a bailee or custodian for hire*, the same duty of *exacta diligentia* is imposed on him as when he was actually transporting the goods—*Cunji Moosa's case* (supra), and *Bagsoobhoy's case* (supra). Unless the matter is regulated by special agreement the question as to who was in effective control of the goods at the time of their loss or deterioration is always the deciding factor.

Turning now to the case immediately under consideration every bag of grain discharged from the ship into the company's lighters has been accounted for. The plaintiff was unable to prove, *as against the company*, that the cargo discharged from the vessel in fact included 436 bags bearing

[1] *(1897) 14 S. C. 76.*
[2] *(1906) 23 S. C. 180.*
[3] *(1908) 25 S. C. 434.*
[4] *(1918) C. P. D. 378.*
[5] *(1878) 7 H. L. C. 269*
[6] *(1947) 49 N. L. R. 35.*
[7] *(1903) 7 N. L. R. 158.*
[8] *(1952) 53 N. L. R. 419.*

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the identifying marks " I.O.T.C. " (consigned under the bills of lading P 1 and P 2) in addition to a number of other bags bearing similar marks (consigned to him under P 3 and P 4 and taken delivery of from the warehouses on or before 27th January, 1947, by their purchasers for value). The shipowner's acknowledgments contained in the bills of lading P 1, P 2, P 3 and P 4 are certainly evidence against them, but they do not bind the company. The documents produced in the case prove that out of the entire cargo actually landed into lighters, every bag which was proved to have borne the identifying mark " I.O.T.C. " has been accounted for. Out of these, 60 bags were eventually traced and made available for delivery to the plaintiff against the bills of lading P 1 and P 2. His refusal to accept them discharged the company from any further liability towards him in respect of them.

The question remains whether the plaintiff is entitled even to claim damages from the company for the alleged deterioration of the contents of these 60 bags between the date on which they were discharged into the company's lighters and the date on which they were eventually tendered to him. The answer is clearly in the negative. There is no evidence of any kind as to the condition of the grain in these bags when they came into the company's custody, and it is therefore impossible to assess the extent of their subsequent deterioration (if any). That there must have been some deterioration during this latter is, I concede, extremely probable. But the chaotic conditions prevailing in the harbour and in the warehouse during the relevant period were the effective causes of the delay in tracing them and of their consequent deterioration. These were circumstances which were " utterly beyond (the company's) power to prevent "—*Fumba's case* (supra).

For these reasons, I agree to the order proposed by my brother Fernando.

Appeal dismissed.
Cross-appeal allowed.

1955 *Present :* **Gunasekara J. and Sansoni J.**

ANNAMALAI CHETTIAR, Appellant, *and* B. S. GREASY *et al.*, Respondents

S. C. 348—D. C. Kurunegala, 8,064

Rent Restriction Act, No. 29 of 1948—Section 13—Tender of rent—Landlord's refusal to accept it—Effect of such refusal—"Arrear of rent"—Section 27—"Landlord".

When, in a tenancy to which section 13 of the Rent Restriction Act is applicable, the landlord makes it clear to his tenant that he will not accept further payments of rent there is no obligation on the tenant to tender the rents as and when they fall due. The tenant, however, remains liable to pay the rent when demanded and must bring the arrears into Court when an action in ejectment is instituted by the landlord.

When a person purchases from a landlord rented premises to which the Rent Restriction Act applies he becomes the tenant's " landlord " by virtue of the definition of that term in section 27 of the Act.

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APPEAL from a judgment of the District Court, Kurunegala.

H. W. Tambiah, for the plaintiff appellant.

No appearance for the 1st defendant respondent.

S. Sharvananda, for the 2nd defendant respondent.

Cur. adv. vult.

March 25, 1955. SANSONI J.—

The plaintiff purchased the premises in dispute on 23rd July, 1951, from the former owner who had rented them to the 1st defendant, who had in turn rented a portion of the premises to the 2nd defendant. On 30th August, 1951, the plaintiff through his proctors wrote to the 1st defendant to quit the premises on or before 1st November, 1951, as he required them " for his own business and occupation ". It is quite clear from the evidence that the 1st defendant sent the plaintiff Money Orders in payment of the rent as it fell due for the months of August, September and October, 1951, but the Money Orders were returned by the plaintiff's proctors with their covering letter 1D3 dated 1st November, 1951. The reason given in that letter is that the plaintiff has not accepted the 1st defendant as his tenant and is filing action for ejectment. This action was filed on 2nd November, 1951. The plaint set out only two grounds on which exemption from the statutory bar against ejectment contained in section 13 of the Rent Restriction Act, No. 29 of 1948 was claimed—subletting, and requirement of the premises for the purposes of the plaintiff's trade and business. It is significant, however, that the money claim of Rs. 151·50 was " for use and occupation " of the premises for August, September and October, 1951 and not for arrears of rent; nor was it pleaded that the 1st defendant was the plaintiff's tenant. The 1st defendant in his answer pleaded that the action could not be maintained as the plaintiff had refused to accept him as a tenant and had refused to accept rent when it was tendered.

The action then took a strange turn. On 22nd April, 1953, an amended plaint was filed and certain new averments were made. The plaintiff now pleaded that the premises were required for the purpose of residence by the plaintiff's son ; he also pleaded that rent was in arrear from August 1951 to 31st March, 1953 and accordingly claimed exemption from the provisions of sections 13 of the Rent Restriction Act. No objection appears to have been raised to these amendments nor was an amended answer filed. At least one interesting question that seemed to arise for discussion was therefore not put in issue. I refer to the new ground of non-payment of rent for the period subsequent to the filing of this action. It

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was a ground which was non-existent at the time of institution, yet it was allowed to be brought in by way of amendment as an additional ground on which to claim exemption from the statutory bar already referred to. The learned District Judge held against the plaintiff on all grounds. The only matter that has been seriously pressed in appeal is the non-payment of rent during the period August 1951 to March 1953 : the only defence that can be raised to that, as the pleadings and issues stand, is that payment was rendered unnecessary by the plaintiff's conduct.

Dr. Tambiah urged that the 1st defendant should have tendered the rent as it fell due every month, and that his failure to do so rendered him liable to ejectment on account of the rent being in arrears. He submitted that the refusal to accept rent indicated in the letter 1D3 did not absolve the 1st defendant from the obligation of tendering rent for the subsequent months. I do not agree. I construe the letter 1D3 as an election by the plaintiff not to accept his vendor's tenant as his tenant after he purchased these premises. Now although he was entitled to follow this course and could have sued his vendor's tenant in ejectment under the law as it stood before rent restriction was introduced, the Rent Restriction Act introduced a new creature called a statutory tenant. Under the Act the ejectment of the vendor's tenant is permitted only on one or more of the grounds specified in section 13 of the Act, and the plaintiff became the 1st defendant's " landlord " by virtue of the definition of that term contained in section 27 of the Act. It seems to have been thought, to judge by the letter 1D3, that when the plaintiff purchased these premises he became entitled to treat the 1st defendant as though he were a trespasser and no longer a tenant, but this was a wrong view to take and the plaintiff seems to have realized that when he filed his amended plaint. The letter 1D3 contains what is, to my mind, a repudiation of the 1st defendant's character as a tenant under the plaintiff and this, when coupled with the return of the rent, amounted to an unequivocal intimation by the plaintiff that any payment or tender for subsequent months would also be refused.

Weerasooriya J. in *Vadivel Chetty v. Abdu* [1] and Gratiaen J. in *Sideek v. Sainambu Natchiya* [2] have held that when the landlord has made it clear that he will not accept further payments of rent there is no obligation on the tenant to tender the rents as and when they fall due. The rule has long been established that a party is not required to make a formal tender where it appears that the tender would have been mere form, and that the party to whom it was made would have refused to accept the money : see *Hunter v. Daniel* [3] and the authorities quoted by Gratiaen J. in *Wijeyesekera & Co. v. The Principal Collector of Customs* [4]. They refute the argument of Dr. Tambiah that there can be no waiver of a tender before the time for performance has arrived. The claim for ejectment must therefore fail.

The 1st defendant still remained liable, however, to pay the rent when demanded and he should have brought the arrears into Court when this action was filed. Since he did not object to the amendment of the plaint he should have brought into Court the further arrears claimed

[1] *(1953) 55 N. L. R. 67.*
[2] *(1954) 55 N. L. R. 367.*
[3] *4 Hare 420—67 E. R. 712.*
[4] *(1951) 53 N. L. R. 329.*

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in the amended plaint. His failure to do so also deprives him of the right to claim his costs. While the learned District Judge was right in dismissing the plaintiff's claim for ejectment he erred in dismissing the entire action with costs. He should have given the plaintiff judgment for the arrears of rent up to 30th April, 1953.

I would therefore set aside the decree appealed from and direct that a decree be entered ordering the 1st defendant to pay the plaintiff a sum of Rs. 1,110 being arrears of rent from 1st August, 1951 to 30th April, 1953. The plaintiff and the 1st defendant will bear their own costs throughout, but the plaintiff must pay the 2nd defendant his costs in both Courts.

GUNASEKARA J.—I agree.

Decree varied.

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[Privy Council]

1955 *Present :* **Lord Oaksey, Lord Tucker, Lord Keith of Avonholm, Lord Somervell of Harrow and Mr. L. M. D. de Silva**

T. A. K. DE SILVA, Appellant, *and* HIRDRAMANI LTD., Respondent

Privy Council Appeal No. 39 of 1954

S. C. 94—D. C. Colombo, 21,772 M

Contract—Novation—Delegation.

The names given to different kinds of novation in Roman-Dutch law introduce no principle which would not equally operate in similar circumstances under the law of contract in England.

S (the plaintiff appellant) had for several years been employed as leadin jeweller in a business owned by P. There was also employed in the business S's brother-in-law, W, whom S had earlier introduced into the business. In 1944, S decided to retire from his employment and an agreement was entered into on January 29, 1944, between P, S and W the effect of which was to give S a conditional annuity of Rs. 150 a month during his life and to put W into his place as leading jewellery maker also on certain conditions. The agreement which was duly signed by all the contracting parties expressly provided, *inter alia*, that (1) towards the payment of the aforesaid monthly sum of Rs. 150 by P to S, W should contribute a sum of Rs. 75 monthly from his remuneration, (2) in the event of W dying or being dismissed from service the payment to S of the " said sum of Rs. 150 shall immediately cease anything herein contained to the contrary notwithstanding ". S thereafter received the sum of Rs. 150 monthly in terms of the agreement.

On June 27, 1946, a private limited company (the defendant respondent) was formed, with P as managing director and chairman of the Board of Directors. It was not in dispute that this company took over the business that had been owned by P. When the company took over the business, W ceased to be in P's employment and became an employee of the company. In July, 1946, soon after the Company was formed, S spoke to P, who then, as managing director of the Company, undertook to make the payments due to S under the agreement. Following on this undertaking, S continued to receive his monthly payments of Rs. 150 which were made by Company cheques, occasionally sent to him under covering letters from the Company.

P died on March 23, 1948. The Company then took the view that there was no longer any liability on it to make payments to S under the agreement of January 29, 1944. S thereupon instituted the present action claiming from the Company payment of Rs. 150 per month.

Held, that, irrespective of any condition with regard to W's employment, a completely new form of contract was made between the Company and the appellant (S) when the Company undertook to pay the appellant for his life an annuity of Rs. 150 per month. Such a contract might be regarded as a mixture of novation and delegation.

2—J. N. B 45709-1,592 (7/55)

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APPEAL from a judgment of the Supreme Court reported in *55 N. L. R. 294.*

L. G. Weeramantry, with *Biden Ashbrooke*, for the plaintiff appellant.

Stephen Chapman, for the defendant respondent.

Cur. adv. vult.

May 9, 1955. [*Delivered by* LORD KEITH OF AVONHOLM]—

This is an appeal from a judgment of the Supreme Court of Ceylon reversing a judgment of the District Court of Colombo in favour of the appellant and dismissing his action.

The facts of the case can be briefly stated.

The appellant had for some 11 years been employed as leading jeweller in a business known as Hirdramani which in 1944 was owned by one Parmanand Tourmal. There was also employed in the business the appellant's brother-in-law, Wijeratne, whom the appellant had earlier introduced into the business.

In 1944 the appellant decided to retire from his employment and an agreement was entered into between Parmanand, the appellant and Wijeratne the effect of which was to give the appellant a conditional annuity of Rs. 150 a month during his life and to put Wijeratne into his place as leading jewellery maker also on certain conditions. The agreement which was duly signed by all the contracting parties and witnessed was in the following terms :—

"This Agreement made and entered into between Parmanand Tourmal carrying on business at No. 65/69, Chatham Street, Colombo, under the name and style of Hirdramani hereinafter referred to as 'Mr. Parmanand' (which term as herein used shall mean and include the said Parmanand Tourmal his heirs, executors and administrators) of the one part and Thenuwera Acharige Karnolis de Silva of Ambalangoda (hereinafter referred to as 'Silva') and Alahendrage Acharige Charles Perera Wijeratne of Kalutara (hereinafter referred to as 'Wijeratne') of the other part.

Whereas the said Silva and Wijeratne have for some time past been employed under Mr. Parmanand as leading jewellery maker and Assistant respectively.

And whereas Silva has agreed with Mr. Parmanand to retire from service as leading jewellery maker in the firm of Hirdramani and has requested Mr. Parmanand to employ Wijeratne as his leading jewellery maker which Mr. Parmanand has agreed to do subject to the terms and conditions hereinafter set forth.

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Now this Agreement witnesseth and it is hereby mutually covenanted and agreed between the parties hereto as follows :—

(*a*) The said Silva shall retire as leading jewellery maker in the firm of Hirdramani as from the first day of February One thousand nine hundred and forty-four and shall in consideration of the sum of Rupees Four hundred and seventy-five (Rs. 475) being the purchase price, deliver to Mr. Parmanand all machines, tools and other implements that are now at Hirdramani and owned by Silva.

(*b*) The said Wijeratne shall as from the 1st day of February One thousand nine hundred and fourty-four serve under Mr. Parmanand as leading jewellery maker on such remuneration as may be agreed upon from time to time and shall devote his whole time and attention to such work and shall not work for any other person or firm whomsoever without the consent first had and obtained from Mr. Parmanand.

(*c*) In consideration of the services rendered as aforesaid by Silva and as long as Wijeratne is employed under Mr. Parmanand he Mr. Parmanand shall as from 1st February One thousand nine hundred and forty-four pay to Silva monthly at the end of each and every month a sum of Rupees One hundred and fifty (Rs. 150) during the life time of Silva.

(*d*) Towards the payment of the aforesaid monthly sum of Rupees One hundred and fifty (Rs. 150) by Mr. Parmanand he the said Wijeratne shall contribute a sum of Rupees seventy-five (Rs. 75) monthly from his remuneration.

(*e*) The said Silva shall be at absolute liberty to undertake orders and carry on his usual business of jewellery maker.

(*f*) In the event of the said Wijeratne dying or being dismissed from service or being incapacitated by illness or otherwise or leaving the service of Hirdramani at any time or in the event of the death of Silva then the payment to Silva of the said sum of Rupees One hundred and fifty (Rs. 150) shall immediately cease anything herein contained to the contrary notwithstanding.

(*g*) In the event of the said Wijeratne proving at any time hereafter in the opinion of Mr. Parmanand incompetent, insubordinate, negligent or dishonest then it shall be lawful for Mr. Parmanand to dismiss Wijeratne immediately and in that event this Agreement shall cease and be of no avail.

(*h*) In addition to any other remuneration that Mr. Parmanand shall pay to Wijeratne for his service as leading jewellery maker and as long as the said Wijeratne shall serve Mr. Parmanand he Mr. Parmanand shall pay to Wijeratne monthly at the end of each and every month as from 1st February One thousand nine hundred and forty-four the sum of Rupees Fifty (Rs. 50) as salary.

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In witness whereof the said Parmanand Tourmal, the said Thenuwera Acharige Karnolis de Silva and the said Alahendrage Acharige Charlis Perera Wijeratne do set their respective hands hereunto at Colombo on this twenty-ninth day of January One thousand nine hundred and forty-four."

The appellant left the service of Hirdramani on the 1st February, 1944, and Wijeratne took the appellant's place in the business. The appellant thereafter received the sum of Rs. 150 monthly in terms of the agreement.

On the 27th June, 1946, the private limited company of Hirdramani Limited (the defendant in this action) was formed, with Parmanand as managing director and chairman of the Board of Directors. He and various relatives were also appointed by the Articles of Association first directors and life directors of the company and were allotted shares in the issued and subscribed capital of the company. It is not in dispute that the company took over the business of Hirdramani.

The appellant came to know that the business had been converted into a limited company and in or about July, 1946, he spoke to Parmanand. His evidence (the only evidence in the case) in this matter is contained of the following passages. In examination-in-chief he said :—

"After I came to know that the business had been converted into a limited liability Company I spoke to Mr. Tourmal. I spoke to him about the payments that were being made to me. I asked him whether there would be any change in the payments made to me according to the agreement after the business was incorporated into a limited liability Company. He said he was the Managing Director and Chairman of the Board of Directors, and that there would be no change, and that the Company would pay. The Company continued to pay me according to the agreement. Wijeratne continued to work in Hirdramani Ltd. He is working there up to date. I spoke to Mr. Tourmal about my payments on the agreement in June or July, 1946. By that time Mr. Tourmal was the Managing Director of the Defendant-Company."

In cross-examination he said :—

"After the Company was formed I spoke to Mr. Tourmal. He said that he was the Managing Director of the Defendant-Company and that there would not be any change in regard to the payment on the agreement, and that he would continue to pay me. That was a very important matter so far as I was concerned. I had no misgivings in my mind that he would continue to pay me."

Later in cross-examination with reference to a passage in a letter which he wrote on the 28th June, 1948, he was asked :—

"You stated there 'I feel that the Company or in the alternative the estate of the late Mr. Parmanand Tourmal is liable to pay me the said amount throughout my life'. Why did you say that ?

A. I expected either the Company or the estate of Mr. Parmanand to pay me according to the agreement, because Mr. Parmanand had told me so.

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To Court:

Q. What did Mr. Tourmal tell you ?

A. He said the Company would continue to pay."

Following on this meeting with Parmanand the appellant continued to receive his monthly payments of Rs. 150 which were made by company cheques, occasionally sent to him with covering letters from the company.

Parmanand died on the 23rd March, 1948. The company then took the view that there was no longer any liability on anyone to make payments to the appellant under the agreement but was prepared to continue to do so, on an *ex gratia* basis, and accordingly sent to the appellant two letters dated the 9th and 30th April, 1948, respectively :—

The first was in the following terms :—

"Dear Sir,

We enclose herewith a cheque for Rs. 150 being the amount paid to you monthly by the late Mr. T. Parmanand.

As you are aware of Mr. Parmanand died recently and before his death our Company was formed.

We are therefore continuing this payment without any obligation or binding on our part.

Please acknowledge receipt.

Yours faithfully,
Hirdramani, Ltd."

The second was as follows :—

"Dear Sir,

By our letter of 9th inst., we informed you the condition subject to which we will be paying you your monthly payment and you have doubtless accepted the payment subject to that condition.

We are enclosing herewith cheque for Rs. 150 being April payment and shall be glad if you will acknowledge receipt.

Please note that all future payments will be subject to that condition.

Yours faithfully,
Hirdramani, Ltd."

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The appellant did not at this time reply to these letters but after receiving the second letter he called on Parmanand's son, Bagawandas, who was one of the directors of the company. In his evidence the appellant says he told Bagawandas that according to the agreement the payment could not be stopped and that he was trying to do an injustice to him by including a condition in the letter in regard to future payments and that he, the appellant, expected to receive payment. Bagawandas told him that the company was not bound to pay.

Thereafter the company sent the appellant a further cheque along with the following letter dated the 31st May, 1948 :

" Dear Sir,

Enclosed please find cheque No. T. 174596 on Chartered Bank for Rs. 150 drawn in your favour subject to the condition mentioned in our previous letter and which you have accepted.

Please acknowledge receipt.

Yours faithfully,
Hirdramani, Ltd. "

To this the appellant replied by the following letter dated the 28th June, 1948 :

" AGREEMENT DATED 29–1–44, BETWEEN THE LATE MR. PARMANAND TOURMAL AND K. DE SILVA.

Sirs,

I am in receipt of your letters, dated 9–4–48, 30–4–48, and 31–5–48, enclosing cheques due to me and thank you for same.

However, I find it difficult to understand why you state that these payments are being made without any obligation or binding on your part and I shall be glad if you will explain your position clearly for my future guidance.

I have not in anyway accepted this position of yours although you state that I have done so.

I feel that the company or in the alternative the estate of the late Mr. Parmanand Tourmal is liable to continue the payment of the said sum throughout my life.

Yours faithfully,
T. A. K. de Silva. "

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This correspondence is concluded by a letter from the company to the appellant dated the 29th June, 1948, re-affirming its position and stating that " the agreement is now at an end ". No payment has been made to the appellant since May, 1948.

In September, 1949, the appellant began the present suit claiming Rs. 2,250 arrears of payment from June, 1948, to September, 1949, and payment of Rs. 150 per month from September onwards.

The learned District Judge (K. D. de Silva, A.D.J.) in an able and careful judgment found for the appellant. On appeal the Supreme Court set aside his judgment and dismissed the appellant's action with costs.

The crucial question for consideration is what happened to the agreement when the business of Hirdramani was turned into a limited company ? The District Judge has found that at the meetings between the appellant and Parmanand in July, 1946, " Parmanand as managing director of the defendant-company undertook to make the payments due to the plaintiff under the agreement " and answered affirmatively the relevant issue on this point, " Did the defendant-company undertake to pay the plaintiff the sum of Rs. 150 per month mentioned in the said agreement ? ". As their Lordships read the opinion of Gratiaen J., in the Supreme Court, concurred in by Gunasekara J., the other member of the Court, the Supreme Court has also accepted this finding. It is not their Lordships' practice to upset concurrent findings in fact of two courts, but their Lordships would observe that the evidence already quoted amply supports the findings so made.

The real controversy is as to what the effect of this undertaking was on the rights of the appellant under the agreement. Both Courts below treated the matter as falling to be determined on an application of the doctrine of novation under Roman-Dutch law. Their Lordships were referred to two species of novation recognised under the Roman-Dutch system. One is novation properly so called by which the obligations under an agreement are altered, the new obligations being substituted for the old while the parties remain the same. Another is known as delegation, by which the obligations remain the same but a new debtor is substituted for the original debtor, with the consent of both and of the creditor, the original debtor being discharged of his obligation. The terms of the agreement thus remain the same, but the parties are altered. Other species of novation are recognised under Roman-Dutch law but need not for the purposes of this case be considered. In the present case the Supreme Court considered the form of novation relied on to be " a transaction described by the Roman-Dutch jurists as delegation ".

The principle of novation in contract is not foreign to English law. As was pointed out in *Scarf v. Jardine* (1882) 7 App. Cas. 345 it frequently operates on a change of partnership where the new partners take over the obligations of the old partners with the consent of the creditors. But Lord Selborne, L.C. recognised also that novation might include a new contract substituted for the original contract between the same parties

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(p. 351). The names given to different kinds of novation in Roman-Dutch law and in other systems of law drawing on the civil law are a convenient means of classifying different kinds of transaction but, as their Lordships apprehend, introduce no principle which would not equally operate in similar circumstances under the law of contract in England.

The agreement here was a tripartite agreement. But the contractual relationships set up were between Parmanand and the appellant on the one hand and Wijeratne and Parmanand on the other, although the contractual obligation of Parmanand to the appellant might be conditioned in certain circumstances by what happened within the contractual relationship existing between Parmanand and Wijeratne. When, therefore, on the formation of the company, the company took over Parmanand's obligation to the appellant the immediate result was to substitute the company for Parmanand as the appellant's debtor and to release Parmanand from his obligation for, on their Lordships' view of the effect of the evidence, it must be assumed that the appellant was a consenting party to this transaction. It is to be observed, however, that one of the conditions of Parmanand's liability to the appellant under the original agreement was that Wijeratne should be in his employment. When the company took over the business of Hirdramani, Wijeratne ceased to be in Parmanand's employment and became an employee of the company. It is upon this fact that the defence to this case and the judgment of the Supreme Court are based.

Their Lordships would here observe that if the defence is well founded the undertaking given by the company to the appellant had no meaning at all, for at that time Wijeratne was in fact no longer employed by Parmanand and was employed by the company. None the less the company as from the date of the undertaking made payment to the appellant without condition or qualification for some two years until the death of Parmanand. Their Lordships are quite unable to hold in these circumstances and taking the evidence as a whole that some form of new contract was not made on the formation of the company whereby the company became bound to the appellant. In certain eventualities it might be necessary to determine what the precise terms of this new contract were but, in their Lordships' opinion, on any view of the contract the company is bound, as matters at present stand, to fulfil the obligation undertaken by them to pay the appellant Rs. 150 a month.

Two possible views, in their Lordships' opinion, are alone tenable on the evidence. One is that a completely new form of contract was made by which the company undertook to pay the appellant for his life an annuity of Rs. 150 per month, irrespective of any condition with regard to Wijeratne's employment. This it may be observed would not be novation proper according to Roman Dutch law, because there would be a change of debtor, as well as a change in the terms of the obligation. Nor would it be delegation, because there would be a change of the terms of the contract, as well as a change of debtor. It might be regarded as a mixture of novation and delegation, and in principle their Lordships see no reason why this could not be so.

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The other view is that the company was substituted for Parmanand at all points of the agreement, so that not only did the company become the debtor of the appellant for the payment of Rs. 150 per month, but also became the employer of Wijeratne, with the benefit of all the rights and subject to all the obligations previously existing between Parmanand and Wijeratne under the agreement and with the right to terminate the payment to the appellant on Wijeratne's ceasing to be in the company's employment for a reason contemplated in the agreement. This would be difficult to bring under any single category of novation in Roman-Dutch law. It would be novation of a somewhat composite character. But again there is no reason in principle why such a new arrangement could not be made with the consent of all the parties.

Prima facie the facts of the case so far as brought out by the evidence suggest that the latter was the true view of the arrangement come to on the formation of the company. The evidence that Parmanand said there would be no change made to the appellant according to the agreement and that the company would pay may be thought to support that view. Wijeratne also in fact became an employee of the company and is still employed by the company. But there is no evidence of Wijeratne or of the company as to what are the contractual relations between them and in the absence of such evidence it would be improper to make any assumption in this matter. Their Lordships, however, see no escape from the view that in fact and in law the company took over Parmanand's obligation to the appellant. Their Lordships are unable to hold that this obligation was subject to a condition which was impossible of fulfilment at the time of the novation, namely that Wijeratne should continue in the employment of Parmanand. If it was subject to any other condition, or conditions, it was for the company to prove this by evidence.

The learned District Judge said that it was necessary to consider whether the other party to the agreement, namely Wijeratne, was a consenting party to the novation and held that in the absence of evidence to the contrary it was legitimate to presume that he was. This may well have been so but as already observed it is not, in their Lordships' view, necessary so to find. Wijeratne's obligation to pay half of the monthly payment to Parmanand was a separate obligation from Parmanand's obligation to make the monthly payment to the appellant and there was no interdependence between the two obligations. The appellant could not have sued Wijeratne for half the annuity and Wijeratne's failure to pay his share would not have excused Parmanand from paying the full annuity to the appellant. Wijeratne's position on the formation of the company was a matter for agreement between Wijeratne, Parmanand and the company with which strictly the appellant had no concern, except in so far as it affected the receipt of his monthly payment.

The ground of judgment of the Supreme Court would seem to be contained in the following passage in the opinion of Gratiaen, J. :—

> " The plaintiff could not succeed by pleading and proving that the Company had undertaken only the original obligation of Parmanand

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Tourmal under the agreement dated 29th January, 1944, for even upon an interpretation most favourable to the plaintiff, that particular obligation was no longer subsisting after the date of Parmanand Tourmal's death. Indeed, the action could not be maintained except upon the basis of a fresh contract whereby the Company undertook an obligation not measured by the limits of Parmanand Tourmal's extinguished liability but continuing *for a period of time extending far beyond that which had been contemplated in the terms of the original contract*, namely, so long as Wijeratne served 'Hirdramani Limited' as its 'leading jeweller'. No such contract has been pleaded or proved by the plaintiff."

The words emphasised in italics are so emphasised by the learned judge, not by their Lordships' Board.

As their Lordships understand this passage the learned judge is intending to convey that, as the original obligation of Parmanand, or his heirs, executors and administrators, under the agreement was confined to the period during which Wijeratne served him or his heirs, &c., the company's obligation could not be extended beyond that period, for Wijeratne had ceased to serve Parmanand and was now in the service of the company. But that event happened when the company was formed and their Lordships do not appreciate the significance of looking at things as at the date of Parmanand's death. By that time the company had assumed the liability and there is nothing to suggest that it was limited to the period of Parmanand's life. If on the other hand Gratiaen, J., means that all liability ceased on the formation of the company and the transfer of Wijeratne's services to it, that, as has already been pointed out, gives no meaning to the evidence that the company would take over Parmanand's liability and that there would be no change in the payments.

Some importance was attached by Gratiaen, J., to the correspondence already quoted that took place between the company and the appellant after Parmanand's death. The learned judge appears, however, to have omitted to notice the evidence of the meeting of the appellant with Bagawandas when the appellant protested against the attitude taken up by the company. But in any event what the company wrote after Parmanand's death could not affect a liability which had already been accepted by the company during his life.

An argument was addressed to their Lordships for the appellant, based on the doctrine of estoppel, but, in their Lordships' view, there are no circumstances in this case which call for any consideration of that doctrine.

For the reasons given their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment of the Supreme Court be set aside with costs and the judgment of the District Court be restored. The respondent must pay the costs of this appeal.

Appeal allowed.

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1955 *Present :* **Gratiaen J. and Gunasekara J.**

R. S. FERNANDO *et al.*, Appellants, *and* K. PODI NONA *et al.*, Respondents

S. C. (Inty.) 124—D. C. Colombo, 5,140/P

Co-owners—Prescription—Adverse possession—Distinction between possession by a co-owner and possession by a stranger.

Where a stranger enters into possession of a divided allotment of land claiming to be sole owner, although his vendor in fact had legal title only to a share, *Corea v. Appuhamy* (1911) 15 N. L. R. 65 has no application unless his occupation of the whole was reasonably capable of being understood by the other co-owners as consistent with an acknowledgment of their title.

C, who was entitled to only an undivided 1/10 share of a land, entered into a notarial agreement with a stranger, M. By this agreement, C, purporting to be sole owner, employed M to cultivate the entire land as planter for a period of six years expiring on August 21, 1877, after which C undertook to separate a half of the land and the new plantations and to grant the same (i.e., the soil as well as the plantations) to M. M carried out his part of the agreement, but C did not apparently execute a formal conveyance of any part of the common land to M in implementation of his contractual obligation. Nevertheless, the land was in fact divided up into two allotments, Nos. 1 and 2, and lot 2 and the plantations standing on it were openly and exclusively occupied *ut dominus* by M and his heirs after the expiry of the six-year period.

Held, that M and his heirs acquired prescriptive title to the entirety of lot 2, although its area far exceeded the extent which C had legal title to convey to a stranger.

APPEAL from an order of the District Court, Colombo.

F. R. Dias, with *H. L. de Silva*, for the 30th, 31st and 32nd defendants appellants.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke*, for the plaintiffs respondents.

Cur. adv. vult.

May 19, 1955. GRATIAEN J.—

The plaintiff in this case was granted an interlocutory decree for the partition of two contiguous allotments of land marked A and B in the plan No. 4148 filed of record. The surveyor reported that Lot B was in the possession of the 8th defendant and of the appellants who were accordingly added as parties to the action. They claimed no interests in lot A, but asked that Lot B should be excluded from the partition for reasons which I shall later explain.

Lots A and B had originally formed part of a single land, a little over three acres in extent, belonging to two brothers named Nandochchi and Samichchi in equal shares. In due course Nandochchi's share passed by inheritance to his five children one of whom was named Cornis.

On 22nd August, 1871, Cornis, who in fact had legal title to only an undivided 1/10 share, entered into a notarial agreement 30D1 with a stranger called Maththa. By this agreement, Cornis, purporting to be sole owner, employed Maththa to plant the entire land (described as "sufficient to plant 150 coconut trees") in coconuts and other crops.

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Maththa was to cultivate the property as planter for a period of 6 years expiring on 21st August, 1877, after which Cornis undertook " to separate a half of the land and the new plantations and to grant the same (i.e., the soil as well as the plantations) to Maththa ".

Maththa carried out his part of the agreement, but Cornis does not appear, in implementation of his contractual obligation, to have executed a formal conveyance of any part of the common land to Maththa. Nevertheless, the land was in fact divided up into two allotments and lot B (or at least a substantial part of it) and the plantations standing on it were exclusively occupied by Maththa after the expiry of the 6 year period referred to in 30D1. The learned Judge was also satisfied that Maththa, and members of his family after him, " built on this portion and raised other plantations on it ". Nor did Cornis or his co-owners or their respective successors in title exercise proprietary rights over lot B since 1877. It is in these circumstances that the appellants and the 8th defendant, claiming under Maththa, asked for the exclusion of this allotment from the proposed partition.

The learned Judge's decision that both lots A and B, treated as an entity, should be partitioned was based on the following findings :—

(*a*) that Maththa had prescribed only to an undivided 1/20 share of the entire land (i.e. one half of the 1/10 share to which alone Cornis had legal title) ;

(*b*) that, as Maththa occupied lot B under what must be regarded as a derivative title from a co-owner, neither he nor persons claiming under him could prescribe against the other co-owners unless the presumption laid down by the Judicial Committee in *Corea v. Appuhamy* [1] could be rebutted.

With great respect, I think that it is permissible to take a more realistic view of the legal position resulting from the continuous, exclusive occupation of lot B (or at least a defined part of it) by Maththa and his family ever since 1877. In the facts of this case, the same consequence follows whether or not Cornis, in terms of his contractual obligation, had executed a formal conveyance to Maththa of a separated portion of the land and plantations in consideration of services rendered by the latter as planter. In either event, what is significant is that in 1877 Maththa went into possession claiming as of right to enjoy a defined portion of the land *ut dominus*, whereas Cornis and his co-owners were content to exercise proprietary rights over lot A alone.

The *ratio decidendi* of *Corea v. Appuhamy* (supra) is that a person *entering as a co-owner* into possession of the common property cannot, by merely forming a secret intention which has not been communicated to his other co-owners either by express declarations or by overt action, alter the character of his possession and thereby acquire title to their shares by prescription. This principle is, of course, subject to the rule of common sense that, in appropriate cases, an ouster may be presumed to have taken place at some point of time after the date of entry which was originally not adverse. *Tillekeratne v. Bastian* [2], *Hamidu Lebbe v. Ganitha* [3].

[1] *(1911) 15 N. L. R. 65.* [2] *(1918) 21 N. L. R. 12.*
[3] *(1925) 27 N. L. R. 33.*

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There is, however, no room for the application of presumptions or of counter-presumptions *where a man had from the inception entered into possession of the land unequivocally claiming title to the entirety.* In such a situation, his possession is at every stage adverse to the true owner or to his true co-owners (as the case may be), and in the latter event the other co-owners cannot be heard to say that his possession was merely " in support of their common title ".

If Cornis, pretending to be and believed by Maththa to be the sole owner, had in fact conveyed lot B to him on that basis, the case would have been covered by the decision of Schneider J. and Garvin J. in *Mohamed Marikar v. Kirilanaya* [1]. Similarly, in *Punchi Singho v. Bandara Menika* [2], Jayetileke J., sitting alone, held that where one of the co-owners purports to sell the entire property, and the purchaser enters into possession claiming title to the entirety, prescription begins to run at once. This principle, though acknowledged as correct, was distinguished on the facts by Howard C.J., sitting alone, in *Cooray v. Perera* [3] and subsequently by the present Bench in *Kobbekaduwa v. Seneviratne* [4]. At a later date it was expressly followed by two of the three Judges who decided *Sellappah v. Sinnadurai* [5].

We have not been referred to any decision of this Court where the rule laid down in *Mohamed Marikar v. Kirilanaya* (supra) and *Punchi Singho v. Bandara Menika* (supra) has been expressly dissented from.

After we reserved judgment, Sansoni J. has referred me to certain decisions of the Indian Courts where a stranger purporting to have purchased the entire land from a person who was in fact only a co-owner, has been held to hold adversely against the other co-owners for purposes of prescription. In *Bhavrao v. Rakhmin* [6] the Full Court of the Bombay High Court took the view that prescription would run in favour of the purchaser as soon as he entered into exclusive possession of the property if he did so claiming to be the sole owner. " Adverse possession ", the judgment points out, " depends upon the claim or title under which the possessor holds and not upon a consideration of the question in whom the true ownership is vested ". The distinction between the possession of the entire land by a co-owner on the one hand and of a stranger who has purported to purchase the entire land is also emphasised in *Palania Pillai v. Rowther* [7]. " While the possession of one co-owner " said Chief Justice Leach, " is in itself rightful, the position is different when a stranger is in possession. *The possession of a stranger in itself indicates that his possession is adverse to the true owners* ".

These observations are in accord with certain passages in *Angell on Limitations* (6th ed.) mentioned by Jayetileke J. in *Punchi Singho v. Bandara Menika* (supra). The text book refers at page 443 to a judgment of Mr. Justice Story in an American case where the defendant, a stranger, had a deed of the whole estate but his legal title was valid only as to an undivided 1/4 in common with others ; but he made an actual entry into

[1] *(1923) 1 T. C. L. R. 158.*
[2] *(1942) 43 N. L. R. 547.*
[3] *(1944) 45 N. L. R. 455.*
[4] *(1951) 53 N. L. R. 354.*
[5] *(1951) 53 N. L. R. 121.*
[6] *I. L. R. 23 Bom. 137.*
[7] *(1942) 55 Madras L. W. 532.*

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the whole land, and claimed the whole in fee, that is to say, he entered as sole owner and his possession was openly and notoriously adverse to the true owners of the balance 3/4 share. Story J. held that the date of his entry claiming to be sole owner was a good starting point for prescription. "Acts, if done by a stranger, would *per se* be a disseisin, whereas acts if done by a co-owner are susceptible of an explanation consistently with the real title".

The true test now becomes clear. Where a stranger enters into possession of a divided allotment of property, claiming to be sole owner, although his vendor in fact had legal title only to a share, *Corea v. Appuhamy* (supra) has no application unless his occupation of the whole was reasonably capable of being understood by the other co-owners as consistent with an acknowledgment of their title. In the present case, the conduct of Maththa and his successors in title was quite unequivocal, and must have clearly indicated that he claimed lot B (or at least the defined portion of it exclusively occupied by him) as sole owner adversely to Cornis and all others. The area of lot B far exceeded the extent which Cornis had legal title to convey to a stranger, and it is not unreasonable to assume that he entered into the planting agreement as agent for all the co-owners. In the result, Maththa and his heirs have long since acquired prescriptive title to the entirety of the divided allotment.

I have so far assumed that Cornis had in fact granted a conveyance (which cannot now be traced) of a larger interest in the land than he himself enjoyed. If, on the other hand, Maththa had entered into occupation of the divided allotment relying on the rights promised him under the planter's agreement but without an actual conveyance, his possession would have been equally adverse to the co-owners. *Theivanapillai v. Arumugam* [1] and *Silva v. Lechiman Chetty* [2].

For these reasons, I would set aside the judgment under appeal and hold that the interlocutory decree for partition must be confined to so much of the land as was not occupied by Maththa and his successors-in-interest. The learned District Judge has not given a definite finding as to whether this portion takes in the whole of lot B or only a defined part of it. I would therefore send the record back with a direction that this issue should be decided and that an interlocutory decree must then be entered for the partition of the rest of the land depicted in plan No. 4148 among the co-owners claiming title in accordance with the pedigree proved by the plaintiff.

The appellants are entitled to the costs of this appeal and of the contest in the lower Court. The costs of the further inquiry which we now direct will be costs in the cause, and the other costs must be borne *pro rata* among the co-owners of lot A and of any portion of lot B which may be included in the ultimate partition.

GUNASEKARA J.—I agree.

Appeal allowed.

[1] *(1912) 15 N. L. R. 358.* [2] *(1923) 23 N. L. R. 372.*

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1954 *Present :* **Pulle J. and Fernando A.J.**

M. GANAPATHY, Appellant, *and* M. RAMASAMY, Respondent

S. C. 105—D. C. Colombo, 19,035

Postponement—Conflict of medical certificates—Proper assessment.

Where a medical certificate which was submitted on behalf of the plaintiff in support of an application for a postponement of the hearing of evidence was in conflict with the report of the medical practitioner who examined him on the next day on a commission issued by Court at the instance of the defendant—

Held, that the medical certificate should not be rejected unless it could be said that the medical practitioner who issued it and the plaintiff had conspired to conceal the true facts.

APPEAL from an order of the District Court, Colombo.

N. E. Weerasooria, Q.C., with *H. W. Jayewardene, Q.C.*, and *D. R. P. Goonetilleke*, for the plaintiff appellant.

C. Thiagalingam, Q.C., with *V. Arulambalam*, for the defendan respondent.

Cur. adv. vult.

December 15, 1954. PULLE J.—

The order from which this appeal is taken arises out of an application made by the plaintiff's counsel on the 18th December, 1952, for a postponement of the hearing fixed for that date on the ground of plaintiff's illness. The application was supported by a medical certificate dated the 17th December, which reads :

" This is to certify that Mr. M. Ganapathy is under my treatment for influenza with a temperature of 100 degrees and chest pain. He is confined to bed and unfit to move about. "

The certificate was challenged by defendant's counsel apparently on the ground that the statements therein were untrue and he obtained a commission on Dr. Cyril Fernando to have the plaintiff examined the same day. Dr. Fernando examined him on the 18th December at 12.45 p.m., and reported that his temperature was 98·2, pulse 84, and lungs and throat clear. In his opinion the plaintiff was not suffering from influenza and was fit to attend court. The case was called on the 19th December when defendant's counsel moved that it be fixed for trial *ex-parte*. This was resisted on two grounds, first, that an enquiry should be held on the medical reports and, secondly, that in any event the trial should proceed *inter partes*. The learned District Judge fixed the whole matter for

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enquiry on the 9th March, 1953, and after hearing evidence he came to the finding that the plaintiff was fit to attend court on the 18th December and to continue his evidence and that his absence was without sufficient cause and made order that the case be set down for trial but that both on the plaintiff's claim and the defendant's claim in reconvention the plaintiff would not be entitled to be heard. The plaintiff appeals from this order.

The only evidence there is of the condition of the plaintiff on the night of 17th December is that of Dr. S. Chinniah. He was sent for to the house of the plaintiff on the 17th at about 7.30 p.m., and found him with a temperature of 100 degrees. The plaintiff complained of severe chest pain and pains all over the body. He prescribed a mixture, a powder and an ointment for the pain. The circumstances in which he gave to the plaintiff the certificate quoted earlier are spoken to by him as follows :

> " Plaintiff told me that he had a case and that he had to attend court the next day. I told him that, as he had a chest pain, it was better for him to be in bed and take the necessary medicine. He wanted a certificate and I gave him a certificate stating the condition that he was in at the time. "

It is relevant at this stage to mention that the plaintiff claimed a sum of Rs. 26,012 and the defendant counter-claimed Rs. 35,002. The trial commenced with the evidence of the plaintiff on 23rd July, 1952, and was continued on 24th July, 13th and 14th October and 15th December, 1952. On the last mentioned date further hearing was put off for the 18th and 19th December, 1952. The cross-examination of the plaintiff commenced on 23rd July and was to be resumed on 18th December so that on five different dates he had appeared and submitted himself for cross-examination. I think there is considerable force in the contention that it was unlikely that the plaintiff having contested the case thus far would have taken the risk of forfeiting his claim and of having judgment entered against him on the counter-claim by simulating illness to avoid an appearance on the 18th December.

The District Judge has accepted the evidence of Dr. Chinniah that the plaintiff was not sufficiently well on the night of 17th December to leave his bed and that he had fever and pain : in other words, that the certificate was factually true.

It is in evidence that Dr. Chinniah again examined the plaintiff at about 10.30 a.m. on the 18th December and found that his temperature had returned to normal. He complained of pain in the leg and said that he could not go to court and " was sending the certificate ". Dr. Chinniah was satisfied that he was not in a fit condition to go to court and I have no reason to doubt that the plaintiff acted on the opinion of his medical adviser. If in fact that opinion was not well founded one can yet understand a medical adviser erring on the side of caution in telling his patient to lie up in bed some fifteen hours after he had found him suffering from influenza.

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The opinion of Dr. Fernando which has been accepted, and rightly, by the Judge is that the plaintiff's condition at about 10.30 a.m. on the 18th December, which was the time of the second examination by Dr. Chinniah, would have been much the same in which he found him at 12.45 p.m. Now accepting the entirety of Dr. Fernando's evidence can it be said that the plaintiff's absence was without sufficient cause ?

It is definitely established that on the night of the 17th December the plaintiff was suffering from influenza. Assuming that Dr. Chinniah on the morning of the 18th December formed erroneously the opinion that the plaintiff was not fit to attend court it appears to me that the plaintiff acted reasonably in accepting the advice of a medical practitioner who had commenced to treat him only the night before for an illness which may recur, unless the patient lies up in bed for two or three days.

After describing the condition of the plaintiff as found by Dr. Chinniah on the 18th morning the learned Judge says in his order :

> " But that, even on Dr. Chinniah's evidence, was all that was wrong with him on the 18th morning. Why Dr. Chinniah says that even at that time he was satisfied the plaintiff was not in a fit condition to go to court I am at a loss to understand. As regards the pain, of course, he could have only gone on what the plaintiff told him. But when the plaintiff told him that he was sending the certificate granted on the 17th to the court I think Dr. Chinniah should have objected to such a course. "

Dr. Chinniah may have made an incorrect assessment on the 18th morning of plaintiff's fitness to attend court immediately on the day following the onset of influenza but should the fact that the plaintiff acted on medical advice expose him to all the consequences, almost penal, of the claim made by him and that made against him being adjudicated upon without his being heard ? I do not think so. The purpose for which Dr. Chinniah made out his certificate on the 17th was undoubtedly to excuse plaintiff's absence on the 18th. If he believed on the 18th that the plaintiff was not in a fit condition to appear on that day, the propriety or otherwise of the use to which the certificate would have been put could hardly have occurred to him. I may even be permitted to add, with all respect, that in the circumstances Dr. Chinniah need not have objected to the certificate being produced when the plaintiff said that he was " sending " it. Besides, it is highly probable that at the time he examined the plaintiff (i.e., 10.30 a.m. on the 18th) the certificate was already in the hands of counsel with hardly any time to countermand it.

It is no doubt true that the condition of the plaintiff described in the certificate did not accord with the facts as they existed on the 18th but can the application be aptly described in the words of the learned Judge " as a deliberate attempt by the suppression of the true facts, which it was essential that the court should have been apprised of, to have the trial delayed " ? Unless it could be said that Dr. Chinniah and the plaintiff had conspired on the 18th morning to conceal the true state of affairs,

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I think that a charge of deliberate suppression cannot be made out on the evidence.

For the reasons which I have stated I am of the opinion that the plaintiff had sufficient cause to be absent on the 18th. It is, therefore, not necessary to deal with the further submissions on behalf of the plaintiff that even if the finding of fact is accepted as correct the order cannot in law be supported.

I would set aside the order appealed from and remit the case for hearing in due course. The plaintiff will pay to the defendant the taxed costs of the 18th and 19th December, 1952, (including the expenses of the commission). Each party will bear his own costs of appeal and the costs of 9th March, 1953.

FERNANDO A.J.—I agree.

Order set aside.

1955 *Present :* **Pulle J. and Weerasooriya J.**

DHARMARATNE, Appellant, *and* FERNANDO, Respondent

S. C. 102—D. C. Kalutara, 29,062M

Prescription Ordinance (Cap. 55)—Sections 6, 7, 8—Goods sold and delivered—Action for purchase price—Promissory note as evidence of unwritten promise—Prescriptive period.

Where a purchaser of goods gave the seller, at the time of delivery of the goods, a promissory note in respect of the balance purchase price due from him, and the seller, in his suit for the balance price, relied on the promissory note as evidence only of an unwritten promise and did not actually base his action on the promissory note—

Held, that, in regard to the issue of prescription, the action was governed by section 8, and not section 7, of the Prescription Ordinance ; the prescriptive period was therefore one year only, and not three years.

APPEAL from a judgment of the District Court, Kalutara.

Vernon Wijetunge, for the defendant appellant.

Cecil de S. Wijeratne, for the plaintiff respondent.

Cur. adv. vult.

March 22, 1955. WEERASOORIYA J.—

The 2nd defendant appeals against the judgment and decree of the District Court of Kalutara ordering him to pay the plaintiff-respondent a sum of Rs. 800 being the balance purchase price of a motor van which was the subject of a sale transaction between the two parties.

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The plaintiff-respondent brought this action against the 1st and 2nd defendants alleging in the plaint, which was filed on the 24th April, 1952, that they had jointly purchased the van from him on the 3rd September, 1949, for Rs. 1,800 of which a sum of Rs. 1,000 was paid to the plaintiff on the same day at the time of delivery of the van to the purchasers who promised to pay the balance Rs. 800 within a month from that date and also gave " a writing ". According to the evidence adduced this " writing " is the promissory note P1 by which the 2nd defendant alone promised to pay the plaintiff the sum of Rs. 800 on demand. After trial the learned District Judge dismissed the action against the 1st defendant, holding that the van had been purchased only by the 2nd defendant against whom he gave judgment.

The sole question for decision in this appeal is whether at the date of the filing of the plaint the action was already prescribed under s. 8 of the Prescription Ordinance, which according to the appellant is the section of the Ordinance applicable to this case.

It is common ground that the promissory note P1 relates to the Rs. 800 which is the subject of the present claim. It was conceded, however, by learned counsel for the plaintiff at the hearing of the appeal that the action is not based on it but is based on the alleged liability of the 2nd defendant (and also of the 1st defendant) in terms of the unwritten promise to pay the Rs. 800 (being the balance purchase price) within a month of the date of sale. That the plaintiff came into Court on this basis cannot be doubted, having regard to the terms of paragraph 4 of the plaint as well as issue No. 3. The plaintiff's contention is that notwithstanding that the claim is in respect of goods sold and delivered, in view of this unwritten promise the question of the maintainability of the action is governed by s. 7 and not by s. 8 of the Prescription Ordinance. In upholding this contention the learned District Judge observed that an agreement with some degree of formality (whatever that may mean) was in the contemplation of the parties. Possibly he had in mind the *dictum* of de Sampayo J. in *Walker, Sons & Co. Ltd., v. Kandyah* [1] that the term " written contract " in s. 6 of the Prescription Ordinance seemingly refers to a contract entered into with a certain degree of formality and he therefore thought that the term " unwritten contract " in s. 7 must be given a corresponding meaning.

In addition to the above case, several decisions of this Court were cited to us as having a bearing on the point involved in this appeal. Most of those decisions were discussed in *Assen Cutty v. Brooke Bond, Ltd.* [2] which, it appears to me, furnishes the answer to this point. That case is a decision of a bench of two Judges, and it dealt *inter alia* with a claim for the recovery of damages on a breach of warranty as to the quality of certain goods sold and delivered on an unwritten contract, and the contention raised was whether the transaction was governed by s. 7 or s. 8 of the Prescription Ordinance. Macdonell C.J. took the view (at page 178) that in a case of sale of goods the present section 8 refers only to the unwritten contract for which an action lies owing to the fact of delivery of the goods and that where the action lies on some other ground as, for example, a breach of warranty in delivering goods not up to sample (as

[1] *(1919) 21 N. L. R. 317 at 319.* [2] *36 N. L. R. 169.*

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in that case) the present s.7 of the Ordinance is the governing section. In taking this view he seems to have adopted the reasoning of Ennis J. in *Campbell & Co. v. Wijesekere* [1], and of Bonser C.J., in *Markar v. Hassen* [2], each of which is also a decision of a bench of two Judges. In the last mentioned case the claim was for the balance purchase money for a steam launch which had been sold and delivered by the plaintiff. The precise point which is raised in the present appeal did not have to be decided in that case, the only contention there being that a steam launch was not "goods" within the meaning of the present s.8 That contention was rejected by Bonser C.J. who in holding that "goods" mean movable property, also expressed himself in the following terms—

> "There is no necessary inconsistency between sections 8 and 9 (now sections 7 and 8 respectively) of the Ordinance. An action for or in respect of goods sold and delivered may be, as in the present case, an action upon an unwritten contract.
>
> I read section 8 as providing that the period of prescription applying to the *actio venditi* in general is to be three years, and section 9 as providing that in the particular case of a sale of movables where there has been a delivery to the buyer of the thing sold the period is to be reduced to one year."

In the separate judgment of Garvin J. in *Assen Cutty v. Brooke Bond, Ltd.* (supra) he came to the same conclusion (at page 190) as Macdonell C.J. but on a different ground, namely that the operation of s.8 must be limited to the recovery of *debts* due in respect of the matters specified therein and that only such actions are excluded from section 7. As pointed out by him in an earlier passage (at page 189) the decision of the Full Bench in *de Silva v. Don Louis* [3] brings within the operation of s.6 (to the exclusion of s. 8) all actions for or in respect of goods sold and delivered based on written contracts, and if that case is also relied on to exclude from the operation of s.8 all actions of a like nature when based on unwritten contracts (a proposition for which that decision does not appear to be an authority and which was dissented from by Garvin J. himself) no effect whatever would be given to section 8.

Even if it be assumed as proved in the present case that at the time of the unwritten contract of sale there was annexed thereto a legally binding agreement (also not in writing) between the seller and the purchaser that the balance sum of Rs. 800 was not payable till after the expiry of a month, the contention of learned counsel for the plaintiff that by reason of that agreement the transaction is governed by s.7 to the exclusion of s.8 of the Prescription Ordinance is one which appears to have been rejected by both the Judges who decided *Assen Cutty v. Brook Bond, Ltd.* (supra). Moreover, the finding of the District Judge that the 2nd defendant agreed to pay the balance sum of Rs. 800 unconditionally is against this contention since that finding denotes that if there was any understanding at all that the 2nd defendant could have a month's time to pay the balance it was purely as an act of grace on the part of the

[1] *(1920) 21 N. L. R. 431 at 435.* [2] *(1896) 2 N. L. R. 218.*
[3] *(1881) 4 S. C. C. 89.*

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plaintiff which had no legal consequences. The promissory note P1 which provides for the payment of Rs. 800 on demand confirms this view.

In my opinion, on the authorities cited, this action must be held to have been prescribed within the period of one year under s. 8 of the Prescription Ordinance. That period had already elapsed at the date of the filing of the plaint.

The judgment and decree ordering the 2nd defendant to pay the sum of Rs. 800 are set aside and the plaintiff's action is dismissed with costs here and in the Court below.

PULLE J.—I agree.

Appeal allowed.

1954 *Present :* **de Silva J.**

M. RAMALINGAM (Office Assistant to the Government Agent, Northern Province), Appellant, *and* THE JAFFNA CENTRAL BUS CO., LTD., Respondent

S. C. 764—M. C. Mallakam, 6,447

Interpretation Ordinance (Cap. 2)—Section 6—Prosecution under a repealed Ordinance—Retrospective effect on it of repealing statute—Motor Car Ordinance, No. 45 of 1938, ss. 29 (1), 150 (1), 158—Motor Traffic Act, No. 14 of 1951, s. 243.

Where an offence is committed in contravention of an Ordinance which is subsequently repealed the prosecution in respect of it may, by virtue of section 6 (3) (*b*) of the Interpretation Ordinance, be instituted even after the repealing statute comes into force, unless the repealing statute expressly prohibits it. Section 6 (3) (*b*) of the Interpretation Ordinance is independent of section 6 (3) (*c*).

The accused was charged on July 3, 1953, with having possessed on April 1, 1950, a motor vehicle without a licence in contravention of section 29 (1) of the Motor Car Ordinance, No. 45 of 1938. The Motor Car Ordinance was, however, repealed on September 1, 1951, by section 243 of the Motor Traffic Act, No. 14 of 1951.

Held, that the prosecution was maintainable.

APPEAL from a judgment of the Magistrate's Court, Mallakam.

H. A. Wijemanne, Crown Counsel, with *V. S. A. Pullenayagam*, Crown Counsel, for the complainant appellant.

C. Renganathan, with *V. K. Palasunderam*, for the accused respondent.

Cur. adv. vult.

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November 16, 1954. DE SILVA J.—

The complainant-appellant who is the Office Assistant to the Government Agent, Northern Province, reported to the Magistrate's Court of Mallakam on the 3rd July, 1953, that the accused-respondent did, in or about the 1st April, 1950, in contravention of section 29 (1) of the Motor Car Ordinance No. 45 of 1938, possess a Motor Vehicle bearing registered number X 5355 for which a licence was not in force on 1st April, 1950, and the said accused-respondent had thereby committed an offence under section 158 read with section 150 (1) of the said Ordinance. To this charge the respondent on 7th August, 1953, pleaded not guilty.

When the case came up for trial on 27th May, 1954, the proctor who appeared for the defence submitted to the Court that the prosecution could not be maintained because the Motor Car Ordinance No. 45 of 1938 had been repealed by section 243 of the Motor Traffic Act No. 14 of 1951. After hearing the arguments addressed to him by the proctor for the respondent and the Crown Counsel who appeared for the prosecution, the learned Magistrate by his order dated 17th June, 1954, upheld the objection raised by the defence and acquitted the respondent. The complainant has appealed, with the sanction of the Attorney-General, from that order.

As stated above the respondent is charged with the contravention of section 29 (1) of the Motor Car Ordinance No. 45 of 1938. The date of the alleged offence is 1st April, 1950. The case was instituted on 3rd July, 1953. The Motor Car Ordinance No. 45 of 1938 was repealed by section 243 of Motor Traffic Act No. 14 of 1951 which came into operation on 1st September, 1951. Admittedly no provision was made in this Act for past contraventions of section 29 (1) of the Motor Car Ordinance of 1938 in respect of which legal proceedings had not been taken. The effect of such a repeal, it is contended on behalf of the respondent, is as stated by Tindal C.J. in *Kay v. Goodwin* [1] (decided before the Interpretation Act of 1889) where he says " I take the effect of repealing a statute to be to obliterate as completely from the records of the Parliament as if it had never been passed ; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and conducted whilst it was an existing law ". Mr. Wijemanne, C.C., who appeared for the appellant, however, argued that no such drastic result would ensue by this repeal of the Motor Car Ordinance of 1938 in view of the provisions of section 6 (3) of the Interpretation Ordinance of 1901 (Cap. 2). This section reads as follows :—

> 6 (3). Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected—
>
> (*a*) the past operation of anything duly done or suffered under the repealed written law ;
>
> (*b*) any offence committed, any right, liberty or penalty acquired or incurred under the repealed written law ;

[1] (*1830*) *6 Bing. 576.*

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(*c*) any action, proceeding, or thing pending or incompleted when the written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal.

Mr. Wijemanne relies on section 6 (3) (*b*) and contends that in spite of the repeal of the Motor Car Ordinance of 1938 the offence committed by the respondent before such repeal is kept alive and he is liable to be prosecuted and punished in respect of that offence. Mr. Renganathan for the defence submits however, that section 6 (3) (*b*) cannot stand alone but it is subject to section 6 (3) (*c*). According to him, and this view was shared by the learned Magistrate, section 6 (3) (*b*) merely keeps alive the offences, rights, liberties, or penalties acquired or incurred under the repealed written law for the purpose of punishing or enforcing them under section 6 (3) (*c*). The latter section deals with actions, proceedings, &c. which were pending at the time of the repeal. Therefore it is argued that only those offences, rights, &c. referred to in section 6 (3) (*b*) in respect of which actions have been filed or proceedings instituted can be punished or enforced as the case may be. Attention was also drawn to the fact that in section 6 (3) (*c*) no reference is made to the institution of actions or proceedings whereas in Section 38 of the Interpretation Act of 1889 of England and section 6 of the General Clauses Act of 1897 of India which correspond to section 6 (3) of our Interpretation Ordinance express provision is made for the institution of proceedings in respect of the rights, privileges, penalties, &c. saved by those sections.

The contention that section 6 (3) (*b*) cannot stand by itself is quite untenable in my view. Sections 6 (3) (*b*) and 6 (3) (*c*) refer to two categories of matters. Section 6 (3) (*b*) sets out in general the various matters which are saved after the repeal. If the defence contention is correct, then at the end of section 6 (3) (*b*) some such words as " provided that an action proceeding or thing has been instituted " should have been inserted. If the intention of the legislature was to save only those rights, &c. in respect of which proceedings were pending effect to that intention could easily have been given by the insertion of the necessary words. It is clear from the language used in this section that there was no such intention. The meaning of the words appearing in this section is neither obscure nor ambiguous and therefore speculation regarding the intention of the legislature becomes unnecessary. The grant of a right implies the grant of the means necessary for its enforcement. Section 6 (3) (*c*) makes provision for pending cases or proceedings as distinct from those matters in respect of which no action has been taken at the time of the repeal. It would appear that this section apart from saving pending cases, &c. (which perhaps is not quite necessary in view of 6 (3) (*b*)) provides for the continuity of the procedure under the repealed law in respect of them, even though the repealing law sets up a different procedure to be followed in the proceedings taken under it.

If the defence contention that only those offences and rights in respect of which proceedings were pending at the time of the appeal were saved is correct then it would result in a serious encroachment on vested rights.

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It is not the policy of civilized countries, except for very good reason, to deprive parties of the rights they have already acquired, by resorting to retrospective legislation. If a particular law is to operate retrospectively there must be express provision in it to that effect. It is a well known principle of judicial interpretation that the Courts would refuse to recognize a law to be retrospective unless it is clear from its provisions that it was so intended. Section 6 (3) of the Interpretation Ordinance provides that in the absence of express provision to the contrary the repeal of a written law shall not affect the matters set out in section 6 (3) (*b*).

It is true that the corresponding sections in the English and the Indian Acts make provision for the institution of actions and proceedings. That provision was made, probably, from an abundance of caution. Section 6 of the Indian Act is almost identical with section 38 of the Interpretation Act of England. Section 6 (3) of our Interpretation Ordinance is more concise although it achieves the same result.

In the case of *Akilandanayaki v. Sothinagaratnam et al.*[1] which was decided by a Bench of five Judges the effect of sections 6 (3) (*b*) and 6 (3) (*c*) was considered in relation to the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 88 of 1947. It was contended in that case that the provisions of that Ordinance were retrospective in effect. Gratiaen J. who prepared the main judgment, with which the other judges agreed, held that in view of Section 6 (3) (*b*) the vested rights of the plaintiff in Thediatheddam property were not affected by the repealing Ordinance. It was not even contended in that case that section 6 (3) (*b*) was governed by section 6 (3) (*c*). It is true, however, that at the time the repealing Ordinance came into operation an action brought by the plaintiff in regard to the property involved was already pending. Gratiaen J., however, held that the plaintiff was entitled to succeed under section 6 (3) (*b*) as well as under 6 (3) (*c*). In the light of this decision the order of the learned Magistrate cannot be upheld. Accordingly I set aside the order of acquittal and direct the Magistrate to proceed on with the trial.

Acquittal set aside.

[1] (1952) 53 N.L.R. 385.

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[PRIVY COUNCIL]

1955

Present : **Lord Morton of Henryton, Lord Radcliffe, Lord Keith of Avonholm, Lord Somervell of Harrow and Mr. L. M. D. de Silva**

ABDUL HAMID *et al.*, Appellants, *and* ODHAVJI ANANDJI & CO., LTD., Respondents

PRIVY COUNCIL APPEAL NO. 40 OF 1954

S. C. 240—D. C. Colombo, 21,162

Sale of goods—Wrongful refusal to accept the goods—Measure of damages—Special damage—Sale of Goods Ordinance, s. 49.

Where, in a contract of sale of goods, the buyer wrongfully refuses to take delivery of the goods and there is no available market for the rejected goods at the time of the refusal to accept, then the goods may be sold as soon as buyers can be found. In such a case the amounts realised later, if reasonable steps are taken, are the best measure of their value at the date of the breach of contract ; the prima facie measure of damages that can be claimed under section 49 of the Sale of Goods Ordinance is the difference between the contract price and the value at the date of the breach.

APPEAL from a judgment of the Supreme Court delivered on March 9, 1953, by Gratiaen J. (Gunasekara J. agreeing).

Joseph Dean, for the defendants appellants.

J. F. Donaldson, for the plaintiffs respondents.

Cur. adv. vult.

May 16, 1955. [*Delivered by* LORD SOMERVELL OF HARROW]—

This is an appeal by buyers who wrongly rejected goods under a contract of sale. It is submitted on their behalf that the damages awarded are excessive and should be reduced or a new trial ordered.

Under a contract dated 24th December, 1946, the appellants, merchants in Colombo, agreed to buy from the respondents, merchants in Mombasa, 60 tons of cowpeas as per sample approved at £51 per ton c.i.f. Colombo shipment per s.s. " June Crest ". The " June Crest " was then loading and arrived at Colombo on or about 14th January, 1947. The documents with a bill of exchange for the contract price attached were forwarded to the National Bank and presented to the appellants. The appellants refused to accept the bill which was noted for non-payment on 29th January. On that day and again on the 4th February, the respondents cabled to the appellants that unless the draft was paid within forty-eight or twenty-four hours respectively, the respondents would sell. There was no reply. On 5th March the respondents' proctor wrote to the appellants.

2——J. N. B 46658—1,592 (8/55)

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Dear Sir,

I have been consulted by Messrs. Odhavji Anandji & Co., Ltd., of Mombasa, to take steps against you for the breach of contract entered into with them on 24th December, 1946, by your representative Mr. M. Y. Aboobucker, for the purchase by you of 60 tons of cowpeas at £51 per ton c.i.f. Colombo.

The goods were duly shipped by s.s. " June Crest " which sailed from Mombasa on or about 28th December, 1946, with goods.

You have failed to accept the goods and honour the relative Bill of Exchange for £3,134 3*s*. 1*d*.

As you have failed to take delivery of, and pay for, the goods in spite of my clients' requests, my clients will now dispose of the goods on your account and at your risk, according to their earlier intimations to you, and file action against you for the recovery of any deficit.

As the quantity of goods is very large the sale of the whole quantity in bulk at an auction sale may not be as advantageous as a sale by private treaty, and so my clients intend to have the goods sold by private treaty unless you prefer a sale by public auction, in which event you must inform me forthwith.

Before doing so, I am giving you a final opportunity of fulfilling your obligations under the contract.

If I don't hear from you within 24 hours agreeing to meet the draft and take the goods, my clients will proceed to dispose of the goods as stated above.

The disposal of the goods will be done by my clients without prejudice to their legal rights under this contract and purely with a view to reducing their ultimate claim against you as far as possible.

Yours faithfully,
(Sgd.) S. A. S. HAMID.

The appellants replied on the 17th March.

Dear Sir,

With reference to your letter of the 5th instant addressed to Mr. Abdul Latiff Abdul Hamid, I am instructed to state that the goods referred to are not the goods contracted for by my client's representative and that the same were found to have been attacked by weevils and been subject to some treatment before they were shipped and which has adversely affected the quality of the goods. My client regrets that he cannot accept the goods in view of the damaged condition in which they have been received and as the goods cannot be marketed in Colombo or elsewhere.

My client also denies liability for any loss that your clients may suffer in respect of the said goods.

Yours faithfully,

In the meantime the goods had been cleared by E. B. Creasy & Co., Ltd., who acted for the National Bank. On 3rd April, 530 bags were delivered to M. Popatlal & Co. for sale and the remaining bags on 12th July.

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The bags were sold under 13 contracts, one for three bags in April and the rest in July, August and September.

The plaint was filed on 16th May, 1949, the respondents claiming damages for wrongful refusal to take delivery of the documents or goods. Special damage was alleged as follows :—

> The plaintiff with due notice to the defendants sold the said goods at their risk by private treaty at the then available market rate for Rs. 5,609·12. In this connection the plaintiff incurred expenses amounting to Rs. 1,000.
>
> By the said refusal, neglect or breach of contract aforesaid, the defendants have caused plaintiff loss or damage in the sum of Rs. 37,525, to wit :—Rs. 36,325 being difference between the said Rs. 41,934·12 and Rs. 5,609·12 and the said sum of Rs. 1,000 which said sum of Rs. 37,325 or any part thereof the defendants have failed and neglected to pay though thereto often demanded.

The sum of Rs. 41,934·12 is the equivalent of the contract price.

The defence was that the goods shipped did not correspond to the sample and were not merchantable. The defences failed and the learned Judge awarded the damages as claimed. The appellants appealed taking the point now taken before the Board namely that the damages were excessive. The appeal failed.

The provisions as to damages for wrongful refusal to accept goods are contained in section 49 of the Ceylon Sale of Goods Ordinance and are the same as those in section 51 of the Sale of Goods Act, 1893 :—

> 49.—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
>
> (3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Sub-section 3 is of course a prima facie application of the principle laid down in sub-section 2. If there is no market price within sub-section 3 then the prima facie measure is the difference between the contract price and the value at the date of the breach. If the rejected goods could be sold at the time or times referred to in sub-section 3 then it may well be academic to consider whether there was a market price within sub-section 3. The realisable price whether " market " or not will give the figure to be subtracted from the contract price. There are cases, of which it is said by the respondents this is one, in which the goods in

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question could not (reasonably) be sold at the date of the breach. In such cases the amounts realised, later, if reasonable steps are taken, will be the best measure of their value at the relevant date.

At the trial the appellants maintained that the sample referred to in the contract was one of white cowpeas.

The respondents disputed this and the learned trial Judge accepted the respondents' evidence that the contract was for brown or red cowpeas, a somewhat inferior commodity.

It was submitted for the appellants first that there was an available market for the 60 tons of brown cowpeas on or about the 4th February and a market price within sub-section 3. Alternatively it was submitted that the sellers acting reasonably could have realised the goods earlier at better prices. The learned Judge awarded the damages as claimed without discussing these points. One explanation may be that they were not sufficiently taken. The appellants called some evidence and asked some questions as to prices in February and March. The appellants were of course defending on merits and may not have emphasised arguments which would only become relevant if they lost the case. Their Lordships however agree with the Supreme Court in holding that the points should be regarded as open on appeal.

In their Lordships' view on the evidence it would be impossible to hold that there was an available market within sub-section 3 for 60 tons of brown cowpeas at the time of the appellants' refusal to accept. The alternative submission requires a consideration in a little detail of such evidence as there is. It is common ground that these cowpeas are liable to be attacked by weevils after two or three months and of course deteriorate. There was therefore every motive for the bank and those acting for the sellers to see that the goods were sold as soon as buyers could be found.

Once the goods were in the hands of Popatlal the evidence is clear. Their representative said that he sold at the highest possible price. The delay from April to July was due to the fact that there were no buyers earlier. The same witness said that in December and January large quantities of this and other grains had arrived. The demand therefore fell off. If no buyers for these brown cowpeas could be found in April, May and June, it seems probable on his evidence that there would have been no buyers in March and February. Owing to congestion, landing was slow and there was some confusion in the warehouses.

The defendants called some evidence as to sales in March. These were sales of comparatively small quantities to retailers. Most of the evidence dealt with white cowpeas and therefore does not assist. The evidence if accepted is not strong and one of the defendants' witnesses said there was no good price between January and March. The Supreme Court referred to the fact that the appellants had admittedly taken delivery from the "June Crest" of 25 tons of cowpeas of the same description. If their case was that the respondents could have obtained higher prices why did they not prove how much they had realised for this smaller quantity?

The fact that there are no clear findings or evidence as to the course of events in February and March is due to the failure of the defendants to make clear or emphasise the case they now seek to make. They were

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invited to for nulate issues but failed to do so on any of the points now raised. There would seem to have been no clear cross-examination on the question why no bags were handed over to the selling agents before the beginning of April. The onus is of course on a plaintiff to prove recoverable special damage. The respondents here called a representative of their firm, of the bank, of the bank's clearing agents and of the selling agents. They were clearly making the case that they had acted reasonably, had got the best prices and that therefore the net proceeds represented the value of the goods. Taking the evidence as a whole their Lordships agree with the Supreme Court in holding that the claim was made out.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

1954 *Present :* **Sansoni J.**

S. SINNATHURAI, Appellant, *and* SUB-INSPECTOR OF POLICE, VAVUNIYA, Respondent

S. C. 560—M. C. Vavuniya, 26,585

Motor vehicle—Charge of using it without revenue licence—Burden of proof—Motor Traffic Act, No. 14 of 1951, ss. 25, 226—Evidence Ordinance (Cap. 11), ss. 105, 106.

In a prosecution for using a motor vehicle without revenue licence, in contravention of section 25 (1) of the Motor Traffic Act, the burden lies on the accused to prove that there is a licence in force, once evidence of user has been led by the complainant.

APPEAL from a judgment of the Magistrate's Court, Vavuniya.

M. M. Kumarakulasingham, for the accused appellant.

H. B. White, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 16, 1954. SANSONI J.—

The accused in this case was charged with having driven a motor omnibus "on the public highway without there being in force in respect of the said omnibus a revenue licence" in breach of section 25 (1) of the Motor Traffic Act No. 14 of 1951 and thereby committed an offence punishable under section 226 of the Act. There was an alternative charge of having failed to carry the licence in a weather proof holder in breach of section 38 of the Act. The Magistrate convicted the accused on the first charge and acquitted him on the other after evidence had been given

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by the prosecuting Inspector that the omnibus in question was stopped on a public road and no licence was produced although called for. No evidence was led by the defence.

In appeal it was contended that the prosecution had failed to prove the essentials of the offence set out in section 25 (1) which runs :—" No person shall possess or use a motor car for which a licence is not in force ". Must the prosecution in such a case prove that a licence is not in force in respect of the particular car or does the burden lie on the person who possesses or uses the car to prove that there is a licence in force ? I certainly think that the sub-section could have been worded more clearly, but I have no doubt that the burden lies on the possessor or user to prove that there is a licence in force, once evidence of possession or user has been led by the prosecution. It will be seen that this is a case of an absolute prohibition followed by an exception in the case of cars in respect of which there are licences in force. This construction of the sub-section is supported by the wording of sub-section (3) which reads :—

> " The possession by a dealer of a motor vehicle imported by him into Ceylon for the purposes of sale shall be deemed not to be a contravention of sub-section (1) so long as the vehicle remains unsold and is not used on any highway except under the authority of a dealer's licence. "

Sub-section (5) reads :—

> " The possession of a motor vehicle by a person (not being a dealer) by whom the vehicle was imported into Ceylon shall be deemed not to be a contravention of sub-section (1), if, but only if, that person has applied for a revenue licence and such application has not been finally determined. "

And sub-section (6) reads :—

> " The use of a motor vehicle which upon importation into Ceylon is used on a highway only for the purpose and in the course of removal from the Customs premises shall be deemed not to be a contravention of sub-section (1). "

These sub-sections create further exceptions. The rule which applies is that a person claiming the benefit of an exception must prove the existence of circumstances bringing the case within the exceptions.

Another reason why I would hold that the burden shifted on to the accused after evidence of user had been led by the prosecution is the principle enunciated in *R. v. Turner*[1]. Bayley, J.,—" I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative ". These rules have been embodied in sections 105 and 106 of the Evidence Ordinance (Cap. 11).

For these reasons I affirm the conviction and dismiss this appeal.

Appeal dismissed.

[1] *5 M. and S. 206.*

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1954 *Present :* **Nagalingam S.P.J. and Fernando A.J.**

M. U. LOKUBANDA ARACHCHI *et al.*, Appellants, *and*
P. M. I. L. S. MOHAMED *et al.*, Respondents

S. C. 166—D. C. Kandy, 2,791

Kandyan Law—Donation—Revocability—Covenant to render succour to a party other than the donor—Validity—Construction of deed.

A Kandyan revocable deed of gift is revoked by the donor if he executes a later and inconsistent deed.

Under Kandyan Law a deed of gift in consideration of assistance to be rendered to the donor is revocable subject to compensation for assistance actually rendered.

A convenant in a gift by a brother to a sister that the sister should look after and render succour and assistance to their mother is valid under the Kandyan Law.

A, a Kandyan Sinhalese, donated certain immovable property to her son B in 1916, citing as title to the property a deed of 1855. Subsequently, in 1917, both A and B jointly gifted the same property to C, who was A's daughter and B's sister, and cited as title the deed of gift of 1916 only.

Held, that the deed of gift of 1917, though executed by A and B, was in fact a donation by B alone in favour of C and that, as it was a revocable deed of gift, B was entitled to revoke it.

Held further, that under the deed of gift the donee C was liable to render succour and assistance not only to B but also to A.

APPEAL from a judgment of the District Court, Kandy.

B. H. Aluvihare, for the 2nd, 3rd and 4th defendants appellants.

H. W. Tambiah, with *H. L. de Silva*, for the plaintiffs respondents.

Cur. adv. vult.

December 8, 1954. NAGALINGAM S.P.J.—

This appeal involves a dispute as regards $\frac{3}{8}$ share of a field called Halankumbura which, the parties are now agreed, is depicted as lots 1 and 2 in plan No. 1410 of the 9th of June 1951 made by E. R. Claasz, Licensed Surveyor, and filed of record marked X, lot 3 having been excluded in favour of the 1st defendant.

Admittedly one Dingiri Menike Kumarihamy *alias* Tikiri Kumarihamy, who will hereafter be referred to by the latter name, was entitled to the $\frac{3}{8}$ths now in dispute as well as to the rest of this field. The devolution of the other shares is unaffected by the dispute in the case.

Tikiri Kumarihamy by deed P5 of 1916 gifted the $\frac{3}{8}$ths in dispute to her son Mutu Banda. Thereafter by deed P6 of 1917 Tikiri Kumarihamy and her son Mutu Banda both jointly gifted the $\frac{3}{8}$ to Battana Kumarihamy, the daughter of the first named and sister of the second named. Battana

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Kumarihamy died leaving a son Gopallawa who inherited the $\frac{3}{8}$ share and he by deed P7 of 1944 transferred the $\frac{3}{8}$ to the 2nd plaintiff. In 1945 by deed 3D1 Mutu Banda purported to revoke and cancel the deed of gift P6 of 1917, executed, it will be remembered, not only by himself but also by his mother Tikiri Kumarihamy. The 2nd, 3rd and 4th defendants claim the $\frac{3}{8}$ on the footing that, the deed of gift P6 of 1917 having been revoked and Mutu Banda having died possessed of the $\frac{3}{8}$, those shares have now devolved on them as his intestate heirs.

The question therefore centres round the validity of the deed of revocation 3D1 of 1945, and this question depends upon the determination of the further problem whether deed of gift P6 of 1917 was a gift by Mutu Banda or whether, as contended for on behalf of the 2nd plaintiff, it was a deed of gift by Tikiri Kumarihamy.

It is well settled law that a Kandyan revocable deed of gift is revoked by the donor executing a later and inconsistent deed.—*Taldena v. Taldena*[1] and *Molligoda v. Abeyratne Ratwatta*[2].

The contention put forward on behalf of the 2nd plaintiff is that Tikiri Kumarihamy's describing herself as a donor in executing the deed P6 of 1917 which was not only later in point of time but also inconsistent with P5 in favour of Mutu Banda, had the effect of revoking the latter, and that the reason why Mutu Banda joined was to create an estoppel against him from his contending that he had rendered succour and assistance to his mother which would have rendered the deed P5 irrevocable. I do not think this contention is entitled to prevail. I think it is equally settled under Kandyan Law that a deed of gift in consideration of assistance to be rendered to the donor is revocable subject to compensation for assistance actually rendered,—*Pereira 50 and 62, Morgan's Digest 7, Austin 177.* Besides, had Tikiri Kumarihamy executed deed P6 in her own proper person, without getting Mutu Banda to join her, such a deed would have had the effect of revoking the earlier deed of gift, P5 of 1916.

On behalf of the 2nd to 4th defendants, however, it has been urged that the gift P6 of 1917 was in fact a gift by Mutu Banda and that Tikiri Kumarihamy joined in that deed to prevent her from effecting a revocation of the deed P5 of 1916 in favour of Mutu Banda. It seems to me that this proposition too is of doubtful value. Notwithstanding the fact that Tikiri Kumarihamy joined in the deed P6 of 1917, as there was no renunciation of the power of revocation expressed by her in either of the deeds P5 or P6, she was free by a subsequent deed inconsistent with both P5 and P6 to set at naught both these gifts. In order to reinforce the argument on behalf of the 2nd to 4th defendants, the express terms contained in the deed setting out the title of the donors have been referred to, and the deed says that " the premises (donated) . . . . are held and possessed by us under and by virtue of the deed of gift No. 8879 dated 16th March, 1916, and attested by J. W. A. Illangatilleke, Notary Public ; " P5.

It has been asked why, if Tikiri Kumarihamy was the true donor on the deed P6, the title of the donors is recited as P5 of 1916. That question has received no adequate answer at the hands of the 2nd plaintiff.

[1] *7 Balasingham 133.*

[2] *7 S. C. C. 117.*

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The defendants also point to the fact that on the same day that P6 was executed by Tikiri Kumarihamy she executed another deed of gift 1D1 whereby she gifted to a grandson of hers certain other lands the title to which she recites as deed No. 914 dated 14th May, 1855, and attested by Don Carolis de Silva Siriwardene, Notary Public. That the deed here recited is the identical deed under which Tikiri Kumarihamy was entitled, *inter alia*, to the $\frac{3}{8}$ share in dispute and it was this title that she had recited in making the gift by deed P5 to her son Mutu Banda are clear from the recital in the deeds. It is pointed out that if Tikirihamy was in fact the donor or even part donor there was not the slightest difficulty in her having recited the same title deed of 1855 as the title under which she held and possessed the shares of which she was making a gift to her daughter Battana Kumarihamy by deed P6, for the Notary had particulars of the deed of 1855. I think there is great force in this latter contention.

It seems to me that on a careful consideration of all the circumstances the conclusion that must be reached is that Mutu Banda who had received a large number of lands under the deed P5 of 1916 and had disposed of most of them, feared that if he continued to possess the lands dealt with under P6 of 1917, he might lose those as well and not be in a position to render succour and assistance to his mother, and the mother without doing any act such as the execution of a subsequent deed inconsistent with the deed of gift P5 of 1916 which would have had the effect of bringing about strained feelings between mother and son, persuaded the son to make a gift to the sister ; and the son in his turn, in order to provide an assurance of succour and assistance being rendered to the mother, got her as well to join the deed as a donor in order that the donee may be required expressly to render succour and assistance not only to himself but also to his mother.

The view I therefore take is that on any other construction the difficulties that arise on the case presented by the 2nd plaintiff cannot be satisfactorily solved.

The learned Counsel for the 2nd plaintiff, however, submitted that a convenant whereby succour and assistance is to be rendered to a party other than the donor is not recognized under the Kandyan Law. But no authority has been cited for that proposition ; nor even any passage from a text-book writer.

Having regard to the nature of the deeds of gift under Kandyan Law and the principles underlying their revocability, and the position of parents in a Kandyan family, I do not think it could be said that a provision in a gift by a brother to a sister that the sister should look after and render succour and assistance to their mother is repugnant to any conception of the Kandyan Law. In fact such a provision merely gives effect to the elementary principles of natural feelings and justice.

I would therefore hold that the deed of gift P6 of 1917, though executed by Tikiri Kumarihamy and Mutu Banda, was in fact a donation by Mutu Banda himself in favour of his sister and that being a revocable deed of gift Mutu Banda was entitled by deed 3D1 of 1945 to revoke it. In the result I set aside the judgment of the learned District Judge in so far as it

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declares the 2nd plaintiff entitled to $\frac{3}{8}$ share of the filed. The 1st plaintiff however will be declared entitled to $\frac{1}{8}$ share of the field and he will also be entitled to damages at the rate of Rs. 37·50 per annum from 1st December, 1949, till he is restored to possession.

The 2nd to the 4th defendants will pay to the 1st plaintiff a quarter share of the costs in the District Court but he will be entitled to no costs of appeal. The 2nd plaintiff will pay the 2nd, 3rd and 4th defendants the costs of action and of the appeal.

FERNANDO A.J.—I agree.

Appeal allowed.

1955 *Present :* **Gratiaen J.**

V. PARAMASIVAM, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 234—In the matter of an application for registration of an Indian resident as a Ceylon citizen under Act No. 3 of 1949

Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949—Citizenship by registration—Residential qualification—Standard of proof required—Quantum of evidence—Power of Supreme Court to order fresh inquiry.

The qualifications of a person to be registered as a citizen of Ceylon under the Indian and Pakistani Residents (Citizenship) Act have to be proved on a balance of probability (as in civil proceedings) and not "beyond reasonable doubt" (as in criminal trial).

When an appeal is preferred to the Supreme Court by an applicant who has been refused citizenship the Supreme Court has inherent jurisdiction to order, if necessary, a fresh inquiry.

APPEAL under Section 15 of the Indian and Pakistani Residents (Citizenship) Act.

Walter Jayawardene, with *S. P. Amarasingham*, for the applicant appellant.

H. A. Wijemanne, Crown Counsel, with *R. S. Wanasundera*, Crown Counsel, for the respondent.

Cur. adv. vult.

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June 23, 1955. GRATIAEN J.—

This is an appeal by an Indian Tamil against an order refusing to register him as a citizen of Ceylon under the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949. A Deputy Commissioner who held an inquiry into his application, purporting to act judicially, decided that the appellant had not established that he possessed the requisite residential qualification, namely, " uninterrupted residence " (as defined in the Act) since 1st January 1946.

The appellant, who is unmarried, was born in Ceylon on an estate in the Kegalla District where his father was employed as a sub-kangany and his mother as a labourer. He declared in his affidavit that he had paid only one visit to India, in 1949, and the duration of that isolated visit (which was confirmed by official documents) admittedly does not disqualify him for registration. He also stated that he had never remitted money to India at any time. There was no evidence to contradict these assertions, or the assertion that he has no dependants in that country. He has also declared in his affidavit that he owns no property there of any kind.

The appellant's evidence at the inquiry was to the effect that, until he was about 12 or 13 years of age, he lived with his parents on the estate where they worked. Having then apprenticed himself under a tailor at Wahakula, he established himself in that trade at the Yataderiya Bazaar where he has lived and been engaged in business ever since 1935. In February 1940 he started a subsidiary trade as a dealer in arecanuts, and it is common ground that since 1946 he has also been a licensed rubber dealer in the same locality. The story, if true, is one of steady progress in business in a specified locality in Ceylon.

The record of the proceedings betrays a lamentable failure on the part of the Deputy Commissioner to appreciate the nature of his judicial functions under the Act. In particular, he grossly misdirected himself as to (1) the standard of proof which is required whenever an applicant is called upon to establish that he possesses the statutory qualifications for claiming the privilege of Ceylon citizenship, and (2) the kind of evidence and the *quantum* of evidence which may be received and accepted as proof of those qualifications.

The appellant had been called upon only to prove that he was " resident " in Ceylon within the meaning of the Act during the period 1936 to 1946. He had apparently satisfied the authorities in all other respects as to his qualifications for registration. For instance, I observe from the record that the Deputy Commissioner, in replying to a departmental questionnaire concerning the appellant at the close of the inquiry, specifically stated that " permanent settlement had been established ", and that the appellant was " free from any disability or incapacity which rendered it difficult or impossible for him to live in Ceylon according to its laws ".

The burden of establishing a *prima facie* case of " residence " in this country during the relevant period was of course on the appellant. This and all other qualifications had to be proved on a balance of probability (as

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in civil proceedings) and not "beyond reasonable doubt" (as in a criminal trial). Still less was the appellant required (as some Deputy Commissioners imagine) to undertake the impossible task of establishing his residence, "with mathematical certainty" and by documentary proof, within the geographical boundaries of this Island on every single day during the ten-year period which had terminated long before the issue arose for adjudication at all.

The Act nowhere imposes artificial restrictions of any kind either as to the nature of the evidence which would suffice to prove the fact in issue or as to the kind of witness who should be regarded as reliable. All these are matters which must obviously be left to the common sense of the tribunal whose duty it is to assess the evidence conscientiously, dispassionately, judicially and without bias. Certainly it is quite improper to enter upon a judicial function "with the verdict pre-determined".

At a very early stage of the proceedings, the appellant tendered in evidence his books of account which he said would confirm his oral testimony as to the nature, the scope and the continuity of his business activities in Ceylon since about January 1943. The Deputy Commissioner, without even a superficial examination of the tendered documents, pronounced that they were of no probative value whatsoever. The record reads as follows :—

> "Applicant produces his account books from 1943 onwards, all of which are written in Tamil, and I inform him that I am unable to accept them as proof of residence, *as he could have been away during the period and the books could have been posted by his employees.*"

This was obviously a most unjust conclusion to reach before the entries in the books (all of which had previously been produced at the preliminary inquiry before an "investigating officer") had been scrutinised and before even the handwriting of the appellant had been tested. Indeed, even if the books had been entered up by his employees, they might very well have contained intrinsic evidence that the appellant himself was on the spot actively and personally attending to his business affairs since 1943. Moreover, records of an established business would often justify the presumption that the activity had commenced at a much earlier date.

The books having been rejected out of hand, the applicant offered to call witnesses who could corroborate his evidence from personal knowledge. The Deputy Commissioner then made the following discouraging communication to him :—

> "*I inform applicant that unless he can produce documentary evidence from 1st July 1936 I will not be able to accept oral evidence.*"

The issue having been prejudged, the rest of the proceedings were but a farce.

The appellant was permitted to call certain witnesses, but their oral evidence had virtually been rejected in advance. A Sinhalese man called Punchi Banda testified that he had known the appellant ever

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since he began to work as a tailor in 1935, but his evidence was considered worthless because he was unable in 1954 to specify the " particular date in 1935 " when he first met the appellant. Punchi Banda also stated that since 1940 the appellant, having prospered in his tailoring business, opened a tailoring shop in 1940 in premises taken on rent from Punchi Banda himself. This evidence was rejected " without hesitation " in accordance with the Deputy Commissioner's predetermined formula, because no receipts could be produced for the earlier years of the tenancy, and because the receipts (for which the counterfoils were available) in respect of the later period were unstamped.

The next witness called was an Indian merchant who claimed to have been a well-known merchant at Yataderiya from 1929 until 1950. It transpired, however, that his own application for registration as a Ceylon citizen was (through no fault of his own) still pending. The appellant was peremptorily informed that no purpose would be served by allowing the evidence of this witness to continue. The reason recorded was as follows :—

> " As the witness has not yet proved his residence in Ceylon, I am not able to accept his statement that he has been in Ceylon in 1935. "

The last witness called was a Ceylon Muslim doing business in the locality who claimed to have hired sewing machines to the appellant for a number of years since 1935 at Rs. 5 a month. The hiring, as far as he could remember at this distant period of time, commenced in 1935. The evidence was rejected on the ground that he could not remember " the particular month ". Finally, the probative value of a stamped receipt for a sewing machine purchased from the Singer Sewing Machine Co. during the latter part of the ten-year period was ignored.

This is really not the way to discharge the responsible function of adjudicating upon questions of fact in connection with issues of great moment to non-nationals claiming the privilege of Ceylon citizenship under the Act. The credibility of witnesses cannot be assessed by the application of rigid departmental formulae, and learned Crown Counsel very properly concedes that the reasons for rejecting the evidence in this particular case are quite unsound. I am therefore left to decide for myself as best I can whether the evidence on record does establish a *prima facie* case for registration. If, in the ultimate result, I find myself unable to reach a conclusion either way on this issue, the only alternative is to remit the case for a fresh inquiry according to law before another Deputy Commissioner.

It was suggested to me at the argument that this Court possesses no jurisdiction under any circumstances to order a fresh inquiry because the Act does not expressly authorise such a procedure. I do not take such a narrow view of the appellate functions of this Court under the Act. We have the power, and in appropriate cases the duty, to order a fresh inquiry so as to prevent injustice either to the individual or the State. Let us suppose, for instance, that the conclusions reached by the

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original tribunal on issues of fact were completely vitiated by misdirection, and that the appellate tribunal, not having heard and seen the witnesses, was unable in the particular case to reach any safe conclusion on the facts. It was suggested in argument that in that event this Court, lacking the requisite foundation for deciding whether or not a *prima facie* case exists for registration, cannot but dismiss the applicant's appeal. This would indeed be a travesty of the judicial process ; it assumes that a person, who may in fact possess the qualifications for Ceylon citizenship must, notwithstanding the intentions of Parliament expressed in the Act, forfeit this privilege merely because he had been refused a fair hearing by " an unjust judge ". I could have understood an argument that in such a situation this Court should automatically allow the application. But that solution would prove equally unsatisfactory if in certain cases it results in the registration of a disqualified non-national.

An analogy may be drawn from the jurisdiction of the Court of Criminal Appeal in England which cannot (as in Ceylon) order the re-trial of a person accused of an indictable offence. Nevertheless, there is inherent power to quash a conviction and order a *venire de novo* if the earlier proceedings had amounted to a " mis-trial ", that is to say, if, for one vitiating reason or another, there had virtually been no trial at all on the first occasion. Under the Indian and Pakistani Residents (Citizenship) Act of Ceylon, there would be quite as much justification for the exercise of this inherent jurisdiction in the interests of the individual applicant, because Parliament assumes that an application for registration would not be denied except after a fair and proper statutory inquiry by the Commissioner or by a Deputy Commissioner. Let us consider an extreme hypothetical case which I hope will never occur. If the officer vested with original jurisdiction under the Act had demonstrably functioned not as an impartial judge but as what Sir Frederick Pollock would call a " passive registrar of a foregone (executive) decision ", the reason of the thing dictates that the appellate tribunal could, and must, order a fresh and (for the first time) a *judicial* inquiry in accordance with the true intent of the Act. Equally am I convinced that, even in cases which are less extreme, the same power and the same duty exist whenever justice cannot be achieved by other means.

But in the present case I am satisfied that there is no necessity to invoke our inherent jurisdiction. There is already sufficient material on the record to justify the conclusion that the appellant has (by oral and documentary evidence which has not been rejected by the original tribunal for any acceptable reason) made out a *prima facie* case for registration. Here is a man who was born in this country in 1921, and who claims to have continuously resided (except for one brief visit abroad) and progressively established himself in business *in a particular locality*, ever since 1935. If he had in truth lived and carried on business in the Yataderiya Bazaar continuously since 1936, he must have become a very familiar figure to the inhabitants of the village. If not, the officer who in the first instance investigated the appellant's case under Section 8 of the Act ought to have had little difficulty in finding evidence to disprove

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this claim. The books of account produced by him contain a series of entries commencing on 19th December 1942, and their genuineness has not been disproved. I find nothing in the record to justify a suspicion that the Sinhalese witness and the Muslim witness who corroborated his evidence were untruthful or had any reason to be partial. I therefore hold that a *prima facie* case for registration has been made out, and I direct the Commissioner to take action under the Act accordingly. It is of course still open to any member of the public duly objecting to the appellant's registration to rebut this *prima facie* case, upon proper material, before a final decision is reached. The Commissioner must pay to the appellant a sum of Rs. 210 as costs of this appeal.

Application allowed.

1955 *Present:* **de Silva J.**

M. M. R. DE SILVA *et al.*, Appellants, *and* THE REGISTRAR OF COMPANIES, Respondent

S. C. 382–384—M. C., Colombo, 45,393A

Company Law—Annual general meeting—Failure to hold it—Charge against directors for failure to furnish annual return to Registrar of Companies—Inference of guilt—" Knowingly and wilfully "—Burden of proof—Companies Ordinance No. 51 of 1938, ss. 106 (1), 108 (1) and (4), 110, 346.

The directors of a company were charged under section 108 (4) read with section 346 of the Companies Ordinance with having failed to forward to the Registrar of Companies the annual return for a certain year as required by section 108 (1). The accused pleaded that no general meeting was held during the relevant year and that it was, therefore, impossible to furnish the return. They did not, however, establish that the failure to hold the general meeting was not due to any default on their part.

Held, that the failure to hold the general meeting was due to the default of the accused themselves and that they were not entitled, therefore, to rely on their own default as an answer to the charge.

Held further, that the burden was on the accused, as directors, to establish that no blame could be attached to them for failing to carry out the statutory duties cast on them.

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APPEALS from a judgment of the Magistrate's Court, Colombo.

H. W. Jayewardene, Q.C., with *K. Sivasubramaniam*, for the 1st accused appellant.

G. D. Welcome, for the 2nd accused appellant.

W. P. N. de Silva, for the 6th accused appellant.

A. E. Keuneman, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

June 20, 1955. DE SILVA J.—

The three appellants along with three others who were all described as Directors of " The Golden Dawn Night Club ", being a Company having a share capital, were charged under section 108 (4) read with section 346 of the Companies Ordinance No. 51 of 1938 (hereinafter referred to as the Ordinance) with having failed to forward to the Registrar of Companies the annual return for the year 1952 as required by section 108 (1) of that Ordinance. The charge against the 4th and 5th accused was withdrawn at a very early stage of the proceedings. The learned Magistrate acquitted the 3rd accused as the latter established to the satisfaction of the Court that he had resigned from the Board of Directors of the Company in October 1952. The three appellants were convicted of the charge and the learned Magistrate imposed a default fine of Rs. 25 for every day from 1.2.1953 on each of the 1st and 6th accused while the 2nd accused was ordered to pay a default fine of Rs. 5 a day from the same date.

Section 110 (1) of the Ordinance enacts that a general meeting of every Company shall be held once, at the least, in every calendar year and a failure to do so is made punishable under section 110 (2). Every Director or Manager who is knowingly a party to such default is guilty of an offence. Section 106 (1) provides that an annual return be forwarded to the Registrar of Companies, containing, *inter alia*, the particulars set out in that section. According to section 108 (1) the annual return must be completed within twenty-eight days after the first or only general meeting in the year and the company must forthwith forward to the Registrar of Companies an authenticated copy of such return. The annual return should also include a copy of the balance sheet together with the copy of the Auditor's report on it. Sub-section 4 of this section enacts that on failure to comply with the provisions of this section or either of the two preceding sections " the Company and every officer of the Company who is in default shall be guilty of an offence and shall be liable to a default fine". Section 346 (1) deals with the nature of the default fine that is to be imposed while sub-section 2 of that section states that the expression "'officer who is in default" means " any director, manager, secretary or other officer of the Company, who knowingly and wilfully authorizes or permits the default, refusal or contravention mentioned in the enactment ".

That no annual return for the year 1952 was sent is conceded by the appellants. The annual return has to be completed within twenty-eight

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days after the general meeting in that year. It is also admitted that no general meeting was held during the year 1952. The last date on which the general meeting could have been held during that year was the 31st of December 1952. Therefore the last day for completing the annual return was the 28th of January 1953. The learned Magistrate allowed three days for the purpose of forwarding the return to the Registrar of Companies. Accordingly he held that the default had taken place on 1.2.1953. His finding on this point cannot be questioned.

At the trial the appellants sought to prove that they had ceased to be directors prior to the date of default. The learned Magistrate, however, rejected that contention giving reasons which, if I may say so, are very convincing.

It was also contended on behalf of the appellants that they cannot be convicted of failing to send an annual return as contemplated by section 108 (1) because it was impossible to forward such a return as no annual general meeting was held during the year 1952. This argument is based on the ground that section 108 (1) provides that the annual return is to be completed within 28 days of the holding of the general meeting. The Counsel for the appellants, therefore, submitted that it was impossible to furnish the return as no general meeting was held. In support of this contention Mr. Jayawardene relied on *Dorte v. South African Super-Aeration, Ltd.*[1] In that case the Company was charged before the Aldermen of the City of London for failing to send the annual return. The Company pleaded that it was impossible to furnish the return as no general meeting was held during the relevant year. The Aldermen held that the duty cast on the Company to furnish an annual return was impossible of performance as no general meeting was held and dismissed the summons. In appeal a Bench of three judges one of whom was Lord Alverstone C.J. without calling on the Counsel for the Company affirmed the decision of the Aldermen and dismissed the appeal. As the arguments and the judgment in that case have not been reported it is not possible to say what the grounds of that decision were. In a subsequent case *Park v. Lawton and another*[2] a contrary view was taken. Lord Alverstone C.J. was also one of the judges who decided that case. In that case two directors of a Company were charged before the Justices of Hertfordshire for failing to send an annual return. They were acquitted by the Justices on the ground that as no annual general meeting was held it was impossible to furnish the annual return. In appeal the acquittal was set side and the accused was convicted. In that case Lord Alverstone C.J. said "the cases of *Gibson v. Burton*[3] and *Edmonds v. Foster*[4] are clear authorities that a person charged with an offence under section 26 is not entitled by way of defence to plead the impossibility of complying with Section 26 by reason of no general meeting having been held, at any rate if the person charged was also a party to the default in holding the meeting ; in other words, a person charged with an offence cannot rely on his own default as an answer to the charge". In the present case too the appellants are seeking to avail themselves of their own default to establish their innocence. It is true that in *Park v. Lawton* the accused had been convicted already

[1] *20 Times Law Reports 425.*
[2] *(1911) 1 K. B. D. 588.*
[3] *(1874–1875) 10 Q.B.D. 329.*
[4] *(1875) 44 L. J. M. C. 41.*

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for failing to hold the annual general meeting. In the present case although the appellants were not charged for failing to hold the general meeting it is clear on the evidence led that the failure to hold the general meeting in 1952 was due to the default of the appellants themselves. I am unable to agree with the submission made by Mr. Jayawardene that the Registrar of Companies is not entitled to maintain the present charge because the appellants were not charged with failing to hold a general meeting. It is not sufficient in answer to the present charge for the appellants to say that they were unable to comply with the provisions of section 108 (1) because no general meeting was held. They have to proceed further and establish to the satisfaction of the Court that the failure to hold the general meeting was not due to any default on their part. It is true that the appellants were confronted with certain difficulties in the matter of holding a general meeting but one cannot say that those difficulties were insurmountable. Those difficulties however must be taken into consideration in passing sentence.

Mr. Jayawardene also argued that there was no evidence that the appellants had "knowingly" and "wilfully" permitted the default. The appellants were directors of the Company during the whole of the relevant period. The directors were responsible for the conduct of the business of the Company. The holding of a general meeting and the furnishing of the annual report are important matters which have to be attended to by a Company. The directors being the persons who are entrusted with the transaction of all business relating to the Company must be held *prima facie* responsible for any default on the part of the Company. The burden is on the directors to establish that no blame could be attached to them for failing to carry out the statutory duties cast on them. In this case the appellants have failed to discharge that burden. Therefore the convictions must be affirmed.

The fines imposed on the appellants are far too severe. The registered office of the Company was at No. 161 Turret Road, Colombo. The business of the Company was also transacted there. These premises had been taken on lease by the Company. Mr. Jayawardene submitted that the most valuable asset of the Company was this lease. On a writ issued by the District Judge, Colombo, the Company was ejected from these premises on 20.12.1952. The first accused appellant has stated that he had decided to hold the annual general meeting before the end of December, 1952, and that he failed to hold that meeting as the Company was ejected from these premises. His evidence on this point appears to be true. Even in the previous years the annual general meeting was held at the end of December. It is also quite possible, as stated by the 1st accused, that when the Company was thrown out of the premises some of the papers relating to its business were either lost or got misplaced. In these circumstances it is sufficient if only a nominal fine is imposed on the appellants. I set aside the default fines imposed on them by the Magistrate and substitute therefor a default fine of 25 cents a day from 1.2.1953 on each of them. Subject to this variation the appeals are dismissed.

Convictions affirmed.
Sentence varied.

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1955 *Present :* **Pulle J.**

SUPERINTENDENT, YATADOLA ESTATE, MATUGAMA, Appellant, *and* MUTHURAMAN, Respondent

S. C. 247—Workmen's Compensation No. C. 30/7008/53

Workmen's Compensation Ordinance (Cap. 117)—Section 2 (1)—Superintendent of an estate—Maintainability of claim against him—Is he an "employer"?—Estate Labour (Indian) Ordinance (Cap. 112), ss. 3, 11-15.

In considering whether a claim for compensation under the Workmen's Compensation Ordinance can be maintained by a workman against the superintendent of the estate in which he works it is not permissible to call in aid the meaning of the word "employer" appearing in the Estate Labour (Indian) Ordinance. The superintendent who has himself taken employment on a contract of service at a fixed salary under the owners of the estate is not an "employer" within the meaning of that term in section 2 (1) of the Workmen's Compensation Ordinance.

APPEAL from an order made under the Workmen's Compensation Ordinance.

S. J. Kadirgamar, with *P. Somatilakam*, for the appellant.

Walter Jayawardena, with *R. Manicavasagar*, for the respondent.

Cur. adv. vult.

July 13, 1955. PULLE J.—

In this case the appellant is the superintendent of an estate called the Yatadola Group owned by the Kalutara Rubber Co., Ltd., whose agents and secretaries are Gordon Frazer & Co., Ltd. of Colombo. He appeals from an order made under the Workmen's Compensation Ordinance (Cap. 117) whereby he was adjudged to pay to the respondent, a workman employed on the estate and who met with an accident on the 17th March, 1953, a sum of Rs. 1,163·75 and the taxed costs of the action. The only point that arises on this appeal is whether it can be said that the appellant was the "employer" of the workman as that word is defined in section 2 (1) of the Ordinance. As it appeared to be inconceivable that either the local agents or the owners of the estate would stand in the way of the workman receiving the compensation, in the event of its being held that the superintendent was not the right person to have been sued, I suggested to learned Counsel on both sides that the parties should come to a settlement enabling the workman to draw the money deposited with the Commissioner for Workmen's Compensation. I was later informed, for reasons which I need not set out, that from the point of view of employers the question raised in this appeal is one of such general importance that I should give a considered decision.

The burden was on the workman to prove that the superintendent was his employer for the purposes of the Ordinance. He did not give evidence nor call witnesses, so that this case falls to be decided on the basis of only the evidence given by the superintendent.

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The workman was first employed on the estate as a labourer about 1944 at which time the appellant was not the superintendent. He became superintendent three years later being appointed to that office by the local agents of the owners on a basic salary of Rs. 1,400 per mensem. On his contract of service with his employers, Messrs. Gordon Frazer & Co., Ltd., he had naturally to perform such functions as were assigned to him by his employers. In other words, Gordon Frazer & Co., Ltd. had a controlling power over the superintendent's functions as to how he should discharge them. If, as he says, he had upon instructions from his employers paid to a labourer money to which he was entitled under the Ordinance, that would be perfectly consistent with his not being the employer for the purposes of the Ordinance.

It is true that the appellant by virtue of his office would grant a discharge certificate under the Estate Labour (Indian) Ordinance (Cap. 112) and describe himself as the "employer". The reason for it is that in Cap. 112 the word "employer" means the chief person for the time being in charge of an estate, "and includes the superintendent". It does not follow that even for the purposes of that Chapter the actual contract of service is regarded by law as one between the labourer and the superintendent. For certain limited purposes a superintendent may act as the agent of the employer without breaking the nexus between the real parties to the contract of service. Such a limited agency is necessary not merely for running an estate but any other business undertaking where its owner may choose to assign duties to responsible employees in the performance of which they would have authority to bind the owner. Now the proprietor of an estate is the proper party to be sued by labourers for the recovery of wages. That is evident from sections 11 to 15 of the Estate Labour (Indian) Ordinance. These provisions, in particular the rules and orders in Schedule A, recognise that the contracts of service are between the labourers and the proprietors.

The word "employer" in the Workmen's Compensation Ordinance is defined to include the "managing" agent of an employer. Therefore, it is not every person who can be regarded as an agent who would come within the definition. Section 2 (1) defines "managing agent" as "any person appointed or acting as the representative of another person for the purpose of carrying on such other person's trade or business, but does not include an individual manager subordinate to an employer". The local agents come clearly within the definition and equally clearly, it seems to me, the superintendent who has himself taken employment on a contract of service at a fixed salary is excluded from the definition because he can, at the most, be described as a manager subordinate to an employer. Nor is he, vis-a-vis the workman, in the position of an independent contractor.

I am unable to read the Workmen's Compensation Ordinance as being in *pari materia* with the statutes dealing with Indian immigrant labourers from the bare circumstance that they come within the definition of "workman". Whether a superintendent is an employer for the purposes of the Ordinance is a question the answer to which must be sought within the Ordinance. It would be a strange result if, by having recourse

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to the statutes which I have mentioned, one holds that a claim for workmen's compensation by an immigrant labourer can be maintained against the superintendent of the estate on which he works and that a similar claim against the same superintendent by a non-immigrant labourer would be defeated as being made against the wrong party, because in the latter case it would not be permissible to call in aid the same statutes. I do not think that it was the intention of the legislature to introduce such a refinement into the Ordinance.

The award appealed from is set aside but I make no order as to costs. I hope that this decision on what may be regarded as a technical procedural point will not result in the deprivation of the compensation to which otherwise the workman was clearly entitled.

Appeal allowed.

1955 *Present :* **Fernando A.J.**

IN RE EVELYN WARNAKULASURIYA

Habeas Corpus *Petition No. 424—M. C. Hatton*

Habeas Corpus—*Custody of child—Parent's right thereto—Factors for consideration—Adoption of Children Ordinance, 1941—Children and Young Persons Ordinance of 1939, ss. 34, 35.*

Petitioner claimed the custody of her daughter (1st respondent) aged 15. The 2nd respondent, the Mother Superior of a Convent, claimed no right to custody, but her position was that the girl was placed at the Convent by her father in order to prevent contact between the girl and the petitioner and that the girl herself wished to remain at the Convent.

Held, that the child's own wishes were by reason of her age and education worthy of consideration and that the Court should be guided by the test whether a change in the *status quo* would be prejudicial to the interests of the child. In such a case the question of registration under the Adoption of Children Ordinance did not arise. Moreover, sections 34 and 35 of the Children and Young Persons Ordinance recognized that the parent's right to custody was not absolute and enabled a Court to deprive a parent of this right if, for reasons specified in those sections, the parent was unfit to exercise care and guardianship over the child.

APPLICATION for a writ of *habeas corpus*.

D. S. Jayawickreme, Q.C. with *K. C. de Silva* for the petitioner.

J. A. L. Cooray for the respondents.

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Cur. adv. vult.

January 3, 1955. FERNANDO A.J.—

In this application, the petitioner claims the custody of her daughter Evelyn (1st respondent) who is now 15 years of age. The 2nd respondent, the Mother Superior of St. Gabriel's Convent, Hatton, claims no right to custody, but her position is that Evelyn was placed in the Convent by her father in order to prevent contact between Evelyn and the petitioner and that the girl herself wishes to remain at the Convent. I have not therefore to examine competing claims to the custody of Evelyn but only to consider whether the petitioner's lawful right to the custody of her daughter is to be overridden in favour of Evelyn's wishes.

The evidence *of the petitioner* establishes certain facts which I will assume to be correct :—

(1) Evelyn, the eldest child of the petitioner and her husband Francis Warnakulasuriya, was born on January 1, 1940.

(2) Warnakulasuriya went abroad on war service about 1941 and returned only in 1945.

(3) In 1943, Evelyn was " handed over " to the Moratuwa Convent *at the request of Warnakulasuriya.*

(4) A second child was born to the petitioner in 1946 : Warnakulasuriya denied paternity of that child and filed divorce proceedings, citing one Paulu Fernando as co-respondent. He separated from the petitioner about two months before the birth of that child.

(5) At the same time, the girl Evelyn was removed from the Moratuwa Convent by the petitioner's mother and was handed over to Warnakulasuriya. Evelyn then lived with her father for some years and not with the petitioner.

(6) The divorce action was dismissed, apparently because Warnakulasuriya did not press it, on July 13th, 1949.

(7) On the same day, Evelyn was taken by her father to the Hatton Convent and has remained there ever since in the care of the nuns.

(8) Shortly after the dismissal of the divorce action, the petitioner applied to this Court for the custody of Evelyn from her husband ; and the matter was settled upon statements by both parties that they were reconciled. After this (January 1950), husband and wife lived together (he being away for long periods on business), but Evelyn was never brought back home even for a day.

(9) Warnakulasuriya died a violent death in December 1953, and Evelyn was with great reluctance brought to her father's funeral by the nuns. This was the first occasion after 1946 when the petitioner set eyes on Evelyn.

I need refer only to a few of the controversial items of evidence. In cross-examination the petitioner said :—" In those divorce proceedings he named a co-respondent. The name of the co-respondent is G. Paul Fernando. He alleged that the child that was born to me was G. Paul Fernando's child. He is also called Paulu. My mother did not object to my association with Paulu ". When the inquiry was resumed two months later, however, the petitioner said " I do not know Paulu. I deny

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that my mother accused me of being friendly with Paulu ". This later statement is palpably false, and at least arouses suspicion as to the nature of the association between the petitioner and Paulu.

An inquest was held upon the death of Warnakulasuriya, and a letter alleged to have been written by him to the Hatton Convent very shortly before his death was produced at the inquest. It contained the following statement. " This is to notify you that at any time in my absence, the next responsible person to my dear daughter Evelyn, is her grand-mother Madolena (mother of the petitioner) ". The petitioner admits that this letter (D4) is signed by her husband and that she herself presented a certified copy of the letter to the Mother Superior when she tried in 1954 to take Evelyn away from the Hatton Convent. According to the Mother Superior, Warnakulasuriya had made it quite clear to the nuns that the petitioner was to have no communication with Evelyn.

Evelyn's evidence is to the effect that she first saw her mother at her father's funeral in 1953, i.e., at the age of 14, and she has no earlier recollection of her mother. The father made regular visits to the Convent, and father and daughter used to communicate regularly by letters. She is quite certain that her father wished her to have no contact with the petitioner. Her desire to remain at the Hatton Convent springs mainly from her respect for the father's wishes ; in addition, she expects to sit for the S. S. C. examination in 1955, and is anxious to avoid interruptions in her studies. There is evidence to indicate that Evelyn will inherit some property on the death of her grand-father and/or uncle ; but in view of the special circumstance that she has lived away from home and family for so long, I think it is of particular importance that she receives as good an education as possible in order to fit herself to face the problems and difficulties which lie before her.

Aspersions have been cast against the character of the petitioner, and this principally in the evidence given by the petitioner's own mother. Although I do not agree with Mr. Jayawickreme that this evidence should be disregarded as unreliable, I find it unnecessary to take account of those aspersions. But, wherever the blame may lie, the fact is that the petitioner failed to maintain good or normal relations either with her husband or with her own mother. Evelyn said that on the first date of the inquiry, the petitioner said to her " I know what I will do when I get you ". I am not disposed to accept the petitioner's denial that she made such a remark.

I do not propose to refer, except briefly, to the principles which should guide a Court in determining whether a mother's undoubted right to the custody of a daughter of fifteen may be denied recognition. I can add nothing useful to Nihill J.'s observations on the law in *Samarasinha v. Simon* [1] where the authorities were comprehensively reviewed. Mr. Jayawickreme has relied strongly on the case of *Abeywardene v. Jayatilleke* [2]. It was there held that a person who has failed to register himself as the custodian of a child (under the Adoption of Children Ordinance, 1941) cannot claim to retain custody as against the parents of the child. That decision is not applicable to the present facts because I am here

[1] (*1941*) *43 N. L. R. 129.* [2] (*1953*) *55 N. L. R. 54.*

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considering, not a claim by the 2nd respondent to the custody of Evelyn, but Evelyn's own refusal to live with her mother. Moreover, it does not appear from the judgment in that case what were the child's own wishes, and whether her wishes were by reason of age and education worthy of consideration by the Court. I propose therefore to guide myself by the test whether a change in the *status quo* would be prejudicial to the interests of Evelyn—a test recognised by Nihill J. and adopted by me recently in H. C. Application No. 1824, S. C. Minutes. Our Statute Law also recognises that the parent's right to custody is not absolute; Sections 34 and 35 of the Children and Young Persons Ordinance of 1939 enable a Court to deprive a parent of this right if, for reasons specified in those sections, the parent is unfit to exercise care and guardianship over his child.

The facts to which I have referred convince me that Evelyn's attitude is perfectly reasonable; she has no affection or respect for the petitioner who is virtually a complete stranger to her; her own father deliberately kept her away from contact with the petitioner; she is at present happy and in safe hands and anxious to honour her father's wishes; but for the misfortune of her father's untimely death, she would have remained in this Convent at his direction. On the other hand, I am not satisfied that the petitioner is worthy of her daughter's respect or affection or that she is genuinely concerned for the welfare of the daughter. In any event the petitioner's right to custody would be of no avail after 1955. I am of opinion that a change of custody will be prejudicial to the welfare and interests of the girl Evelyn. I would accordingly refuse the application with costs fixed at Rs. 157·50. I direct, however, that the Mother Superior must permit the petitioner to visit the girl once a month, and must deliver to the girl letters addressed to her by the petitioner; this direction will be effective only for the year 1955, and the matter of visits can thereafter be decided in accordance with the girl's own wishes. The Magistrate will please communicate this direction to the parties.

Application refused.

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1955 *Present :* **Gratiaen J. and Sansoni J.**

H. M. T. B. HERAT, Appellant, *and* T. M. T. B. AMUNUGAMA, Respondent

S. C. 1—D. C. Kurunegala, 6,639

Fiduciary relations—Administrator and beneficiary—Gaining of "pecuniary advantage" by fiduciary—Constructive trust—Trusts Ordinance (Cap. 72), s. 90—Kandyan Law—Adoption—Ordinance No. 39 of 1938, s. 7.

A, the administratrix of her deceased husband's estate, was entitled, under the Kandyan Law, to a life-interest in the entire property of the deceased, who died issueless. Although, according to her application for letters of administration, the only other heir was B, the adopted child of the deceased, two other persons (C and D), who were the children of the deceased's sister, intervened in the testamentary action and claimed that they were the sole intestate heirs of the deceased (subject to the widow's admitted life-interest); C and D denied that the "adoption" of B was of a kind which entitled her to claim the status of an intestate heir. B, being a minor, was represented in the action by her natural father.

A was advised about the difficulty of establishing by oral evidence B's adoption for purposes of inheritance under the Kandyan law (prior to the enactment of Section 7 of Ordinance No. 39 of 1938). Accordingly, negotiations took place for a settlement of the dispute, and in due course the trial Judge, having given consideration to the circumstances placed before him and to the special interests of the minor B, gave his judicial approval on October 9, 1930, to the following bona fide settlement :

(1) B, C and D each received absolute title to a ¼ share of the estate free of a life-interest in favour of A.

(2) A thus waived her undisputed and indisputable life-interest in ¾ of the estate, and agreed to accept instead absolute title to a ¼ share (in which she already enjoyed a life-interest).

Twenty years later B's heir instituted the present action alleging that B was in fact the adopted child of the deceased in the testamentary case. He claimed that the share which was allotted to A under the settlement and which was subsequently donated by A to the defendant was impressed with a trust in favour of B and her heirs.

Held, that it could not be said that A was guilty of express fraud in regard to the settlement in the testamentary case or that she had abused her fiduciary position and thereby derived a pecuniary advantage at the expense of B within the meaning of section 90 of the Trusts Ordinance.

APPEAL from a judgment of the District Court, Kurunegala.

Sir Lalita Rajapakse, Q.C., with *C. R. Gunaratne* and *G. D. C. Weerasinghe*, for the defendant appellant.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the plaintiff respondent.

Cur adv. vult.

February 15, 1955. GRATIAEN J.—

A Kandyan landowner named E. Edward Banda Korale died issueless and intestate on 3rd March, 1929, leaving a substantial estate valued for

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2—J. N. B 47101-1,592 (8/55)

purposes of duty at Rs. 129,918/09. His widow Bandara Menika was duly appointed administratrix of the estate in Testamentary Action No. 3,714 of the District Court of Kurunegala and it is common ground that under the Kandyan Law she was his heir to the extent of a life-interest in the entire property. She was about 49 years old at the time of her husband's death.

In or about the year 1913 Edward Banda and Bandara Menika had adopted as their child Somawathie Kumarihamy who was the infant daughter of a kinsman of Edward Banda. She was 16½ years old when Edward Banda died. Bandara Menika disclosed the fact of the adoption in her application for letters of administration, but her petition P5 dated 9th July, 1929, expressed ignorance as to whether the adoption complied with "the requirements of the Kandyan Law for the purpose of inheritance". Somawathie's natural father Appuhamy was appointed guardian-ad-litem to protect her interests in the testamentary action. Shortly afterwards, two persons named Kumarihamy and Ram Menika (the children of Edward Banda's sister) intervened and claimed that they were the sole intestate heirs of the deceased (subject to the widow's admitted life-interest). They denied that the "adoption" of Somawathie was of a kind which entitled her to claim the status of an intestate heir.

Had this dispute as to heirship proceeded to a judicial investigation, *either* Somawathie alone *or* Kumarihamy and Ram Menika jointly would have been declared entitled (subject to Bandara Menika's life-interest) to Edward Banda's estate to the complete exclusion of the contesting group or individual (as the case may be). This appears to have been the context in which negotiations took place for a settlement of the dispute, and in due course the (then) District Judge of Kurunegala, having given consideration to the circumstances placed before him and to the special interests of the minor Somawathie, gave his judicial approval on 9th October, 1930, to a settlement in the following terms:

(1) Somawathie, Kumarihamy and Ram Menika each received absolute title to a ¼ share of the estate free of a life-interest in favour of Bandara Menika ;

(2) Bandara Menika thus waived her undisputed and indisputable life interest in ¾ of the estate, and agreed to accept instead absolute title to a ¼ share (in which she already enjoyed a life-interest).

This settlement was acted upon by all the parties and was assumed to be valid even after Somawathie (who married the respondent in 1932) attained majority under the Kandyan Law on 7th September, 1933. Bandara Menika died on 31st July, 1940, and it was only after her death that Somawathie and the respondent took steps to revive Somawathie's claim to have inherited the entirety of Edward Banda's estate. In the meantime, Bandara Menika had in 1936 donated to the appellant (her nephew) the undivided ¼ share of some of the properties which passed to her under the settlement of 1930 together with an additional 1/12 share which she had subsequently purchased from Ram Menika (who had similarly acquired those interests under the same settlement). There was

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no evidence, however, that the subsequent donation was in anybody's contemplation in 1930.

On 21st July, 1942, the appellant, claiming title to the shares gifted to him by Bandara Menika in 1936, instituted action No. 1,052 in the District Court of Kurunegala for a partition of the property between himself, Somawathie, Kumarihamy and Ram Menika on the basis of a common title proceeding from the terms of the settlement previously referred to. In paragraph 4 of the plaint he pleaded that the settlement was *res adjudicata* between himself and his co-owners. Somawathie, on the other hand, had by then taken steps, in concert with her husband, to challenge the validity of the settlement of 1930 and she filed answer in the partition action denying all the material averments in the plaint. She specially denied that Bandara Menika had " *any right or title* to convey to the (appellant) ".

Before the trial of the partition action commenced, Somawathie, in pursuance of a compromise privately arrived at with Kumarihamy and Ram Menika, had obtained an order in the testamentary action on 20th September, 1944, purporting to set aside the earlier settlement of 1930 and to substitute in its place a declaration that Somawathie as the adopted child of Edward Banda was in truth his sole heir. (It is now conceded that this compromise does not bind the appellant). On 6th October, 1944, she applied in the partition action for leave to amend her pleadings " owing to the order made on 20–9–44 in D. C., Testy : No. 3714 ". The application was (rightly or wrongly) refused, and no appeal was preferred against that decision.

On 20th October, 1944, an interlocutory decree for partition was entered declaring the parties entitled to shares on the basis of the settlement of 1930. Somawathie was not present at the trial, and her lawyers stated that they had received no instructions to appear for her. Her later application to re-open the proceedings was unsuccessful. In due course, a final decree for partition was passed in terms of which the appellant was declared the owner of a divided allotment of land (described in Schedule " B " annexed to the present plaint) in lieu of his former undivided interests in the larger land (described in Schedule " A "). Similarly, Somawathie and the other co-owners received other divided allotments. The title created by the settlement of 1930 clearly provided the foundation for the adjudication as to the rights of the parties in the partition action.

Somawathie herself died on 27th February, 1945, leaving a last will whereby she appointed the respondent her sole heir. He instituted this action on 25th July, 1950, for a declaration that the defendant held the property described in Schedule " B " in trust for him. He alleged that Bandara Menika, " well knowing that Somawathie was the adopted child of Edward Banda for purposes of inheritance under the Kandyan Law, and although bound in a fiduciary capacity to protect the interests of Somawathie, took advantage of her fiduciary position and, acting in fraud and collusion with the guardian-ad-litem of Somawathie in case No. 3,714, entered into a fraudulent and collusive agreement with the said guardian-ad-litem and Kumarihamy and Ram Menika to divide the estate

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of Edward Banda to the detriment of Somawathie ". Accordingly, it was pleaded, the benefits which Bandara Menika improperly derived from this unconscionable compromise were held by her in trust for Somawathie ; the appellant's rights in the property as Bandara Menika's donee were impressed with the same constructive trust.

The learned District Judge held in favour of the respondent that Bandara Menika had fraudulently abused her fiduciary position in entering into the settlement of 1930 and accordingly became a constructive trustee for Somawathie to the extent of the improper benefits which passed to her thereunder. He held that the appellant, being a mere volunteer, also held the property in trust ; indeed he took the view that the appellant had himself been a party to the fraud, but Mr. Weerasooria very properly did not invite us to adopt that fanciful theory (based as it was on extremely flimsy material). Finally, the learned Judge rejected the plea that the decree in the partition action operated in any event as *res adjudicata* and precluded Somawathie's successor in interest from reagitating any question relating to the validity or propriety of the settlement.

I have come to the conclusion that the judgment under appeal must be set aside because the respondent wholly failed to establish his allegation that Bandara Menika was guilty of express fraud or that (even on a slightly low plane of criticism) she had abused her fiduciary position and thereby derived a pecuniary advantage at the expense of her beneficiary.

Let us consider first the allegation of express fraud. When this action commenced, twenty years had elapsed since the settlement of 1930 was reached in the testamentary proceedings. During this long interval of time, Bandara Menika had died and could not give her version of the motives that induced her to agree to its terms ; Mr. Wanduragala (who acted as her Proctor in the litigation) and Mr. V. I. V. Gomis (who acted for the rival claimants) are also admittedly dead ; so are Somawathie and her guardian-ad-litem who consented to the settlement on independent legal advice. In the absence, therefore, of most of the principal parties to the compromise, it is incumbent upon us to scrutinise the very belated allegation of fraud with considerable caution.

The only direct evidence on which the learned Judge based his inference of express fraud was the testimony of a Proctor's clerk who claimed in 1952 to have overheard parts of certain vague conversations which took place twenty-three years earlier in Mr. Wanduragala's office. To my mind, this evidence (even if true) was quite inadequate to establish fraud against a woman who had since died. As for the circumstantial evidence referred to in the judgment under appeal, it only proves that Bandara Menika knew (as she had herself always admitted) that her husband in fact regarded Somawathie as their adopted child ; it does not justify the further inference that she did not entertain a genuine doubt as to the chances of convincing a Court of law in a contested litigation that the adoption was of a kind which constituted Somawathie the sole heir of her adoptive father under the Kandyan Law. The entire evidence is quite consistent with the more charitable theory that, in her honest

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opinion, which was shared by honest lawyers, a settlement of the dispute was in the best interests of the minor whom she too regarded as her daughter.

The difficulty of establishing adoption for purposes of inheritance under the Kandyan Law by oral evidence (i.e., before the legislature enacted Section 7 of Ordinance No. 39 of 1938) is a matter of common knowledge, and the law on the subject was even more controversial in 1930 than it is now. *Hayley's Law and Customs of the Sinhalese*, published in 1923, states at page 203 that there must be proof of " an intention on the part of the adopter to make the adopted person his child, and constitute him or her his successor, coupled with acts of adoption and, according to the authorities, *an open declaration of the adoption* ". The learned author adds at page 207 that " *the numerous cases in which the Courts have refused to recognise adoption, although the intention to adopt seems to have been established, have apparently settled the law that there must be a public declaration, but what constitutes such a declaration has not been defined* ". The uncertainty was not removed at the time of the settlement which is now impugned, and could not but have been prominently before the minds of the experienced lawyers who represented the parties at the relevant time. Indeed, the controversy continued even after this Court pronounced in November 1937 that " the declaration need not be made on a formal occasion "—*Tikirikumarihamy v. Niyarapola* [1]. For instance, this conflict of authority as to the requirements of " a public declaration " was again emphasised six years later, when a Bench of three Judges was constituted to decide the question authoritatively in *Ukku Banda v. Somawathie* [2], where the same Somawathie successfully established her adoption by the widow Bandara Menika. It is therefore quite wrong to infer that the settlement of 1930 was necessarily prompted by any other motive than to avoid the risks of a protracted and uncertain litigation which, if unsuccessful, would have completely disentitled Somawathie to any rights in her adoptive father's estate.

Has the evidence established a constructive trust against Bandara Menika even though there was insufficient proof of express fraud ? That she stood in a fiduciary position towards Somawathie is clear enough. But did she abuse that position in order to gain some personal advantage at the beneficiary's expense ? And, above all, did she in fact derive any demonstrable advantage from the settlement ? For then only can the plaintiff invoke the well-settled principle of law which has been incorporated in Section 90 of the Trusts Ordinance in the following terms :

> " When a person bound in a fiduciary capacity to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, ... he must hold for the benefit of such other person the advantage so gained. "

When Somawathie's adoption for purposes of inheritance was challenged by the rival claimants to heirship, she was represented by her natural

[1] *(1937) 44 N. L. R. 476.* [2] *(1943) 44 N. L. R. 457.*

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father who had recourse to independent legal advice. In addition, her interests as a minor were protected by a very experienced Judge who approved the settlement. (The suggestion that he had perhaps sanctioned some different compromise seems to be quite fanciful ; the subsequent transactions negative this theory, and on this point at least the later partition decree places the matter beyond all controversy.)

I am very far from satisfied (even if one reconsiders the matter retrospectively) that Bandara Menika herself did gain any demonstrable pecuniary advantage from the settlement. Her own claim to a life-interest in the entire estate was certainly not in jeopardy. How then could it have been argued at the relevant date that she necessarily benefited by taking an absolute interest in a $\frac{1}{4}$ share of the estate in exchange for a life-interest in the entirety ? She had waived in favour of Somawathie and the other claimants her legal right to receive an assured immediate income during her life-time from the outstanding $\frac{3}{4}$ share of a valuable estate ; at the same time Somawathie herself had gained some immediate benefit by being assured of the title to and the income from $\frac{1}{4}$ of the estate in exchange for the bare possibility (let us even call it the probability) of becoming owner of the entirety, *but without any right to any income until Bandara Menika's death.* It would indeed have required an actuary to predict the financial advantages and disadvantages which would flow from the compromise agreed upon ; and, as to the greater risks presented by a contested litigation on the issue of heirship, no lawyer jealous of his reputation would, I fancy, have hazarded a confident opinion in 1930. Indeed it was in recognition of these risks that the Kandyan law of adoption for purposes of inheritance was amended in 1938. In this situation, one would hesitate to pronounce even now that the settlement of 1930 was in fact unwisely reached.

The learned District Judge has emphasised the fact that, according to the evidence, Bandara Menika appropriated her income of the entire property during her life-time. Even if that be true, it has no relevancy to the present cause of action, because such appropriation was contrary to and not a consequence of the terms of the impugned settlement. Similarly, no constructive trust could be imposed by law on Bandara Menika in respect of the benefits derived by Ram Menika and Kumarihamy. Indeed, I see no reason for assuming that she was in any way improperly concerned to promote their interests to her adopted daughter's prejudice.

For all these reasons, I am satisfied that the provisions of Section 90 of the Trusts Ordinance do not apply. In addition, I am inclined to the view that the decree in the partition action No. 1,052 instituted in 1942 precludes the plaintiff from attacking the validity of the settlement of 1930 on which that decree was based. It has no doubt been authoritatively decided that Section 9 of the Partition Ordinance does not necessarily extinguish constructive trusts—*Marikar v. Marikar*[1]. But in action No. 1,052 Somawathie, as she was entitled to do, expressly put in issue the validity of any rights which the appellant (as Bandara Menika's successor in

[1] *(1920) 22 N. L. R. 137.*

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title) claimed by virtue of the settlement. She also attempted unsuccessfully to set up the subsequent rescission of the settlement as a bar to the appellant's title. In that situation I would have been prepared to hold, if necessary, that the decree in favour of the appellant operates as *res adjudicata* against the respondent. In *Marikar's case* (supra) the beneficiary (although a party) had not put in issue the bare legal estate of the constructive trustee. In action No. 1,052, by way of contrast, the alleged beneficiary asked for a dismissal of the action because she virtually denied that the alleged trustee had " any right or title " in the property sought to be partitioned. I would allow the appeal and dismiss the respondent's action with costs in both Courts.

SANSONI J.—I agree.

Appeal allowed.

1954 *Present :* **Weerasooriya J. and de Silva J.**

SINNATHAMBY *et al.*, Appellants, *and* KANDIAH *et al.*, Respondents

S. C. 42—D. C. (Inty.) Chavakachcheri, 261

Civil Procedure Code—Necessary party—Refusal to join in action—Duty of Court to add such party—Sections 17, 18 (1), 473.

Section 473 of the Civil Procedure Code provides that where there are several trustees they shall all be made parties to an action instituted by one or more of them. Hence, if one of them refuses to join in the action it is the duty of the Court, acting under section 18 (1), to add him as a party defendant.

APPEAL from an order of the District Court, Chavakachcheri.

C. Renganathan, for the 1st and 2nd plaintiffs-appellants.

J. V. C. Nathaniel, for the 1st, 2nd, 3rd, 22nd, 24th, 26th–29th, 31st and 32nd defendants-respondents and the citee-respondent.

Cur. adv. vult.

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September 16, 1954. WEERASOORIYA J.—

The citee-respondent was originally joined as the 3rd plaintiff in this action on the basis that he and the other two plaintiffs are the duly appointed trustees of the Nellikinathaddy Kandaswamy Kovil at Mirusuvil.

In the course of the proceedings in the lower Court it was discovered that the proxy filed by the proctor acting purportedly on behalf of all three plaintiffs had not been signed by the 2nd plaintiff and the citee-respondent. The 2nd plaintiff has since made good the omission by granting a proxy to the same proctor ratifying all acts done and authorising the proctor to act on his behalf. The citee-respondent has, however, refused to do likewise and the learned District Judge struck his name out of the plaint. With regard to the application of the 1st and 2nd plaintiffs that in the circumstances the citee-respondent be made a party defendant the learned District Judge stated that this could not be granted since it did not appear to be necessary and proper that the citee-respondent should be made a party defendant. From this order the 1st and 2nd plaintiffs have appealed.

S. 473 of the Civil Procedure Code provides that where there are several trustees they shall all be made parties to an action by one or more of them. Hence, even if (as a result of what has transpired) the action is regarded from its inception as having been filed by the 1st and 2nd plaintiffs alone, there was a non-joinder of a necessary party in the person of the citee-respondent which, however, in view of S. 17 of the Code, would not be a reason for defeating the action, and the remedy is to be found in S. 18 (1) which empowers the Court *inter alia* to add as a party the name of any person who ought to have been joined (in the first instance) whether as plaintiff or defendant.

While the exercise by the Court of the powers conferred under S. 18 (1) is discretionary, I am of the opinion that in this case the learned District Judge should, in view of the provisions of S. 473, have added the citee-respondent as a party defendant. The order of the learned District Judge is therefore set aside and the case is remitted to the lower Court so that the citee-respondent may be added as a party defendant and the action proceeded with thereafter according to law.

It was not urged before us by learned counsel who appeared for the respondents that the addition of the citee-respondent as a defendant would in any way be prejudicial to the rights of the respondents as at the date of the filing of the action.

The 1st, 2nd, 3rd, 22nd, 24th, 26th–29th, 31st, 32nd defendants and the citee-respondent will pay to the appellants the costs of this appeal and of the inquiry in the Court below.

DE SILVA J.—I agree.

Order set aside.

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1955 *Present :* **Sansoni J.**

W. H. BUDDHADASA, Petitioner, *and* N. NADARAJA Respondent

S. C. 90—In the matter of an Application for an Injunction under Section 20 of the Courts Ordinance

Injunction—Power of Supreme Court to grant injunctions—Conditions precedent—Liability of a servant of the Crown—Courts Ordinance (Cap. 6), s. 20—Income Tax Ordinance (Cap. 188), s. 79 (2) (a).

In an application for an injunction to restrain the respondent, in supposed performance of his functions as Deputy Fiscal, from wrongfully seizing and selling the movable property of the petitioner in alleged pursuance of the provisions of section 79 (2) (*a*) of the Income Tax Ordinance—

Held, that the power of the Supreme Court to grant injunctions under section 20 of the Courts Ordinance " is a strictly limited one to be exercised only on special grounds and in special circumstances ". An injunction will not therefore be granted if the petitioner was in a position to apply to the District Court for an injunction at about the time that he filed his application in the Supreme Court or even if, between the date of his filing his petition in the Supreme Court and the date of hearing of arguments, the petitioner could have instituted action in the District Court.

Held further, that a servant of the Crown purporting to act in his official capacity on behalf of the Crown can be restrained from so acting by an injunction issued against him as an individual.

APPLICATION for an injunction under section 20 of the Courts Ordinance.

Issadeen Mohamed, with *Carl Jayasinghe*, for the petitioner.

Walter Jayawardene, for the Deputy Fiscal, Western Province.

R. S. Wanasundera, Crown Counsel, as *amicus curiae*.

May 2, 1955. SANSONI J.—

The petitioner in this application has asked for the issue of an injunction under section 20 of the Courts Ordinance, Cap. 6, to restrain the respondent " from pursuing the unlawful action already committed " (i.e., the wrongful seizure of the petitioner's goods) " and to prevent further unlawful

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actions about to be committed, namely, the sale of the petitioner's goods and the continuance of the seizure". He has also asked that the respondent be ordered to release the petitioner's goods already seized. The respondent is described in the caption as "N. Nadarajah of Colombo holding office as Deputy Fiscal, Western Province" while the petitioner is "W. H. Buddhadasa carrying on business under the name, style and firm of W. H. Hendrick and Sons at No. 63 Bankshall Street, Pettah, Colombo".

The application was made by petition and affidavit to which were attached certain documents referred to therein, and was filed on 17th February. It came before Gunasekara, J., who ordered notice to be issued on the respondent returnable 22nd February. Notice was duly served on the respondent who filed his own affidavit and the affidavit of T. Murugaser, Assessor of Income Tax, both dated 19th March. The affidavits refer to certain documents filed along with them. In reply to those affidavits the petitioner's proctor filed two further affidavits dated 21st March from the petitioner and W. H. Hendrick, Managing Director of Messrs. Hendrick and Sons, respectively, to which were attached certain documents referred to therein.

The petitioner's complaint in his first affidavit is that "the respondent proceeded on the 14th February, 1955 to seize and seal up the goods belonging to the petitioner at premises No. 63, Bankshall Street, alleging that he was empowered under a certificate issued by the Deputy Commissioner of Income Tax in June, 1954, under section 79 (2) (*a*) of the Income Tax Ordinance to seize the goods belonging to a firm called Hendrick and Sons Limited". He claims to have been the Director/Secretary of the firm of Hendrick and Sons Limited which had been carrying on business at No. 63 Bankshall Street but had ceased to carry on business in those premises as from August 1954. He claims that he bought the goods of that firm for valuable consideration on 10th August, 1954, and thereafter occupied the same premises paying rent to its owners, one of whom is the petitioner himself. He claims that most of the goods lying in those premises have been purchased and imported by him from various sources. His reason for filing this application is that he will suffer irremediable mischief before he can prevent it by bringing an action in an original Court.

The respondent was until 11th March, 1955, the Deputy Fiscal, Western Province. He relies in his affidavit on a certificate of tax in default dated 25th June, 1954, issued by the Deputy Commissioner Income Tax under section 79 (2) (*a*) of the Income Tax Ordinance, Cap. 188, in respect of tax due from Hendrick and Sons Limited, of No. 63 Bankshall Street. He says he received along with that certificate a letter from the Deputy Commissioner requesting him to take early action to recover the tax from the defaulter. He refers in his affidavit to the reports he received from his officers who were sent to demand payment from the defaulter, to the effect that they demanded payment of the tax from the Manager of the Company on several occasions early in July and August, 1954. As no payment was made, the respondent says that he directed his writ officer

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on 15th September, 1954, to seize the movable properties of the Company and that he received a report from his officer that he had effected a seizure on 15th September and placed guards over the property seized. A copy of a letter dated 16th September purporting to have been sent by the petitioner as Secretary of Hendrick and Sons Ltd., 63 Bankshall Street, is referred to in the affidavit. It reads :—

Colombo, 16.9.54.

Fiscal, W. P.,
Colombo.

Dear Sir,

With ref. to the C. I. T. No. D 9/58 on which certain goods were seized by your officer, I hereby undertake to hold the said articles at your disposal. If the cupboards containing these articles are sealed the name of the business will suffer damage. I therefore request you to refrain from sealing the cupboards.

Yours faithfully,
(Sgd.) (Illegibly.)

W. H. Buddhadasa
Secretary,
Hendrick and Sons Ltd.,
63 Bankshall Street,
Colombo 11.

The Commissioner of Income Tax on 17th September directed the respondent to stay sale and withdraw the guards provided Rs. 200 a day was paid by the defaulting Company. No further seizure was apparently attempted till November, 1954, but on that occasion the respondent says he was informed by his officer that the defaulting Company had been liquidated and that the goods lying in those premises belonged to the petitioner. On 11th January, 1955, the Commissioner of Income Tax again directed the respondent to take immediate steps to seize and sell the movable property at No. 63 Bankshall Street for recovery of any balance outstanding on the certificate. The respondent says his officer started to seize and inventorise the goods at No. 63 Bankshall Street on 17th January and this process went on till 21st January.

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In his second affidavit dated 21st March, 1955, which was obviously filed to meet certain allegations in the respondent's affidavit, the petitioner refers to the seizure alleged to have been effected between 17th and 21st January in the following paragraphs :—

(4) The respondent avers that he seized the goods between the 17th and 21st January, 1955. It is admitted that the respondent's subordinates came to the premises on the 17th of January, 1955, and proposed to seize the goods but I resisted the same and thereafter the guards left the premises.

(5) On or about the 26th of January, 1955, the respondent's subordinates accompanied by a Police Sergeant came again to my premises at 63 Bankshall Street and attempted to seize and seal my goods. On showing my documents of title to the goods in the premises, the respondent's subordinates and the Police Sergeant left my premises.

(6) If however the respondent's officers' presence in my premises between the 17th day of January, 1955 and the 21st day of January, 1955, and the inventorizing of my goods was deemed a seizure then there was in fact a suspension of seizure for the reason that I continued to carry on business and dealt with the goods which were alleged to be already seized as owner as I was entitled to in the usual course of my business, during the said period and subsequently.

He refers again to the alleged seizure of 14th February, 1955, in the following paragraphs :—

(7) On the 14th February, 1955, the Respondent's officers came again to my premises at 63 Bankshall Street, and proposed to seize and seal my goods. I resisted the same and was taken into custody and thereafter the goods were seized and sealed and placed in charge of guards in my absence.

(8) Therefore I am advised that the seizure under complaint was in law and in fact the one that took place on the 14th February, 1955.

It is significant that the petitioner does not deny the allegations in the respondent's affidavit that a seizure was effected on 15th September, 1954, and that the letter dated 16th September, 1954, was sent to him by the petitioner. The omission to refer to these matters, and to deny those allegations if they are untrue, is certainly strange.

I shall now refer to the proceedings which took place at the enquiry before me. An application had been made by the petitioner's proctor to add the present Deputy Fiscal, Mr. E. A. A. de Silva in place of the respondent who had retired on 11th March, 1955, in order to render the writ, if granted, effective. Mr. Mohamed supported this application but Mr. Jayawardene objected to the addition of Mr. de Silva. At the

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same time Mr. Jayawardene raised three preliminary objections to the grant of an injunction and it was agreed that the preliminary objections should be considered first. I accordingly heard arguments on them. They were :—

(1) that the petitions and affidavits filed by the petitioner did not bring this case within section 20 of the Courts Ordinance.

(2) that an injunction would not be granted against a public officer where the grant of such an injunction would in effect be the grant of an injunction against the Crown.

(3) that in any event the Court would not exercise its discretion in favour of the petitioner in the circumstances of this case.

It will be convenient to deal with the first and third preliminary objections together. Section 20 (formerly section 22) of the Courts Ordinance repeats the language of section 49 of the Charter of 1833, the terms of which were considered by the Full Court in *In re Baly* [1]. Mr. Mohamed submitted that this judgment was of no binding force because the Charter and the Courts Ordinance are not *in pari materia*. Now the rule of construction in regard to Acts which are *in pari materia* is that such Acts are to be taken together as forming one system and as interpreting and enforcing each other (Craies on Statute Law, 5th Edition page 126). But one should not misunderstand the meaning of the phrase " Acts *in pari materia* " in this context. It only means that the Acts relate to the same subject or the same branch of the law ; it does not mean that the Acts were enacted by the same legislative body. Although the Charter and the Courts Ordinance were not enacted by the same legislative body they are both legal enactments passed by the legislative authority of the Crown. I consider myself bound by the interpretation given by the Full Court to provisions of the Charter which are identical with those of the Courts Ordinance, the more so as the Court thought that it was called upon " to establish a well considered precedent for the future guidance of this Court ". The rule of interpretation which seems to be applicable in this case is, I think, that enunciated in Australia and adopted by the Privy Council :—" No doubt it is a general rule of construction that when particular words in a statute have received judicial interpretation and the statute is subsequently repealed and re-enacted in identical terms, the words in the new enactment should be considered in the sense previously attributed to them by the judiciary. But I think that rule only applies to cases of considered decision upon the meaning of particular words in a statute " (Craies op. cit. p. 162).

The Full Court considered that it must look strictly to the Charter for its guidance, and decided that the relevant provisions " give to this Court a special power to be exercised on very special occasions only. They appear to point not simply to a limited jurisdiction, protecting the applicant *ad interim*, until he can protect himself by obtaining an injunction in the District Court, which he can obtain on filing the libel as the very

[1] (1859) 3 Lor. 238.

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first step in the cause, but they also require that the applicant should, as a condition precedent to obtaining a writ from this Court, show that he is prevented by some substantial cause from applying at once to the District Court instead of coming to the Supreme Court at all". The judgment then gives instances of such cases and proceeds :—"The petitioner's affidavit simply states that there is not time for him to apply to the District Court. That affidavit was sworn on the 6th of July, the day on which this application was first made to this Court ; and as the question of right, on which the application was founded, had been for some time mooted between the parties, and the transaction at the College on which the Queen's Advocate relies, as ground for believing that irremediable mischief would ensue, unless an injunction of this Court be interposed, took place on the 1st of July, the Supreme Court is at a loss for any proof, either of insufficiency of time, or of any other cause, of which this Court as a Court of Justice could take notice why the application for an injunction might not have been made in the District Court".

On this question of the powers of this Court under section 20 we have also the judgment of Bonser, C.J., in *Mohamado v. Ibrahim* [1]. The learned Chief Justice pointed out, as the Full Court had also done, that this Court has by its constitution no original jurisdiction in civil matters and that the provisions of section 20 confer "a limited power, very different from that given by the Judicature Act of 1873 to the English Supreme Court of granting injunctions in all cases in which it shall appear to the Court just or expedient to do so". He also held that this Court has no inherent power to issue injunctions and its jurisdiction is restricted to the cases referred to in section 20. He then went on to say: "It would appear, therefore, that the power of granting injunctions is a strictly limited one to be exercised only on special grounds, and in special circumstances, (1) where irremediable mischief would ensue from the act sought to be restrained, (2) an action would lie for an injunction in some Court of original jurisdiction and (3) the plaintiff is prevented by some substantial cause from applying to that Court". Nowhere in his judgment did Bonser, C.J., show any disagreement with the judgment of the Full Court ; on the contrary, I think his judgment occasionally adopts, with variations, the language of the earlier judgment. While the applicant failed before Bonser, C.J., because he had not satisfied the above-mentioned first condition, and the applicant before the Full Court failed because he had not satisfied the third condition, the preliminary objections raise the question whether the applicant before me has satisfied the second and third conditions.

I have already referred to the salient features of this dispute in so far as they have a bearing on the preliminary objections. It is necessary to consider whether the petitioner was prevented by some substantial cause from applying to the District Court for an injunction. I quite appreciate that he was under an obligation to comply with the imperative provisions of section 461 of the Civil Procedure Code before he could proceed against the respondent in the District Court. I wish to make it clear that if the first act of interference by the respondent with the goods in question

[1] *(1895) 2 N. L. R. 36.*

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took place on 14th February, 1955, there would be no substance in the first and third preliminary objections because the month's notice required to be given would have involved the petitioner in delay and resultant damage ; but that is not the view I take of the facts as I gather them from the affidavits, and I am now considering only such facts as appear to me to be incontrovertible. On the petitioner's own admission in his second affidavit, there was an interference or at least a threatened interference with the goods in question on 17th January, 1955. It is strange that though he refers to these matters, he has studiously refrained from making any admission or denial in regard to the respondent's statement that there was a seizure in September 1954, with regard to which the petitioner himself wrote the letter R7 dated 16th September, 1954. Taking these facts alone into consideration I ask myself whether the petitioner has established that he was prevented by some substantial cause from applying to the District Court for an injunction. Even if the first attempt at interference with these goods claimed by him only took place on 17th January, he could on that day have given the respondent a month's notice of action ; he would then have been in a position to apply to the District Court for an injunction at about the time that he filed the present application. It was submitted that the petitioner complains of a seizure which was effected on 14th February. But, as the judgment of the Full Court put it, " the question on which the application was founded had been for some time mooted between the parties " and if the petitioner chose to wait until the only forum in which he could ask relief was this Court he must bear the consequences of the rule that the power of this Court to grant injunctions " is a strictly limited one to be exercised only on special grounds and in special circumstances ".

But there is a further objection to the grant of the injunction applied for. It was stated by Mr. Jayawardene that although the papers were filed in this Court on 16th February and over a six weeks had elapsed before I heard arguments, no action had yet been filed in the District Court. This statement was not contradicted by Mr. Mohamed and I therefore accept it as setting out the true position. If, then, as the Full Court held, an injunction under section 20 is only granted under a limited jurisdiction to protect the applicant *ad interim* until he can protect himself by obtaining an injunction in the District Court, it is clear that the petitioner has failed in his duty to act promptly. If I were to issue the injunction I could only do so on the footing that the petitioner could not, for some substantial cause beyond his control, have obtained one from the District Court ; and this is demonstrably not so. It should not be thought that this Court will issue an injunction permanently or for an indefinite period. If the petitioner's object was to obtain redress for a threatened wrong and not to hamper the work of the Income Tax Department, he should have given the statutory notice at once, and instituted an action in the District Court on the earliest date after the expiry of one month. If no such notice has been given, the petitioner has disentitled himself to any relief whatever in these proceedings. For these reasons the application of the petitioner must be dismissed.

In appreciation of the helpful arguments of Counsel on the second preliminary objection, I shall deal with it as briefly as possible. Counsel

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treated as axiomatic the proposition that no injunction lies against the Crown. Mr. Jayawardene sought to deduce from this the corollary that no injunction will be issued against an officer of the Crown if such an injunction will in its practical effect be an injunction against the Crown. His argument was that you cannot do indirectly what you are prohibited from doing directly, and the effect of issuing an injunction against the respondent in his individual capacity would be to interfere with the work of the Income Tax Commissioner in collecting tax for the Crown. The case may, he said, be different if the respondent as Fiscal were seeking to seize goods of the petitioner in execution, say, of a decree entered in favour of a private judgment creditor. Mr. Mohamed on the other hand argued that although the Crown is not liable to be sued in tort and is not liable to an injunction, Crown Servants are personally, though not officially or in a representative capacity, liable for any wrong done by them in the course of their employment even though done by the authority of the Crown. These propositions, I should add, were conceded by Mr. Jayawardene. Mr. Mohamed denied the existence of a supposed rule that the Crown cannot be interfered with in its work, for if that were the case, he submitted, no injunction could issue against any servant of the Crown for they are all engaged in doing the work of the Crown.

As I see it the point in dispute is whether a servant of the Crown purporting to act in his official capacity on behalf of the Crown can be restrained from so acting by an injunction issued against him as an individual. I think the respondent's position is correctly set out in the question I have just posed, for what he did was done in virtue of his office as Deputy Fiscal, and the petitioner has made him a respondent not in his official capacity but as an individual—thereby complying with the rule in *Raleigh v. Goschen* [1]. The plaintiffs in *Raleigh v. Goschen* had, however, asked for an injunction against the Lords of the Admiralty to restrain a threatened trespass on their land, and this question would have been considered in that case if the plaintiffs had not made the mistake of suing the defendants as an official body. I think the answer to the question is to be found in the judgment of the Privy Council in *Nireaha Tamaki v. Baker* [2]. In that case an aboriginal inhabitant of New Zealand sued the Commissioner of Crown Lands for a declaration that he and other aboriginal natives owned certain land, and for an injunction to restrain the Commissioner from advertising the same for sale or disposal as being property of the Crown. The following extracts from the judgment make the position quite clear :—"The object of the action is to restrain the respondent from infringing the appellant's rights by selling property on which he alleges an interest in assumed pursuance of a statutory authority, the conditions of which, it is alleged, have not been complied with. The respondent's authority to sell on behalf of the Crown is derived solely from the statutes and is confined within the four corners of the statutes . . . . If the land were not within the powers of those sections, as is alleged by the appellant, the respondent had no power to sell the lands, and his threat to do so was an unauthorised invasion of the appellant's alleged rights. In the case of *Tobin v. R.*[3] a naval officer, purporting to act in pursuance of a statutory

[1] *(1898) 1 Ch. 73.*

[2] *(1901) A. C. 561.*

[3] *16 C. B. N. S. 310.*

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authority, wrongly seized a ship of the suppliant. It was held on demurrer to a petition of right that the statement of the suppliant showed a wrong for which an action might lie against the officer, but did not show a complaint in respect of which a petition of right could be maintained against the Queen, on the ground, amongst others, that the officer in seizing the vessel was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by Act of Parliament, and in such a case the maxim 'Respondeat superior' did not apply. On the same general principle it was held in *Musgrave v. Pulido* [1], that a governor of a Colony cannot defend himself in an action of trespass for wrongly seizing the plaintiff's goods merely by averring that the acts complained of were done by him as 'Governor' or as 'acts of State'. It is unnecessary to multiply authorities for so plain a proposition and one so necessary to the protection of the subject. Their Lordships hold that an aggrieved person may sue an Officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority". If in the passage just quoted we substitute "goods" for "land" and "petitioner" for 'appellant" I think it perfectly fits the case I am dealing with.

I find that this case is cited in Bowstead on Agency (11th Edition) p. 280 for the following rule:—"A public agent threatens to do an act, purporting to be in pursuance of statutory powers, but in fact outside the limits of such powers. He may be restrained by injunction at the instance of a person aggrieved". It is referred to also in Broom's Legal Maxims (9th Edition p. 41) where the learned editor cites it in support of the following statement: "Although a petition of right does not lie for a tort committed by servants of the Crown, yet the servants who commit it, whether spontaneously or by order of a superior power, are answerable therefor in an ordinary action, for the civil irresponsibility of the superior power for tortious acts could not be maintained with any show of justice if its agents were not personally responsible".

Mr. Jayawardene relied on the case of *Ellis v. Earl Grey* [2] where Vice Chancellor Shadwell granted an injunction because he was of the opinion that the injunction sought did not seek to interfere with any public duty which the Lords of the Treasury had to discharge, or with any discretion which they had to exercise in their public capacity. "But", he said "it seeks to restrain them from doing a mere ministerial act, with a view to secure the money for the parties who may be decreed to be entitled to it". That case is cited in 18 Hailsham, paragraph 15, as authority for the statement that "in a proper case an injunction will be granted to restrain a department of the British Government from doing a mere ministerial act if it does not involve an interference with the public duty of the department". But I do not regard it as authority for the proposition that an injunction will not be granted to restrain a public officer from threatening to do a wrongful act which purports to be within his statutory powers but is in fact outside them. It is clear that section 79 (2) (*a*) of the Income

[1] (1879) 5 *A. C. 102.* [2] *58 E. R. 574.*

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Tax Ordinance Cap. 188 empowers and requires the officer " to cause the tax to be recovered *from the defaulter* named in the certificate *by seizure and sale of his movable property* ". If the officer seizes or threatens to seize the property of any other person he would obviously be acting only in supposed pursuance of the Ordinance but really outside the statutory authority, and the Privy Council has decided that he may be restrained from doing so.

For these reasons I would overrule the second preliminary objection, but in view of my earlier findings on the first and third preliminary objections the application for an injunction fails and I dismiss it with costs.

Application dismissed.

1954 *Present :* **Rose C.J. and Sansoni J.**

J. D. LIYANAGE, Appellant, *and* L. H. THEGIRIS, Respondent

S. C. 139—D. C. Galle, 4,593

Partition action—Improvements made by a co-owner—Scope of his right to be allotted portion which contains the improvements—Partition Ordinance, No. 10 of 1863, ss. 4, 5.

In an action for the partition of a land owned in common the rule that a co-owner should be allotted the portion which contains his improvements is not an invariable rule ; it will not be followed if it involves substantial injustice to the other co-owners.

Where, therefore, co-owner A wrongfully demolishes a building put up by co-owner B and erects on its foundation another building, A will not, in preference to B, be allotted the portion of the land on which the building stands. The question as to who should get the lot with the building may be decided at the stage of partition if there is no provision in regard to it in the interlocutory decree.

APPEAL from a judgment of the District Court, Galle.

H. V. Perera, Q.C., with *Cyril E. S. Perera, Q.C.*, and *A. W. W. Goonawardana*, for the 7th defendant-appellant.

C. G. Weeramantry, for the plaintiff respondent.

Cur. adv. vult.

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August 4, 1954. SANSONI J.—

This is an appeal by the 7th defendant in a partition action who is dissatisfied with the scheme of partition ordered by the learned District Judge. The dispute has arisen because of the building No. 1 which the Surveyor in his report, attached to the preliminary plan, described as "a partly constructed masonry-walled and thatched garage (not completed)". Lying under this building is an old foundation. It is common ground that building No. 1 was constructed by the 7th defendant and the foundation No. 2 by the plaintiff. Under the interlocutory decree each of them received 780/12096 share of the land and in respect of the buildings the decree provided "No. 1..... to the 7th defendant, No. 2..... to the plaintiff". Obviously the Commissioner could not comply with both directions, if they are to be considered "special directions as to the partition" within the meaning of section 5 of the Partition Ordinance, No. 10 of 1863, since the building stands on the foundation. I would regard this part of the decree not as a direction but merely as a determination by the Court, under section 4, that these improvements were made by the parties mentioned. To that extent only the decree is *res judicata*, and compensation would accordingly become payable to the improver who does not receive a lot containing his improvement. The Commissioner was faced with the difficulty of partitioning the land and giving each improver his particular improvement, and he gave the 7th defendant lot A with the building and foundation and gave the plaintiff lot C which is bare land. The plaintiff objected to this scheme, and after inquiry the learned District Judge gave lot A to the plaintiff and lot C to the 7th defendant. The 7th defendant has appealed against this order.

It is important to bear in mind the considerations which led the learned Judge to make this order. The plaintiff had a 5 cubit thatched boutique standing on the foundation No. 2 ; he had transferred his share of the land and the entirety of this boutique to the 7th defendant by a conditional transfer in September, 1948, and the 7th defendant had re-transferred that share and the boutique to the plaintiff in September, 1949. On 27th June, 1950, the 7th defendant bought a share of the land from another co-owner and on the following night he pulled down the plaintiff's boutique and erected a shed on the foundation. The plaintiff complained of this to the Headman and charged the 7th defendant with mischief in the Magistrate's Court on 1st July. The criminal case did not proceed to trial, but the Magistrate advised the 7th defendant not to add to the building pending this partition action which had, by that time, been filed by the plaintiff. These are the facts as found by the learned Judge and they have not been canvassed in appeal. The learned Judge says in his order : "But for the 7th defendant's act in pulling the plaintiff's house down, lot A would have contained the plaintiff's house, and ordinarily that lot would have been allotted to the plaintiff. To allow the scheme to stand as it is would be to allow the 7th defendant to profit by his wrong doing". The main argument urged for the appellant is that the learned Judge should not have gone into the history of how the building No. 1 came to be erected, as it involved investigating events

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which happened before the interlocutory decree was entered. It was also submitted that the Court should not set aside the scheme of partition proposed by the Commissioner except upon grounds which the Commissioner himself could have considered : in other words, the Court would act as an appellate authority considering only submissions which could have been made to the Commissioner. Both submissions involve the question whether a Court is precluded, when acting under section 6, from considering any grounds which could not have been considered by the Commissioner. Now I am willing to concede that it is only in exceptional cases that a Judge, who is considering the merits and demerits of a scheme of partition submitted by a Commissioner, will have need to, or be willing to, consider the earlier history of improvements effected on the land before he makes his decision as to how the land should be partitioned. In the majority of cases the principle acted upon is that in dividing the property it is no more than equitable that, when it can be conveniently done, the improving co-owner should be allotted the portion which contains his improvements. The main reason is that this course will render it unnecessary for the other co-owners to pay him compensation in respect of those improvements. But it is not an invariable rule, and it will not be followed if it involves substantial injustice to the other co-owners.

That there will be substantial injustice done to the plaintiff in this case if lot A were to be allotted to the 7th defendant is undeniable. The plaintiff's boutique had stood on lot A for some years. It presumably came up with the acquiescence, if not the consent, of the other co-owners and the 7th defendant has recognized the plaintiff's right to it in his transactions with the plaintiff in 1948 and 1949. Nothing that I can see would have stood in the way of the plaintiff getting lot A with his boutique, if the boutique had been standing when the interlocutory decree stage was reached. Can the 7th defendant have a better right to lot A, based as his claim must be solely upon his forcible and wrongful conduct in demolishing the boutique and hastily attempting to erect a garage upon the same site, despite the plaintiff's objections and in breach of the Magistrate's direction that there should not be an addition to the partially constructed building ? I find it impossible to condone such conduct, and I consider that he has acquired no superior equity or favour in the subsequent division of the property under such circumstances—see *Silva v. Corea* [1]. I would, moreover, stress that in this case the plaintiff has acted promptly in protesting against the series of wrongful acts of the 7th defendant, from the very first act of demolishing the boutique. The complaint to the Headman, the criminal prosecution, and the filing of this partition action were all closely related steps taken by the plaintiff to seek redress.

Is there any statutory provision which prevents the grant of redress at this stage ? If the plaintiff had contested the 7th defendant's right to get any compensation at all for his garage, as he might conceivably have done in the proved circumstances of this case, the learned Judge would have decided that dispute before entering the interlocutory decree ;

[1] (1859) *3 Lor. 312.*

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but since the plaintiff did not at that stage deny the 7th defendant's right to claim compensation I think it was not unreasonable for the question as to who should get the lot with the garage to be left to be decided only at the stage of partition. The 7th defendant did not at the trial claim that he should at the partition get a lot with his garage. There is nothing in the interlocutory decree which suggests that the garage should be allotted to the 7th defendant. It is generally premature for such a provision to be made in the decree. Up to that point, therefore, the matter was left open. When the stage of partition was reached, the Court was entitled to inquire summarily and decide whether the 7th defendant had infringed the rights of his co-owner to such an extent that he should not enjoy the privilege of getting a lot which contained his improvement.

I would, for these reasons, dismiss this appeal with costs.

ROSE C.J.—I agree.

Appeal dismissed.

1954 *Present :* **Pulle J.**

S. D. FERNANDO, Appellant, *and* MILLY NONA, Respondent

S. C. 876—A. M. C. Colombo, 19,878

Maintenance—Application by wife—Presence of husband's mother—Is it a valid ground ?

In an application for maintenance made by a wife—

Held, that the bare fact that the husband's mother was in the same house was not a sufficient reason for the wife's refusal to live with him.

APPEAL from a judgment of the Additional Magistrate's Court, Colombo.

E. A. G. de Silva, for the defendant-appellant.

M. L. S. Jayasekera, with *B. E. de Silva*, for the applicant-respondent.

Cur. adv. vult.

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May 24, 1954. PULLE J.—

In this case the husband, who is the appellant, has been ordered to pay Rs. 30 as maintenance for his wife and Rs. 15 for a child. Whether the wife's refusal to live with the husband is reasonable or not, the order in respect of the child must stand.

The husband offered to live with the wife in a house taken by him but she refused the offer on the ground that his mother was living in that house. She was prepared to accept the offer, if he sent away his mother. The husband refused. The learned Magistrate without taking any evidence then made the order :

" He cannot compel applicant to live with his mother. So the applicant's refusal to go back to him is not unreasonable. Therefore, he has to pay maintenance. "

In my opinion the bare fact that the husband's mother was in the same house was not a sufficient reason for the wife's refusal to live with him. There are authorities which support this proposition and I need refer only to *Rosa v. Adonisa* [1]. The cases decided in England are also to the same effect.

I do not wish to suggest in advance the sort of circumstances in which it would be unreasonable for the husband in this case to compel the wife to live with him. The case should go back for adjudication upon evidence of the issue whether the wife without any sufficient reason refuses to live with her husband.

The order for maintenance in favour of the wife is set aside *pro forma*. There will be no order as to costs.

Case sent back for further evidence.

1953 *Present :* **Swan J.**

D. F. SENARATNE, Appellant, *and* K. SIMON APPU, Respondent

S. C. 1,200—M. C. Matara, 28,847

Motor Traffic Act No. 14 of 1951—Sections 38, 45 (1), 216, 226—Charge of unauthorised plying for hire—Driver accused—Right of owner of car to withhold production of revenue licence—Evidence Ordinance, s. 130 (1).

Where the driver of a private motor car is prosecuted for carrying passengers for hire in contravention of the conditions of the revenue licence issued in respect

[1] (1924) 6 C. L. Rec. 17.

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of the car, the registered owner of the car is not entitled, when he is summoned to produce the revenue licence, to refuse to produce the licence on the ground that it would tend to incriminate him. If the owner refuses to hand over the document to Court, secondary evidence of the contents of the document would be admissible.

APPEAL from a judgment of the Magistrate's Court, Matara.

D. Jansze, Crown Counsel, with *R. S. Wanasundera*, Crown Counsel, for the complainant appellant.

S. Saravanamuttu, with *V. K. Palasunderam*, for the accused respondent.

Cur. adv. vult.

March 11, 1953. SWAN J.—

In this case the accused respondent was charged with, being the driver of a private motor car No. CN 2698, having carried two persons for hire in contravention of the conditions of the revenue licence for the time being in the said vehicle in breach of Section 45 (1) read with Section 216 of the Motor Traffic Act No. 14 of 1951, and that he thereby committed an offence punishable under Section 226 of the said Act.

The accused pleaded not guilty and the case went to trial. One of the witnesses for the prosecution was Newton Devanarayana, the registered owner of the said car. When he was called into the witness box he admitted to the Magistrate that he had been summoned to produce the revenue licence for the year 1952, issued in respect of the said car, and that he had brought it with him to Court but was not prepared to produce it as it would tend to criminate him as the owner of the car. The learned Magistrate taking the view that the production of the licence would tend to criminate the witness did not compel the production of the document.

I fail to see how the production of this document could tend to criminate the witness. Undoubtedly the owner of a private car would be guilty of an offence under Section 45 (1) if he contravened the conditions laid down in the revenue licence by permitting the car to be plied for hire, but the essence of the offence as against him would be, if he was not present at the time, that the act was done with his knowledge and consent or acquiescence or connivance. In my opinion the production of the licence in this case could not in any way tend to criminate the witness if he was charged with an offence under the Motor Traffic Act.

Section 38 provides that the revenue licence shall be carried on the motor vehicle and made available for inspection. The proviso to the Section states that it shall be removed from the vehicle and produced when required by a Court. I hold that the witness could not have

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claimed exemption under Section 130 (1) of the Evidence Ordinance and that the learned Magistrate should have asked him to hand over the document to Court. If he refused to do so secondary evidence of the contents of the document would have been admissible. In point of fact there is such evidence on record and that the car in question was licensed to carry passengers other than for fee or reward has been established.

I set aside the order of acquittal and remit the case for trial in due course. As the learned Magistrate has taken a very strong view on the facts against the accused I think the new trial should be before another Magistrate.

Acquittal set aside.

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1955 *Present:* **Gunasekara J., Pulle J. and Weerasooriya J.**

K. L. S. SUBBIAHPILLAI, Appellant, *and* M. A. SHERIFF & CO., LTD., Respondent

S. C. 218—D. C. Colombo, 23,718 M

Rent Restriction Act, No. 29 of 1948—Cheques given in payment of rent—Landlord's failure to present them at the Bank—Demand for fresh cheque—Refusal by tenant—Effect on question of rent being "in arrear"—Section 13 (1), proviso.

When a landlord takes cheques from his tenant as conditional payment of rents due, the cheques operate as payment, and the tenant is not in arrear within the meaning of the proviso to section 13 (1) of the Rent Restriction Act unless the cheques are dishonoured on presentment. Nor is the tenant in default where the reason why his cheques have not been realized is that the landlord elected not to present them for payment. If then the landlord returns the cheques and asks for "a fresh cheque to cover the entire rent due" the tenant's liability would be a liability on the cheques and not a liability to pay rent.

Per GUNASEKARA J.—"Moreover, the rent can be in arrear only from the day on which it became due, which is fixed by the terms of the contract of tenancy and cannot be varied by the unilateral act of the landlord in returning a cheque that he has taken as conditional payment."

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *C. Manohara* and *P. Navaratnarajah*, for the defendant appellant.

H. W. Jayewardene, Q.C., with *N. C. J. Rustomjee* and *P. Ranasinghe*, for the plaintiff respondent.

Cur. adv. vult.

May 13, 1955. GUNASEKARA J.—

This appeal from a judgment of the District Court of Colombo was heard originally by a bench composed of Nagalingam J. and Fernando A. J. and as they were unable to agree as to the decree which should be passed it was reheard by the present bench in terms of section 775 (1) of the Civil Procedure Code.

The action out of which the appeal arises was instituted by the respondent, a limited company, on the 26th October, 1950. The company sought to recover from the appellant a sum of Rs. 3,625 as rent for the period 1st October, 1947, to 28th February, 1950, at the rate of Rs. 125

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2—J. N. B 47189—1,592 (8/55)

a month, for certain premises to which the Rent Restriction Act applied, and for ejectment of the appellant and damages for overholding from the 1st March, 1950. They alleged that damages in respect of the period 1st March to 31st August, 1950, had been paid by the appellant and asked for a decree for damages only in respect of the appellant's occupation after that. The district court gave judgment for the respondent company as prayed for in the plaint. The only ground on which the appeal was pressed was that the learned trial judge had erred in finding for the respondent on an issue as to whether the rent had been in arrear for one month after it had become due and the case was thus brought within the proviso to section 13 (1) of the Rent Restriction Act, No. 29 of 1948

The tenancy began on the 1st April, 1946, and the agreement regarding the time for the payment of rent was that each month's rent should be paid on or before the 10th of the next month. The appellant regularly sent the respondent each month a cheque for the amount of the previous month's rent, and the respondent realized all the cheques except those that represented the rents for the period 1st October, 1947, to 31st January, 1950, which he refrained from presenting for payment. It appears from the evidence of the managing director of the respondent company that it was at the company's own request that the appellant sent them cheques for the rent. The 26 cheques in respect of the period 1st October, 1947, to 30th November, 1949, were returned to the appellant by the respondent's proctor with a letter dated the 24th January, 1950, in which he asked for " a fresh cheque to cover the entire rent due ". He says in this letter that the respondent company did not cash these cheques because " their application before the Rent Board was pending " and that " most of the cheques have grown stale ". (The earliest of the cheques was dated the 7th November, 1947, and the latest the 10th December, 1949.) The application referred to was one made on the 6th October, 1947, for the sanction of the assessment board, which was the predecessor of the rent control board established under the Act, to sue for the ejectment of the appellant. The application was refused on the 7th November, 1947, and the order made by the assessment board was affirmed by the Board of Review on the 29th October, 1948. The letter of the 24th January, 1950, from the company's proctor to the appellant was followed by another of the 30th January, 1950, giving the appellant notice to quit on the 28th February and demanding payment of " all arrears of rent " up to that day. The appellant's proctor replied by a letter dated the 3rd February, 1950, with which he returned the cheques. He said : " The stale cheques sent by your clients are herewith returned. It is the duty of your client to realise the amount due on the cheques as and when cheques are sent ". The company's proctor sent the cheques back with a letter dated the 6th March, 1950, in which he said that the appellant had been aware that the cheques had not been cashed " on account of the application pending before the Rent Control Board " and he repeated his request for a fresh cheque. He also said " If your client still refuses to issue a fresh cheque my client will have no other alternative but to sue your client for ejectment on the ground they are in arrears of rent ". The appellant's proctor replied by a letter dated the

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16th September, 1950, returning the 26 cheques once more. After the institution of the action the appellant brought into court the sum of Rs. 3,625, though he denied in his answer the respondent's averment that it was due as arrears of rent.

The learned district judge holds that the payments in question were conditional payments and that the appellant " cannot plead either that the cheques were received by the plaintiff company as absolute payment or that he is discharged merely by reason of the failure to present the cheques for payment before they became stale ". He appears to have accepted an argument " that those cheques, although they were conditional payments, had failed to satisfy the condition, and the debt revived when the cheques became stale " ; and it is apparently on this ground that he bases his finding that at the time of the institution of the action the rent had been in arrear for one month after it had become due.

In the argument before this court the case for the respondent was put higher than at the trial and it was contended that the giving of the cheques did not amount to even a conditional payment of the rents in question.

The basis of this contention is that while there is ordinarily a strong presumption that the giving of a bill or note on account of a debt is a conditional payment, there is no such presumption in a case where the creditor already possesses a higher remedy : see *Chalmers' Bills of Exchange, 11th edition, pp. 310, 312.* Thus, it was held in *Davis v. Gyde* [1] that a promissory note given and received for rent could not of itself extinguish the claim for such rent, which is a debt of a higher degree than that arising upon the note, or operate in suspension of such claim. The question that arose for decision in that case was the sufficiency of a plea to a avowry of rent, that the landlord had received from the tenant on account of the rent a promissory note and the note was not yet due for payment. It was held that the plea was insufficient as it made no averment that the note was received by way of satisfaction or upon an agreement with the landlord that it should suspend his claim of rent. Again, in *Re J. Defries and Sons, Limited* [2], it was held that the mere giving of a cheque is not conditional payment of a secured debt so as to release the security. The reason for the presumption of conditional payment and the qualification of the rule was explained by Maule J. in *Belshaw v. Bush* [3]. He said :—

" If an agreement were expressly made, that the bill should operate as payment, unless defeated by dishonour, etc., there is no reason why a suit brought while the payment remained undefeated, should not be barred by such agreement ; and the cases in which a bill given on account of the debt has been held to operate as such payment, are to

[1] *(1835) 2 Ad. & E. 623 ; 111 E. R. 240.*

[2] *(1909) 2 Ch. 423.*

[3] *(1851) 11 C. B. 191, at 206 ; 138 E. R. 444, at 450.*

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be supported by considering that such an agreement is to be implied by law from giving and receiving such security on account of a debt on simple contract : and the cases in which the giving of the bill has been held not to suspend the remedy on a demand by specialty, or for rent, may be accounted for on the ground that the legal implication of an assent that the bill shall operate as a conditional payment, does not arise, when, if it did, the plaintiff would be deprived of a better remedy, than an action on a bill as in *Davis v. Gyde* [1] in which, the debt being for rent, the plaintiff would part with a remedy by distress : and in *Worthington v. Wigley* [2], where, the demand being on bond, the plaintiff might, in certain events, have recourse to other funds than he could in an action on a simple contract. "

The fact of a landlord taking a bill of exchange from his tenant for rent due is, however, some evidence of an agreement by the landlord to suspend his remedy by distress during the currency of the bill (*Palmer v. Bramley* [3]); although it does not raise a legal implication of such agreement. As was pointed out by Kay L.J. in *Palmer v. Bramley* [3] what was decided in *Davis v. Gyde* [1] was that the plea was insufficient and not that the giving of the bill was no evidence of an agreement to suspend the landlord's right of distress.

In the present case the learned district judge's finding is not based on a view that the mere giving and receiving of a cheque raises a legal implication of an assent by the landlord that the cheque shall operate as a conditional payment. Besides, there is here more than the mere giving of a cheque, for the rent was always paid by cheque and was so paid because, in the words of the company's managing director, the company " wanted cheques to be sent ". Moreover, even when the 26 cheques were returned what the company asked for in their place was a fresh cheque for the total amount. In my opinion there is sufficient evidence to support the finding that the cheques were taken by way of conditional payment, and there is no reason to disturb that finding. (I may observe in passing that the view is expressed in Chitty's *Treatise on the Law of Contracts* [4] that there appears now to be no difference between specialties and simple contract debts, and that if nothing is said as to terms the original debt remains but the remedy is suspended till the maturity of the bill.)

The condition upon which these cheques were received as payment of the rents due must be understood to be that the debt would revive if they were not realized (*Currie v. Misa* [5]) and they would operate as payment unless they were presented and dishonoured (*Marreco v. Richardson* [6]). There is no evidence of presentment or dishonour, and it is contended for the appellant that the learned district judge's finding

[1] *(1835) 2 Ad. & E. 623 ; 111 E. R. 240.*
[2] *(1837) 3 Bing. N. C. 454.*
[3] *(1895) 2 Q. B. 405.*
[4] *20th Edition, p. 291.*
[5] *(1875) L. R. 10 Eq. 153.*
[6] *(1908) 2 K. B. 584.*

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that the debt had revived is therefore erroneous and the rent was not in arrear at the material time. It is also contended that even if the learned judge is right in this finding all that follows is that the appellant's liability to pay the debt is not discharged, but not that the rent is in arrear within the meaning of the proviso to section 13 subsection (1) of the Rent Restriction Act.

It was held by my brother Weerasooriya in *Vadivel Chetty v. Abdu* [1] that the meaning of the expression " in arrear " in that proviso is that " the payment of the rent has been in default " and that " a tenant who has tendered to the landlord the rent as it fell due and has taken all reasonable steps towards the landlord's acceptance of it cannot be regarded as in default in paying the rent ". The effect of the proviso is to take away from a tenant, in the circumstances there set out, the protection given to him against being sued for ejectment without the sanction of the rent control board. It seems clear that in the context the expression must imply not merely that the debt remains undischarged but that it is undischarged in consequence of some default on the part of the tenant and not that of the landlord. Otherwise the protection given to the tenant is rendered nugatory, for the landlord can prevent the debt from being discharged by merely refusing to accept the rent when it is tendered. In such a case there would be no default on the part of the tenant and therefore the rent, though unpaid, would not be in arrear within the meaning of the proviso. Nor is the tenant in default where the reason why his cheque has not been realized is that the landlord elected not to present it for payment. As was observed by my brother Gratiaen in the case of *Thangadorai Nadar and Brothers v. Esmailjee* [2], " it would indeed be a remarkable result if a landlord by resorting to the simple device of postponing presentation of his tenant's cheque until the bank refused to honour it (for no other reason than that it had become stale) could deprive the tenant of his statutory protection ".

Mr. Jayawardene argued that though the appellant was not in default while the cheques were in the hands of the respondent, he became liable to pay the amount of the cheques within a reasonable time after they were returned to him and was therefore in default when he failed to discharge this liability. But any such liability would be a liability on the cheques and not a liability to pay rent. Moreover, the rent can be in arrear only from the day on which it became due, which is fixed by the terms of the contract of tenancy and cannot be varied by the unilateral act of the landlord in returning a cheque that he has taken as conditional payment.

In my opinion there is no evidence that the rent was in arrear for one month after it became due, and the order for the ejectment of the appellant and for damages must therefore be set aside. The order for the payment

[1] (1953) 55 *N. L. R. 67 at 71.*

[2] (1954) 56 *N. L. R. 343.*

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to the respondent of the sum of Rs. 3,625, which the appellant deposited in court in satisfaction of the respondent's claim, must be affirmed.

It was urged on behalf of the respondent company that in any event no order for costs should be made in favour of the appellant, for the reason that he had raised an issue as to whether his contract of tenancy was a contract with the company and had failed on that issue. It appears from the evidence of the respondent company's managing director, Sheriff, that he was the owner of the demised premises and that the company (which was a private company in which he held the majority of the shares) managed on his behalf this property and certain others of which he was the owner. It also appears both from his own admissions and the relevant documents, that the application made to the assessment board for sanction to sue the appellant for ejectment and the appeal from the order of this board purported to be made by him personally and not by the respondent company. Sheriff explained that this was the result of a mistake made by his proctor, and the explanation was accepted by the learned judge. Having regard to the state of facts in which the issue was raised I do not think that there is sufficient reason why the appellant, who has substantially succeeded in both courts, should not be given his costs. The order made by the learned judge in respect of costs must be set aside and the respondent company must be ordered to pay the appellant's costs in both courts.

PULLE J.—I agree.

WEERASOORIYA J.—

I agree.

Although as a general rule the tendering of a cheque is not equivalent to payment, the Court will not require very strong evidence to show that the parties contemplated that payment might be made by cheque. This appears to be the view not only of the English Courts but also of the South African and American Courts. In this connection see the case of *Scheider and London v. Chapman* [1] which is a decision of the South African Courts. The evidence in that case was that the vendor had accepted from the purchaser a cheque in part payment of the purchase price. The purchaser sent by post on the day before the balance of the purchase price had to be paid another cheque in settlement of the amount due. The cheque was, however, received by the vendor only on the day after payment had to be made. He refused to accept it on the ground that payment had been made too late and he sued the purchaser for breach of contract and damages. The argument of counsel for the purchaser

[1] *(1917) T. P. D. 497.*

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that sending the cheque did not amount to payment (and not that it was sent too late) was rejected by the eminent Judges (de Villiers, J.P., Wessels and Bristowe, JJ.) who heard the appeal in that case. Having regard to the course of business between the parties de Villiers, J.P., stated in his judgment " It seems to me the Court would be encouraging the veriest technicality—seeing that the money to meet the cheque was in the bank—if we were to hold that payment was not made as it should have been ". The judgment of de Villiers, J.P., also contains the following citation from a judgment of the American Courts in the case of *Gunby v. Ingram* [1] : " It may be conceded, we think, under universal authority, that a strictly good tender cannot be made by the offer of a cheque for the amount due. But it is well established that the creditor may waive the character of the money which is tendered by raising no objection to the payment, for the reason that it is not the character of money or specie that is called for in the obligation, or by raising some other objection which would exclude the idea of objecting on that ground. Considering the fact, which is a matter of common knowledge, that probably ninety per cent. of the business of the mercantile world is now done through the medium of cheques, drafts, &c., instead of by the transfer of gold and silver coins, or even of any other species of legal tender, it would be a dangerous rule to announce, and one which could easily be turned into an engine of oppression, if the tender of a payment . . . . could not be made by cheque, where no question was raised as to the value of the cheque tendered, and especially, as in this case, where it was shown that the former payments involved in this transaction had been made by cheques, which were not objected to by the creditor.".

There is nothing in law which precludes a creditor, who already possesses a higher remedy than mere recourse to the debtor for payment of the amount due, from accepting a cheque in settlement of the debt. The authorities cited by Mr. Jayewardene, who appeared for the respondent, in support of his contention that, since in the present case the respondent had the higher remedy of the landlord's lien, the giving of the cheques did not amount to even a conditional payment of the rents in question have been fully discussed by my brother Gunasekara in his judgment, and it is clear that those authorities do not help Mr. Jayewardene in that contention as the evidence is that previous payments of rent had throughout been made by cheque and accepted by the respondent without demur. As pointed out by my brother Gunasekara, the evidence goes further, because the managing director of the respondent company stated that the company " wanted cheques to be sent ". In the letter P31 dated the 24th January, 1950, the respondent's proctor requested the appellant to send a fresh cheque covering not only the amount of the twenty-six cheques returned with that letter and representing the rents for the months of October, 1947, to November, 1949, but also the rent for December, 1949, which apparently had not then been paid by the appellant.

[1] *36 Law Rep. Annot. N. S. p. 232 at 234.*

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It is not in dispute that had those cheques been duly presented at the Bank on which they were drawn they would have been paid. Even if, as a result of the respondent having chosen to withhold their presentment and their having become stale in the meantime, the appellant's obligation to pay the rents represented by the cheques was not discharged, there was, in my opinion, a valid tender of payment of the rents by the appellant when he sent the cheques from time to time to the respondent. " The effect of a tender, though it will not release a debtor from the necessity of making payment or fulfilment in terms of his tender if subsequently called upon to do so, is to release the debtor from all the consequences which would otherwise have arisen from his omission to make such payment or fulfilment "—*Maasdorp's Institutes of South African Law* [1].

I next turn to the argument of Mr. Jayewardene that even if the appellant was not in default while the cheques were in the respondent's hands, the failure of the appellant to pay the rents represented by them within a reasonable time after they were returned to him rendered him in default in regard to those rents for a period of one month (and more) since he had not paid them even at the date of the institution of this action. Mr. Jayewardene conceded that the date on which the rent becomes due has to be determined with reference to the contract of tenancy, but he contended that if at any time after that date the tenant is, for a period of one month, in default in payment of the rent, he would lose the statutory protection conferred on him under the Rent Restriction Act, No. 29 of 1948, against a suit for ejectment. According to Mr. Jayewardene the period of " one month " referred to in S. 13 (1) of that Act should, in a case like the present one, be computed from the expiry of the reasonable time (which would be a varying period depending on the circumstances of each case) within which the payment must be made. A similar argument seems to have been advanced in the case of *Vadivel Chetty v. Abdu* [2] but, as stated in my judgment in that case, it was not necessary to decide the point since the action was filed long before the expiry of one month even so computed. Although the point arises for decision in the present case, in my opinion the words " the rent has been in arrear for one month after it has become due " in paragraph (*a*) of the proviso to S. 13 (1) mean that the rent has been in arrear for one month reckoned from the date on which it became due, and the argument, therefore, fails. Moreover, the appellant's liability to pay the rents in question always existed notwithstanding the giving of the cheques. That liability was not enhanced in any way, nor did a fresh liability arise, on the return of the cheques.

I also agree with the order proposed by my brother Gunasekara as regards costs.

Appeal allowed.

[1] *Vol. IV (The Law of Delicts and the Dissolution of Obligations), 5th. ed., p. 160.*
[2] *(1953) 55 N. L. R. 67.*

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1955 *Present :* **Gratiaen J.**

DON CARTHELIS, Appellant, *and* B. D. IBRAHIM (Sub-Inspector of Police), Respondent

S. C. 370—M. C. Balapitiya, 10,434

Motor Traffic Act, No. 14 of 1951—Section 153 (1)—" Driving when under the influence of alcohol ".

By section 153 (1) of the Motor Traffic Act—

" No person shall drive a motor vehicle on a highway when he is under the influence of alcohol or any drug. "

Held, that no offence is committed unless the person driving the vehicle has brought himself under the influence of alcohol or drugs to such an extent that he cannot safely be entrusted with its control while in that condition.

APPEAL from a judgment of the Magistrate's Court, Balapitiya.

E. A. G. de Silva, for the accused appellant.

P. Weerasinghe, Crown-Counsel, for the Attorney-General.

Cur. adv. vult.

July 19, 1955. GRATIAEN J.—

The appellant drove a motor ambulance in which a patient was conveyed from the Balapitiya Hospital to the Civil Hospital at Galle on the night of 12th October, 1954. On the return journey the ambulance knocked down a pedestrian called Daimon. The injured man was removed in the same vehicle to Balapitiya where, having first reported the accident to the Police, the appellant took him promptly to the hospital for medical attention. The appellant was in due course charged with having driven the ambulance recklessly and dangerously or alternatively in a negligent manner so as to cause injury to Daimon. On those charges he was acquitted. He was, however, found guilty on another count, wherein he was alleged to have contravened Section 153 (1) of the Motor Traffic Act, No. 14 of 1951, by driving the vehicle on a highway " under the influence of alcohol ".

The evidence in support of the conviction under Section 153 (1) was to the effect that the appellant was smelling of liquor when he arrived with the injured pedestrian at the Balapitiya Police Station. This evidence was confirmed by the doctor who pronounced that the appellant was " under the influence of liquor ". The doctor did not explain what precisely he meant by that phrase, or on what grounds he drew this inference. On the other hand, it was conceded that the appellant drove the vehicle quite competently after the accident. Nor is there any evidence from which a Court could fairly conclude that he was not in a fit condition to undertake the responsibility of driving a motor vehicle along the public highway. Can it then be said that, in this state of the evidence, a contravention of Section 153 (1) was established by the mere

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fact that the appellant was undoubtedly smelling of liquor after the accident and had (on his own admission) partaken of some alcoholic refreshment at Galle shortly before the accident occurred ?

I understand that Section 153 (1) of the new Act has not previously received judicial interpretation. Section 60 (2) of the repealed Motor Car Ordinance (Cap. 156) penalised, as an aggravated offence, the reckless or negligent driving of a vehicle when " under the influence of alcohol or of drugs ". At that time, a driver, though " under the influence of alcohol or of drugs ", did not commit an offence unless he was in addition proved to have driven the vehicle in his charge dangerously, negligently or at an excessive speed.

Section 153 (1), by way of contrast, penalises driving " under the influence of alcohol or drugs " without proof of dangerous or careless driving. This new offence is equated for purposes of punishment to reckless or dangerous driving (prohibited by sub-section 2) and negligent driving (prohibited by sub-section 3). In this context, two alternative meanings of Section 153 (1) may be suggested :

(*a*) that, as it is medically true to say that a person is in some slight degree " influenced " if he has partaken of even a very small dose of alcoholic stimulant, Parliament now insists upon total abstinence from Ceylon motorists ;

or (*b*) that " under the influence of alcohol or of drugs " is a relative term, and no offence is committed unless the person driving the vehicle has brought himself under the influence of alcohol or drugs to such an extent that he cannot safely be entrusted with its control while in that condition.

In my opinion, the latter interpretation is to be preferred. The corresponding legislation in England is quite explicit and Section 15 (1) of the Road Traffic Act, 1930, is to the following effect :

> " Any person who, when driving or attempting to drive, or when in charge of, a motor vehicle on a road or other public place is under the influence of liquor or a drug *to such an extent as to be incapable of having proper control of the vehicle* " shall be liable to certain penalties.

This section aims at a motorist who is in control of a vehicle while he is " *in a self-induced state of incapacity*, whether that incapacity was due to drink or drugs ". *Thomson v. Knights* [1]. A conviction based only on a finding that the prisoner was under the influence of drink was quashed because he was not also held to have been incapable of having proper control of the vehicle at the relevant time. *R. v. Hawkes* [2].

It might, of course, be argued that the absence in Section 153 (1) of our local Act of the qualifying words found in Section 15 (1) of the English Act indicates that Parliament intended absolutely to penalise a driver who, though perfectly fit to have control of a vehicle, has partaken of a little alcohol. But an intention to change the law so drastically in Ceylon could, and should, be expressed in much clearer terms.

[1] (*1947*) *1 K. B. 336.* [2] (*1931*) *22 C. A. R. 172.*

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In my opinion, a man cannot be convicted under Section 153 (1) of the local Act unless the evidence justifies the inference that the accused person was under the influence of drink or a drug to the same extent as would justify a conviction in England. The operative words are "*driven under the influence of alcohol or drugs*", indicating that some stimulant has had a prejudicial effect on the man's capacity to drive a car with normal efficiency because, for instance, it has impaired his powers of co-ordination and orientation. In such a condition, the motorist is a source of potential danger to himself and others, and is guilty of an offence even if he has not actually been involved in an accident.

In some cases, a man may be so intoxicated that his incapacity to have proper control of a vehicle is demonstrable. But as a general rule, expert evidence ought to be led on this issue, and the medical expert should inform the Court of the tests which he carried out and his reasons for reaching his conclusions—so that the Court may ultimately form its own decision as to whether the accused person's condition rendered it unsafe to allow him to drive a motor vehicle along a public highway. In the present case, there was no evidence on this vital issue. I therefore allow the appeal and acquit the appellant.

Appeal allowed.

1954 *Present :* **Swan J. and Fernando A.J.**

M. D. THEOBALD *et al.*, Appellants, *and* H. M. ARAMBEPOLA *et al.*, Respondents

S. C. 174—D. C. Kurunegala, 5,303 L

Vendor and purchaser—Sale of immovable property—Doubt as to whether it was ad quantitatem *or* ad corpus*—Construction of deeds.*

Defendants executed an agreement undertaking to sell to the plaintiffs fifty-five acres and thirty-eight perches of land the boundaries of which were specified in the schedule to the agreement. Shortly afterwards a surveyor was requested by the plaintiffs to prepare a plan of the land in question. Despite the fact that the Plan disclosed the extent as forty-four odd acres only, the defendants executed a conveyance in favour of the plaintiffs and the description of the land conveyed was identical with that contained in the schedule to the agreement to sell, with the only difference that the extent was referred to as being "of about 55 acres". Plaintiffs took this conveyance although they were fully aware, from the plan that had been prepared, that the defendants were in no position to deliver possession of an estate of 55 acres. Subsequently the plaintiffs were actually able to obtain possession of only 38 acres 2 roods and 12 perches and, thereupon, sued the defendants in the present action to have themselves placed in possession of an extent of 16 odd acres to make up the 55 acres conveyed to them or, in the alternative, to recover the sum of Rs. 10,000 as damages.

Held, that in regard to the issue whether the sale was *ad corpus* or *ad quantitatem* the correct answer was that the sale was *ad quantitatem*, but in respect only of 44 odd acres. As the defendants were able to place the plaintiffs in possession only of 38 odd acres, the defendants were liable to compensate the plaintiffs for the value of the shortfall of 5 odd acres.

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APPEAL from a judgment of the District Court, Kurunegala.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the plaintiffs appellants.

Cyril E. S. Perera, Q.C., with *O. S. M. Seneviratne*, for the defendants respondents.

Cur. adv. vult.

November 24, 1954. FERNANDO A.J.—

The plaintiffs sued the defendants to have themselves quieted and placed in possession of an extent of fifty-five acres and thirty-eight perches of land alleged to have been sold to them by the defendants or in the alternative to recover the sum of Rs. 10,000 as damages being the value of the extent of land possession of which is alleged not to have been delivered to the plaintiffs, and they have appealed against the decree of the District Judge dismissing their action.

On July 22, 1948, the defendants executed an agreement (P 3) undertaking to sell to the 1st plaintiff the land described in the schedule to the agreement. The schedule enumerates four lots, mentioning in each case the extent of the lot, describes the whole as one property called and known as Diwalgollewatta " containing in extent fifty-five acres and thirty-eight perches ", and further specifies the boundaries of the whole property.

On July 27, 1948, there was a further agreement (P 4) by the defendants which recites that the land in question is subject to a conditional transfer and acknowledges the receipt of Rs. 15,000 paid by the 1st plaintiff in order to enable the defendants to obtain a retransfer and thus presumably to carry out the agreement P 3.

The learned Judge has found that very shortly after the execution of P 3 a Surveyor Fernando was requested by the plaintiff to prepare a plan of the land claimed by the defendants. The extent of the land claimed by the defendants as shown in his plan of July 31, 1948 (D 1) is A. 44 R. 1 P. 32. The learned Judge has also accepted the evidence that the plaintiffs saw that plan and became aware early in August, 1948, that the claim covered only 44 odd acres. On August 11, 1948, the defendants executed a conveyance (P 5) in favour of the plaintiffs and the description of the land conveyed is identical with that contained in the schedule to P 3 with the only difference that the extent is referred to as being " of about 55 acres ". At the trial the plaintiffs produced a plan P 1 of the extent of land of which they were actually able to obtain possession, namely, A. 38 R. 2 P. 12, and their action is based on the failure of the defendants to deliver the 16 odd acres necessary to make up the 55 acres conveyed on P 5. The position taken up by the plaintiffs was that P 5 was a conveyance *ad quantitatem* and that the defendants were accordingly liable either to deliver the extent of the shortfall or to compensate the plaintiffs for the value of that extent. The defendants maintained that the sale was *ad corpus* and that they were not liable to deliver anything more than the extent to which they were actually entitled.

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The 1st plaintiff in his evidence denied that he even saw the plan D 1 before the conveyance P 5 was executed, but he was contradicted on this point both by the attesting Proctor-Notary and by the Surveyor Fernando. He also stated that his offer for the land was on an acreage basis at the rate of Rs. 650 per acre, but had to admit that on his first inspection of the land he realised that only about 25 acres were fully planted, and that, of the remainder, about 12 acres were completely in jungle and the other portions planted with coconut trees here and there. The learned Judge has disbelieved the plaintiff on both these matters and was then led to conclude " that the plaintiffs were aware of the land they were purchasing and satisfied themselves before the purchase ". He accordingly held that the sale was *ad corpus* and hence dismissed the action.

If the agreement P 3 and the conveyance P 5 had stood alone without extrinsic evidence as to the ciscumstances in which the sale took place it would have been impossible to resist the conclusion that the transaction was *ad quantitatem* ; the description of the lots by reference to a Final Village Plan and to the exact extent of each lot, and the absence of anything in the documents to indicate a sale *ad corpus* would have strongly supported the plaintiffs' case. Accepting however the correctness of the finding of fact that the plan D 1 was prepared at the request of the 1st plaintiff and that he was aware that the extent claimed was only 44 odd acres, there seems little doubt that when the plaintiffs subsequently took the conveyance they must have been fully aware that the defendants were in no position to deliver possession of an estate of 55 acres. The Notary's evidence (also accepted by the learned Judge) was that he wished to draft a conveyance by reference to the plan D 1, but that the 1st plaintiff instructed him to retain the description (of 55 acres) given in the original agreements ; he also said that the defendants reluctantly agreed to this course and at the last minute the 1st defendant insisted that the description be altered to " about fifty-five acres ".

The somewhat difficult question which arises upon these findings of evidence is whether on August 11, 1948, the parties intended the sale to be *ad corpus*, and not *ad quantitatem* as would appear from the face of the conveyance. Mr. Jayawardene urges that the proper inference to be drawn is that the parties deliberately decided to ignore the plan D 1 and to go through with the original agreement to convey 55 acres, and that the defendants cannot be heard to say that there was any change from the original intention. The learned Judge has drawn the inference that the plaintiffs were not at the date of P 5 concerned with the actual extent and were willing to take a conveyance of the defendants' rights whatever those rights may be. I think however that the answer lies somewhere between these two extremes. Both parties were aware before P 5 was executed that the land consisted of only 44 odd acres but despite this they were willing to complete the transaction without any reduction in the figure of Rs. 37,500 already stipulated in the original agreement. But that does not mean that the conveyance must be held to have been *ad corpus*. Since D 1 fixed the probable extent as 44 odd acres, it is only reasonable to suppose that the plaintiffs were agreeable to accepting and the defendants to delivering only 44 acres. Nor is it

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at all likely that the plaintiffs, knowing that the defendants claimed only 44 acres and not 55 as was thought originally, would have agreed to take the further risk that their purchase would cover an extent even smaller than 44 acres. The 1st defendant stated in evidence that she requested that the figure of 44 acres should be mentioned in the conveyance. In these circumstances the correct answer to the issue whether the sale was *ad corpus* or *ad quantitatem* should have been that it was *ad quantitatem*, but in respect only of 44 acres. If D 1 is to avail the defendants as indicating an alteration of the original intention, it must equally be accepted by them as evidence of the new intention which existed at the time of the execution of the conveyance. We have then the result that, although the parties intended a conveyance of 44 odd acres, the defendants were able to place the plaintiffs in possession only of 38 odd acres. An extent of A. 5 R. 3 P. 20 is outstanding, and the defendants are liable to compensate the plaintiffs for the value of that extent.

For the reasons mentioned, I would allow the appeal and set aside the decree dismissing the action. Decree must be entered ordering the defendants to place the plaintiffs in possession of the outstanding extent of A. 5 R. 3 P. 20 or in the alternative that they pay to the plaintiffs as damages the value of that extent. The case is remitted to the District Court for the assessment of the amount actually to be paid as damages, which will be calculated at a rate not higher than Rs. 650 per acre.

The claim made in the plaint was much larger than that which the plaintiffs have been able to substantiate, and the identical claim was pressed at the argument in appeal. Moreover, they did not directly put in issue the question which has now proved decisive. I therefore direct that each party bear his own costs both of trial and of appeal. The costs, if any, to be awarded in respect of further proceedings for assessment of damages will be in the discretion of the District Judge.

SWAN J.—I agree.

Appeal allowed.

1954 *Present :* **Nagalingam S.P.J. and Fernando A.J.**

A. S. CHATOOR, Appellant, *and* GENERAL ASSURANCE SOCIETY, LTD., Respondent

S. C. 103 Inty.—D. C. Colombo, 27,216 M

Interrogatories—Use thereof to obtain admissions.

Interrogatories may be administered in order to enable the party interrogating to ascertain what the case is he has to meet or what really are the matters in issue.

Plaintiff, an insurance company, instituted action for the recovery of a certain sum of money against the defendant who, at the dates material to the action, held its power of attorney as chief agent in Ceylon. One cause of action

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proceeded on the basis that the defendant had authority to effect cover notes and to issue policies of insurance thereon on behalf of the plaintiff company. Without any averment to the contrary and without even a suggestion of impropriety on the part of the defendant in effecting a cover note and issuing certain policies in pursuance of the cover, plaintiff suddenly made allegations of fraud and illegality on the part of the defendant in effecting the cover and issuing the policies.

Held, that, in order to prevent any surprise at the trial, the defendant was entitled to administer interrogatories for the purpose of ascertaining the facts and circumstances upon which the plaintiff made the allegations of illegality and fraud.

APPEAL from an order of the District Court, Colombo.

E. G. Wikramanayake, Q.C., with *Walter Jayawardene, K. Shinya* and *M. Hussein*, for the defendant appellant.

N. E. Weerasooria, Q.C., with *S. J. Kadirgamar, B. S. C. Ratwatte* and *A. de Vos*, for the plaintiff respondent.

Cur. adv. vult.

December 20, 1954. NAGALINGAM S.P.J.—

This is an appeal from an order of the learned Additional District Judge of Colombo upholding the refusal of the plaintiff company to answer certain interrogatories administered to it by the defendant.

The action was filed by the plaintiff company which carries on business as an Insurer for the recovery of a sum of Rs. 1,358,437·50 against the defendant, who at the dates material to the action held its power of attorney as chief agent in Ceylon. Several causes of action were set out in the plaint of which it is only necessary to notice the first, second and third for the purposes of this appeal.

In the first cause of action the plaintiff company averred that the defendant, acting as its agent, effected a cover note for his own benefit, to the extent of Rs. 3,500,000, in respect of a shipment of rubber, and that in pursuance of the cover effected, the defendant issued three policies of marine insurance to himself under his business name of A. S. Chatoor & Co. and that the plaintiff company became entitled to receive from the defendant premia payable in terms of the said policies of insurance amounting to a sum of Rs. 311,344·50. It would be manifest, having regard to these averments, that the plaintiff company's claim is based on the tacit recognition of the right of the defendant to have effected cover and to have issued the policies on behalf of the plaintiff company.

Under the second cause of action, the plaintiff company sets out that the defendant, after having paid the sum of Rs. 311,344·50 to the plaintiff company's account at its bank as premia due to it in respect of the policies of insurance issued by the defendant, "wrongfully, unlawfully and fraudulently withdrew the said sum and appropriated it to himself".

The plaintiff company proceeded further to set out that "there was fraud and illegality on the part of the defendant in effecting and issuing the said insurance policies".

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In the third cause of action, the allegation was that the defendant effected the insurance at the rate of ten per cent., while the true and proper rate should have been 40¼ per cent., and that the defendant in effecting the insurance at the lower rate, did so for his own benefit and "acted fraudulently and/or negligently". Under this cause of action, the plaintiff company claimed the sum of Rs. 1,358,437·50, as the correct premia due to it from the defendant.

The defendant denied the allegations of fraud and illegality in effecting the cover note or issuing the policies and of fraud or negligence in charging the rate of 10 per cent. by way of premia, as well as of wrongfulness, unlawfulness, and fraud in withdrawing the sum of Rs. 311,344·50 paid to the credit of the plaintiff company's account.

In this state of the pleadings it was that the defendant came to administer the interrogatories to the plaintiff company. The only question argued on appeal is whether the plaintiff company was justified in its objection to answer the interrogatories.

It will be convenient at this stage to refer to the interrogatories themselves. They are four in number. I shall deal first of all with the interrogatories 3 and 4 in respect of which I see no reason to differ from the view taken by the learned District Judge.

The third interrogatory is as follows :—

"What are the facts and/or circumstances on which you rely in support of the averment in paragraph 9 of the plaint that there was :

(*a*) fraud, and

(*b*) illegality on the part of the defendant in withdrawing the sum of Rs. 311,344·50 ?"

The answer to that interrogatory is, in my opinion, furnished by the very paragraph itself. It sets out the fact that the defendant acting as the plaintiff's agent and having effected insurance on its behalf, paid into the account of the plaintiff company the premia due to it in respect thereof ; but that thereafter the defendant withdrew the amount from the bank without any authority from the plaintiff company. The inference is obvious that the defendant's action was not only wrongful and unlawful but also fraudulent having regard to the facts. The objection of the plaintiff company is therefore entitled to prevail.

The fourth interrogatory was as follows :—

"What are the facts and/or circumstances on which you rely in support of the averment in paragraph 10 of the plaint that the defendant firm effected the insurance at 10 per cent. :

(*a*) for their own benefit,

(*b*) fraudulently,

(*c*) negligently ?"

In regard to this interrogatory too, the answer is furnished by the averments in paragraph 10 of the plaint. The plaintiff has averred that the true and proper rate at which the premia should have been charged was 40¼ per cent. and inasmuch as the insurance was effected for the benefit of the defendant himself he had charged a low rate of 10 per cent.,

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from which circumstances it cannot be denied an inference of fraud or negligence on the part of the defendant would flow. In this instance too there is no reason to disturb the order of the learned District Judge.

The first and second interrogatories however are on a different footing. Those two interrogatories run as follows :

" 1. What are the facts and/or circumstances on which you rely in support of the averments in paragraph 9 of the plaint that there was :

(*a*) fraud, and

(*b*) illegality on the part of the Defendant in effecting the policies ?

" 2. What are the facts and/or circumstances on which you rely in support of the averment in paragraph 9 of the plaint that there was :

(*a*) fraud, and

(*b*) illegality on the part of the defendant in issuing the policies ?"

The foundation for those two interrogatories is paragraph 9 of the plaint. Towards the end of that paragraph for the first time the plaintiff company alleges " that there was fraud and illegality on the part of the defendant in effecting and issuing the said policies ". It may be remarked that the term " effecting the policies " used in the first interrogatory has reference to the issue of the cover note.

The averments set out in respect of the first cause of action, as indicated earlier, proceeded on the basis that the defendant as agent had authority to effect the cover notes and issue the policies of insurance on behalf of the plaintiff company. Without any averment to the contrary and without even a suggestion of impropriety on the part of the defendant in effecting the cover or issuing the policies, the plaintiff company suddenly plunges into making an allegation of fraud and illegality on the part of the defendant in effecting the cover and issuing the policies. These two interrogatories are therefore intended to serve the purpose of ascertaining the facts and circumstances upon which the plaintiff company has made these allegations of illegality and fraud, with a view to prevent any surprise at the trial.

Mr. Weerasooria contends that if there are no facts set out in the plaint from which an inference of fraud or illegality, in effecting the cover or issuing the policies, can be drawn, it will be open to the defendant to resist any issues of fraud or illegality being framed or tried at the trial. He relied upon the case of *Silva v. Periacarupen Chettiar* [1] where at the trial Counsel took the plea *ore tenus* at bar that the decree upon which the opposite side had based its case had been procured by fraud although no fraud had been set out in the pleadings. Wijeyewardene C.J., delivering the judgment of the Court, said :

" We are further of opinion that if evidence was going to be led on the question of fraud, it should have been pleaded and specific details given. "

[1] *(1949) 40 C. L. W. 10.*

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While this case is an authority for the proposition contended for by Mr. Weerasooria, it also illustrates the grave risks that a party may run by evidence of fraud being permitted to be led. Besides, it is possible that an application may be made for amendment of the pleadings by the plaintiff where an objection is taken to the framing of an issue of fraud, and should an amendment be allowed at the stage, even on terms, apart from the circumstance that unnecessary delay would thereby ensue,—delay which from the defendant's point of view may be unwelcome—the defendant certainly would have no opportunity of administering interrogatories should it become necessary at that stage to do so, for once the trial has begun, interrogatories cannot under our procedure be permitted. Furthermore even if Mr. Weerasooria's contention be correct, which as I have indicated, does not reflect the true position, it does not follow that the existence of one remedy negatives the existence of any other remedy.

There may be more than one remedy available, or more than one method of attack open, to a party. While undoubtedly the defendant can take objection at the trial to any issue of fraud or illegality in effecting cover or issuing policies, the existence of such a right does not prevent the defendant seeking to administer interrogatories in order to ascertain particulars of the fraud and illegality pleaded for the purposes of enabling him to get ready to meet those allegations at the trial and to prevent his being taken by surprise and being prejudiced thereby.

No authority which could be regarded as in point, establishing the contrary, has been cited, but reliance has been placed upon an observation of Smith, Lord Justice, in the case of *Kennedy v. Dodson* [1] where the following was given expression to :—

> " In my opinion the legitimate use and the only legitimate use of interrogatories is to obtain from the party interrogated admissions of facts which it is necessary for the party interrogating to prove in order to establish his case ; "

and it has been urged that it is not competent to the defendant to administer interrogatories for the purpose of obtaining particulars. I do not think that the language used by the learned Judge was intended to have such a general import, for it is a well known rule that a judgment should not be extended beyond the necessities of the facts of the case.

In that case with which the learned Judge was dealing, an attempt that was made by means of interrogatories to obtain information regarding not the transaction the subject matter of the action but of other transactions said to have taken place over a period of about 20 years prior to the date of the action,—information which would not have been necessary in order to establish the case of the party interrogating but which may have been remotely relevant. It was in those circumstances that that pronouncement was made by the learned Judge. This case was referred to in the case of *Wijesekere v. Eastern Bank* [2] where Nihill J. observed :

> " In judging an interrogatory a stricter test of relevancy (than the broad sense in which relevancy is defined in the Evidence Ordinance)

[1] *(1895) L. R. 1 Ch. 334 at p. 341.* [2] *(1941) 43 N. L. R. 109.*

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is required. It must be relevant to a fact in issue or as leading up to a matter in issue on the action."

It will be noticed that the learned Judge was dealing with the question of relevancy of interrogatories and not with the question whether the legitimate use of interrogatories is to obtain admissions. In both these cases, it will however be apparent, that the problem raised by issues 1 and 2 had not to be adjudicated upon.

It cannot however be doubted that there is another function, and a proper function which interrogatories can and do perform, and that is to enable the party interrogating to ascertain what the case is he has to meet or what really are the matters in issue.

The case of *Ashley v. Taylor*[1] was one where there was an allegation in the statement of claim that the defendants had advertised a worthless mine by means of private newspapers and circulars containing false statements, and that the plaintiff was thereby induced to take shares. The defendants administered interrogatories asking for the grounds on which the plaintiff alleged that the mine was worthless and that he should set out the particular papers by which he had been deceived. These interrogatories were held to be proper as they were simply directed to show what was the material facts upon which the issues in the case would be raised.

The case of *Lyon v. Tweddell*[2] was one for a dissolution of partnership between two surgeons on the ground that the defendant had so behaved and conducted himself towards the plaintiff in the presence of many of the patients of the partnership as to make it impossible for the plaintiff to carry on practice with him. An interrogatory by the defendant calling upon the plaintiff to set forth the particulars and circumstances of the occasions on which the defendant had so behaved and conducted himself was allowed.

In the case of *Benbow v. Low*[3] which laid down the proposition that where the object of the interrogation is to obtain particulars of the evidence on which the opponent relied to establish his case, the interrogation would be disallowed, there is an interesting observation of James L.J. :—

> "It appears to me the question is whether this is really asking to see the brief of the other side in order to know exactly what is the evidence they are going to produce, which is not permitted, or whether it is a question which comes within the exceptional instance which has been referred to, where a man says, 'Give me particulars of the misconduct which you allege against me', which I always thought was an exceptional and particular case . . . . If a man says, 'I am entitled to recover an estate because you have committed breaches of covenants', the other party is entitled to ask, 'Tell me what breach of covenant I have committed'."

The present case falls within this dictum.

[1] (*1878*) *38 Law Times 44.*

[2] (*1879*) *L. R. 13 Ch. 375.*

[3] (*1880*) *L. R. Ch. 93.*

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Having regard to the principles underlying these cases, I think that these two interrogatories, Nos. 1 and 2, are entirely proper and that the plaintiff should have been ordered to answer them.

I would therefore set aside the order of the learned District Judge in regard to Interrogatories 1 and 2 and direct that the plaintiff company should answer them. They will be answered within such time as may be fixed by the learned District Judge after receipt of the record by him.

As each party has been partly successful, I think the proper order to make with regard to costs is that both in the District Court and on appeal each party should bear his own costs.

FERNANDO A.J.—I agree.

Appeal partly allowed.

1955 *Present :* **Gratiaen J.**

ABDUL CADER, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 368—Appeal under section 15 of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 6 (2) (1)—"Assured income"—Proof.

Documentary evidence is not the only method of establishing an assured income within the meaning of section 6 (2) (1) of the Indian and Pakistani Residents (Citizenship) Act.

APPEAL against an order made under the Indian and Pakistani Residents (Citizenship) Act.

C. Shanmuganayagam, for the applicant appellant.

V. Tennekoon, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

July 21, 1955. GRATIAEN J.—

This is an appeal against an order refusing to register the applicant, his wife and their minor children as citizens of Ceylon under the provisions of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949.

The appellant is an Indian Moor. He was born in India but was brought over to Ceylon by his parents about 40 years ago when he was a young lad, and he has since settled in this country. He married in India in 1935 when he was on a visit to that country, and his wife accompanied him to Ceylon shortly afterwards. Their children, one of whom was born in 1942, and the other in 1945, attend school in Colombo where the family has resided for many years.

The Deputy Commissioner has not rejected the evidence that the appellant and his wife possess the necessary residential qualifications for registration, but the application was refused solely on the ground that

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the appellant had failed to satisfy the following requirement laid down in section 6 (2) (1) of the Act:—

> " that the applicant is possessed of an assured income of a reasonable amount *or* has some suitable business or employment or other lawful means of livelihood to support the applicant and the applicant's dependants, if any. "

On this issue the evidence led at the inquiry was all one way. According to the appellant, who was corroborated by other witnesses, he is well established as a dealer in hair oil and similar commodities which he sells as a " hawker " in the city of Colombo. His daily sales average Rs. 25 to Rs. 30, and his monthly profits amount to Rs. 175 to Rs. 150 a month. He also earns a small subsidiary income as a Radio artiste.

" Hawkers " do not generally appear to keep regular books of account, and the appellant, not being an exception to the rule in this respect, could not satisfy the Department's obsession for " documentary proof " which is regarded as the only kind of acceptable evidence of any fact which must be established under the Act. For this reason, the application was rejected. But there was plenty of evidence placed before the investigating officer at the preliminary investigation, and later before the Deputy Commissioner himself, which supported the appellant's case. For instance, he produced receipts which show that for a number of years he has regularly paid Rs. 13·58 (later reduced by law to Rs. 12·58) each month as the rental for the dwelling-house in which he and his family reside. This is surely some indication of a regular source of income. Moreover, there is evidence that he maintains his family in reasonable comfort. He sends his children regularly to school, and the investigating officer has apparently failed to discover any evidence from which one could infer that the appellant and his family had ever been in financial difficulties. Finally, the appellant produced before the investigating officer a certificate from a Member of Parliament (now a responsible Cabinet Minister) who stated that he had known the family for " the past fifteen years " and considered them fit and proper persons for being granted the privilege of Ceylon citizenship.

Section 6 (2) of the Act requires a reasonable guarantee that the newly admitted citizen and his family will not become a burden on the State. He must therefore establish that he possesses a sufficient income (earned or unearned) to support himself and his dependants, and that there are fair grounds for assuming that he will continue to do so. If the uncontradicted evidence of the appellant and his witnesses be true, the statutory test has been satisfied. His source of income is not very exciting, but it is not unlawful. The past history of his business proves that it is reasonably lucrative, and his anxiety to continue to carry it on is in itself a fair indication of his own confidence in his future prospects. I hold, on the material before me, that a *prima facie* case for registration has been made out, and I direct the Commissioner to take action accordingly on that basis. The appellant is entitled to his costs which I fix at Rs. 105.

The machinery of the Act would work far more satisfactorily, I am sure, if the functions of investigating officers under section 8 (2) are

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performed with more imagination. In the past, the exploded departmental theory that nothing but documentary proof suffices as "*prima facie* proof" of any fact has induced them to concentrate too much on searching for loopholes in the documents produced before them by a particular applicant. Better results would be achieved, for instance, by making independent inquiries from his neighbours or alleged business associates as to the truth or falsehood of a man's claim to have resided and carried on business in a particular locality for a long period of time, or to be engaged in carrying on a fairly lucrative trade in the city of Colombo. The failure of an investigating officer to discover rebutting evidence on these lines is itself a point in favour of the appellant's case.

Appeal allowed.

1955 *Present :* **Sansoni J.**

J. H. DE SILVA, Appellant, *and* H. M. D. ABEYARATNE, Respondent

S. C. 153—C. R. Panwila, 1,075

Landlord and tenant—Sale of rented premises—Right of vendor to sue tenant for ejectment.

When a landlord sells the rented premises it is open to him to sue the tenant thereafter in ejectment, in order to give vacant possession to the vendee.

Wijesinghe v. Charles (1915) 18 N. L. R. 168, followed.

APPEAL from a judgment of the Court of Requests, Panwila.

M. B. G. Dissanayake, for the plaintiff appellant.

M. Rafeek, for the defendant respondent.

March 4, 1955. SANSONI J.—

The plaintiff sued the defendant in ejectment relying on the document P1 of 1950 by which the defendant promised the plaintiff to quit and vacate certain premises within 30 days and hand over peaceful possession of the same. The defendant denied that the plaintiff had any right to sue him and pleaded that the plaintiff's remedy was a partition action. He also pleaded that he had taken a lease of these premises in 1954 from certain parties who were alleged to be co-owners of the land. Issues were framed when the case came up for trial, each proctor suggesting a definite set of issues, the total number being nine. The record does not show that the parties agreed to dispense with oral evidence. The plaintiff's proctor marked P1 and the defendant's proctor marked D1, a transfer executed by the plaintiff, and D2, the proceedings of a case filed by the plaintiff's vendee against the defendant. The Commissioner then made an order holding that, as the plaintiff has transferred the premises which are the subject matter of this action, he cannot sue the defendant who was alleged to be his former tenant. It is wrong to suppose that where an

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owner of a land sells it after having put a tenant in occupation he is precluded from bringing an action thereafter to eject his tenant. If authority is needed it could be found in *Wijesinghe v. Charles* [1]. The plaintiff, therefore, as I see it, was not precluded from bringing this action merely because he had parted with his interests in the land. The learned Commissioner relied on the case reported in *53 N. L. R. 311* where Swan J. decided that when a landlord sells leased premises it is open to the tenant to elect whether or not he should continue as the tenant of the new landlord. That is an entirely different proposition. Undoubtedly it is open to a tenant to refuse to continue as tenant under a new landlord after the former landlord has sold the land, but if he refuses to continue as tenant his first duty is to quit the premises. If he chooses to stay in occupation he remains there as tenant and if the landlord's vendee wants vacant possession it is open to the landlord to sue the tenant in ejectment. I am assuming, of course, that the defendant was the plaintiff's tenant, although, if he was not the plaintiff's tenant, I cannot see how his proctor could have asked the learned Commissioner to decide this case. The trial can only take place satisfactorily if the parties first lead such evidence as they choose to lead on the issues that have been suggested and the Commissioner then makes his findings on those issues. I set aside the order made by the learned Commissioner and sent the case back for a fresh trial on the issues framed. Costs of this appeal will abide the result of the fresh trial.

Order set aside.

1954 *Present :* **Pulle J. and Swan J.**

ASSISTANT GOVERNMENT AGENT, MATARA, Appellant,
and SIDDIK *et al.*, Respondents

S. C. 98 (Inty.) —D. C. Matara, 21,382

Land Acquisition Ordinance (Cap. 203)—Libel of reference—Joinder of parties—Sections 3, 5, 32.

Where the Crown desires to acquire a land under the Land Acquisition Ordinance, the proceedings ending with the filing of the libel of reference are not bad if in fact a claimant can satisfy the Court that he owns a divided portion of the land.

APPEAL from an order of the District Court, Matara.

E. W. P. S. Jayawardene, Crown Counsel, for the plaintiff appellant.

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

Cur. adv. vult.

May 10, 1954. PULLE J.—

This appeal arises out of proceedings taken under the Land Acquisition Ordinance (Cap. 203). The land sought to be acquired is described as lot 30 in Preliminary plan No. A 4,186—S. P. Its extent is 3 A. 0 R. 22·5P. Five claimants appeared at the enquiry before the Assistant Government

[1] *(1915) 18 N. L. R. 168.*

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Agent and, as no agreement was reached as to the amount of compensation, a libel of reference was filed making the five claimants and two others as defendants. The 1st and 2nd defendants, among other matters, pleaded that the libel could not be maintained owing to "a misjoinder of parties and causes of action". The learned District Judge upheld the plea and dismissed the reference with costs.

In their statement which was supplemented by evidence the 1st and 2nd defendants alleged that a divided part of the land sought to be acquired of the extent of 1 A. 2 R. 08 P. depicted as lot B2 in Plan No. 483A of 3rd October, 1939, devolved on them and that, therefore, the libel could not be maintained owing to a misjoinder of parties and causes of action.

The argument which appears to have weighed with the Judge is that where the Crown desires to acquire a land the proceedings ending with the filing of the libel are bad, if in fact a claimant can satisfy the court that he owned a divided portion of the land. In my opinion the argument is not valid. Before the Minister directs the Government Agent to take order for the acquisition of a land a decision is taken under section 3 as to whether it is likely to be needed for a public purpose. Thereafter the Surveyor-General is directed to examine or cause to be examined such land and to report whether the same is fitted for the purpose of the acquisition. Under paragraph (*d*) of section 3 it is the duty of the surveyor to set out the boundaries of the *land proposed to be taken* and a report is made under section 5. It is on this report that the Government Agent is directed to take order for the acquisition. It is manifest that none of the duties specified in sections 3 and 5 involve the ascertainment of the title of one or more persons to the exclusive ownership of a divided portion of the land. Otherwise, one would have expected the Legislature to have set up a machinery for the investigation of such title. The undesirability of such an investigation is obvious.

Where a land is dividedly possessed apportionment of compensation may, as the Judge observes, become difficult but difficulties of the same magnitude exist no less where the land is not divided as, for example, in the assessment of compensation for buildings and plantations put up by co-owners or lessees or bona fide possessors.

The learned Judge relies on section 32 in justification of the order dismissing the action. The proceedings taken in Court on a libel of reference being filed are subject to the Civil Procedure Code only "so far as the same can be made applicable". Not a single flaw in the steps taken up to and including the filing of the libel has been pointed out. I am unable to appreciate how in these circumstances the libel could be rejected. No disability attaches to anything done according to the requirement of law.

I would set aside the order appealed from and remit the case to the District Court for further proceedings in due course. The 1st and 2nd defendants will pay to the plaintiff the costs of appeal and the costs incurred by him on the 2nd February, 1953.

SWAN J.—I agree.

Order set aside.

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