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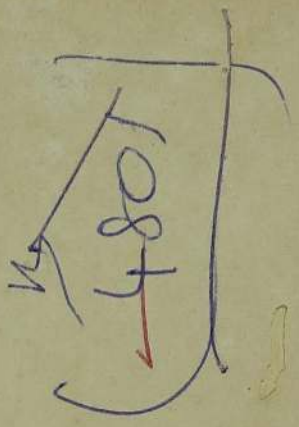

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THE

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, 1953, TO SEPTEMBER, 1954

Chief Justice

The Hon. Sir Alan Edward Percival Rose

The Hon. Mr. C. Nagalingam (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. A. de Silva

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ERRATA

Page 23—Last line, *delete* the word *he*.

Page 66—Footnote 1, for *251* read *257*.

Page 66—Footnote 3, for *53* read *54*.

Page 341—Last Line, for *difference* read *diffidence*.

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DIGEST

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Abatement of Action—

See ACTION (6).

Abetment—

Different types of abetment—Penal Code, ss. 100–103.

L. T. F. RODRIGO *v.* THE QUEEN 49

Action—

1. *Action—Thesavalamai—Action instituted by married woman—Subsequent grant of dispensation to sue alone—Date of action.*

Where a married woman governed by Thesavalamai instituted an action and her application for sanction of Court to sue alone, unassisted by her husband, was made with the presentation of the plaint—

Held, that the date of the institution of the action was the date on which the plaint was filed and not the date when the dispensation to sue alone was granted.

PIRAGASAM *v.* MARIAMMA 114

2. *Action—Plaintiff described as public officer—Right to sue in personal capacity.*

A plaintiff, merely because he describes himself by reference to his public office in the caption to the plaint, is not precluded from obtaining, with the consent of the defendant, a decree in his favour in his personal capacity.

NELSON DE SILVA *v.* S. CASINATHAN 121

3. *Landlord and tenant—Sub-tenant's possession is not that of a trespasser.*

A *rei vindicatio* action cannot be instituted by a landlord against the sub-tenant.

JUSTIN FERNANDO *v.* ABDUL RAHUMAN 275

4. Quia timet *action—Jurisdiction of Court to enter a declaratory decree* 319 ; 426

See QUIA TIMET ACTION.

5. *Execution—Mandatory decree—Application for enforcement of it—Separate action not maintainable—Damages claimable—Civil Procedure Code, s. 334.*

A separate action cannot be maintained when it claims relief for which the appropriate remedy is an application for execution under section 334 of the Civil Procedure Code.

Ismail v. Ismail (1920) 22 N. L. R. 190, doubted.

P. M. SILVA *v.* L. B. M. J. PERERA 378

6. *Abatement of action—Death of sole plaintiff—Circumstances when an order of abatement may be made—Civil Procedure Code, ss. 395, 396, 402, 403.*

Where, after the death of a sole plaintiff, his legal representatives delayed for nearly eighteen months to have themselves substituted under section 395 of the Civil Procedure Code—

Held, that an order of abatement of the action could be entered under section 396 of the Civil Procedure Code.

E. SIMEON SILVA *v.* A. K. N. SIVASUPRAMANIAM AMBALAM .. 562

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Adjournment—

See POSTPONEMENT.

Administration of Estates—

Administration of estates—Property belonging to estate—Prescriptive claim by administrator—Conditions necessary for such claim—Fiduciary relationship of administrator—Trusts Ordinance, s. 111—Prescription Ordinance, s. 3—Civil Procedure Code, ss. 540, 741.

An administrator who enters in that capacity upon any property belonging to the estate of a deceased person cannot commence acquiring prescriptive title to that property for himself against the intestate heirs until he has divested himself of his representative character by " completing the administration " within the meaning of section 540 of the Civil Procedure Code.

An administrator in possession of property belonging to the estate owes an equal duty by virtue of his office to all the intestate heirs without discrimination, and, so long as that fiduciary relationship subsists, the law will not permit him to say, for purposes of prescription, that he held the property for the benefit only of those to whom he was bound by special ties of kinship or affection.

B. J. H. BAHAR *v.* T. K. BURAH 1

Adoption of Children—

See HABEAS CORPUS.

Amendment of Pleadings—

See PLEADINGS.

Appeal—

1. *Criminal Procedure Code, s. 347 (b) (ii)—Alteration of verdict on appeal—Scope of—Abetment—Different types of abetment—Penal Code, ss. 100–103.*

The power vested in the Supreme Court under section 347 (*b*) (ii) of the Criminal Procedure Code to alter a verdict to a conviction on an amended charge which the appellant had not specifically been called upon to meet at any stage of the trial must be used with discretion, and only if the accused was not misled by the form of the charge and there is not any chance of injustice being done. The conviction for abetment under section 103 of the Penal Code could not therefore, in the circumstances of the present case, be altered to a conviction for abetment under section 102 read with section 101, Explanation 3, without injustice to the appellant.

L. T. F. RODRIGO *v.* THE QUEEN 49

2. *Appeal—Order of Supreme Court—Duty of court of first instance to execute it—Power of Supreme Court to permit conditional release of offenders—Courts Ordinance, s. 37—Criminal Procedure Code, ss. 325, 350.*

When a criminal case is decided on appeal and the record of the case is returned to the court of first instance, it is the duty of the lower court, under section 350 of the Criminal Procedure Code, to carry out the order of the Supreme Court on the unquestionable basis that the order of the Supreme Court is right. The Magistrate (or District Judge) must then act as the ministerial officer of the Supreme Court and cannot question the correctness of the order of the Supreme Court.

Although a Magistrate cannot discharge an offender conditionally under section 325 of the Criminal Procedure Code if he proceeds to conviction, the Supreme Court, when it exercises its appellate or revisionary powers, may, without disturbing the order of conviction made by a magistrate, proceed to order the accused person to be discharged conditionally on his entering into a bond in terms of that section.

ATTORNEY-GENERAL *v.* P. DISSANAYAKE .. 100

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3. *Appeal—Stay of execution pending appeal—Quantum of security that should be furnished by judgment debtor—Civil Procedure Code, s. 761.*

Where application is made under section 761 of the Civil Procedure Code for stay of execution of a decree pending an appeal, the security ordered to be furnished by the judgment-debtor should not be unduly excessive. The amount of security should be such as would reasonably safeguard the interests of the judgment-creditor in the event of the judgment appealed from being eventually affirmed in appeal.

WAHARAKA SOBITHA UNNANSE *v.* AMUNUGAMA PIYARATANA UNNANSE 249

4. *Appeal—Dismissal for want of appearance—Effect of such dismissal.*

When an appeal is dismissed, there being no appearance for the appellant, the dismissal of the appeal must be regarded as involving a rejection of all the arguments which might have been raised at the hearing of the appeal. The absent party must bear the consequence of his own *laches.*

NAGALINGAM *v.* LEDCHUMIPILLAI 280

5. *Postponement—Grant or refusal—Discretion of Court—Power of Appellate Court to interfere* 119

See POSTPONEMENT (1).

6. *Civil Procedure Code—Section 326—Appeal from order thereunder—Civil in nature.*

Proceedings under section 325 *et seq.* of the Civil Procedure Code are not criminal in their nature but are steps in aid of execution, and an appeal under these sections should be constituted as an appeal in a civil case.

W. S. PETER *v.* W. S. CAROLIS 406

7. *Privy Council—Fresh evidence—Admissibility in appeal.*

Where application was made, in appeal, to introduce fresh evidence by a handwriting expert—

Held, that the application could not be entertained as it disregarded the well-known rule as to the introduction of fresh evidence.

MURIEL AMARASEKERA *nee* WIJESINGHE *v.* H. D. ADLIET RATNAYAKE 409

8. *Appeal—Power of Appellate Court to re-hear case—Courts Ordinance, s. 37.*

Quaere : Does the Supreme Court, when hearing appeals, sit as a Court of rehearing, with unqualified power to make such order as the Judge of first instance could have made if the case had been heard by him at the date on which the appeal was heard ? Does its power extend to the re-examination of *substantive rights* in the light of fresh legislation passed in the interval between the judgment of the Court of first instance and the hearing of an appeal against it ? *Silva v. Swaris* (1904) 1 Bal. Rep. 61, considered.

NAWADUN KORALE CO-OPERATIVE STORES UNION, LTD. *v.* W. M. PREMARATNE 505

9. *See also* PRIVY COUNCIL.

Appropriation of Payments—

See PAYMENT (1), (2).

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Arbitration—

1. *Arbitration without intervention of Court*—Ex-parte *award—Delay in making award—Validity of award—Effect of regular action filed subsequent to reference to arbitration—Bribery of arbitrator—Strict proof necessary—Arbitration Ordinance (Cap. 83), s. 7—Civil Procedure Code, ss. 386, 691 (2), 696.*

Where parties, without the intervention of Court, voluntarily submitted a matter in dispute to arbitration and the award of the arbitrator was attacked on various grounds under section 691 (2) of the Civil Procedure Code—

Held, (i) that the neglect or refusal of one of the parties to avail himself of the opportunity of presenting his case before the arbitrator did not invalidate the subsequent proceedings or disqualify the arbitrator from exercising his jurisdiction in the matter.

(ii) that delay of the arbitrator in making his award did not constitute " misconduct " on his part because no time limit was fixed in the terms of reference and the delay was largely occasioned by the dilatory and non-co-operative methods employed by the party objecting to the award.

(iii) that a reference to arbitration is not superseded by the institution of a subsequent regular action, unless the subject matter of the arbitration and the subject matter of the regular action are clearly identical.

(iv) that there was nothing improper in an arbitrator accepting from one of the parties, before the date of the award, the fee payable by that party in accordance with an agreement which bound all the parties.

(v) that the Court should not, by reference to affidavits alone, have arrived at a finding of corruption or misconduct against the arbitrator. Before reaching such a conclusion on a disputed allegation the Court should have framed issues of fact and heard oral evidence.

S. D. A. Gunawardene *v.* M. Muttiah Pillai .. 29

2. Res judicata—*Extension of principle to points decided previously in same suit—Arbitration—Objections to validity of award—Same objection cannot be raised twice—Civil Procedure Code, ss. 687, 692 (1).*

A decision in a civil suit or other proceeding in regard to any point operates as a bar to a fresh decision on that point in all subsequent stages of that suit or proceeding. In arbitration proceedings, therefore, the requirement in section 692 (1) of the Civil Procedure Code that the parties should be notified of the day on which judgment will be given does not entitle a party to raise on the day fixed for judgment an objection to an award which he had previously raised and was the subject of an adjudication which is binding on him.

Nagalingam *v.* Ledchumipillai 280

Arrest—

Arrest without warrant—Cognizable offence—Duty to inform suspect of the charge against him—Criminal Procedure Code, ss. 23 (1), 32 (1) (b), 35, 53— Penal Code, ss. 69, 333, 348.

A police officer acts illegally in Ceylon (as in England) if he arrests a man without a warrant on a mere ' unexpressed suspicion ' that a particular cognizable offence has been committed—unless ' the circumstances are such that the man must know the general nature of the offence for which he is detained ' or unless the man himself produces the situation which makes it practically impossible to inform him '. In such a case the police officer is liable to be convicted under the Penal Code for assault and wrongful confinement.

Held further, that a police constable who *bona fide* arrests a person on an order wrongly given by his senior officer is in certain circumstances entitled to claim the benefit of the exception to criminal liability set out in section 69 of the Penal Code.

D. H. R. A. Corea *v.* The Queen 457

Assessment—

See Valuation.

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Autrefois acquit—

1. Autrefois acquit—*Failure of prosecutor to lead evidence—" Discharge " of accused—Right of prosecutor to institute fresh proceedings—Criminal Procedure Code, ss. 190, 330.*

On the date of trial of a summary case the chief witness for the prosecution was absent although summons had been served on him. The prosecuting officer did not apply for a warrant on the witness, but stated that he was not prepared to go on with the case. Thereupon, the Court " discharged " the accused.

Held, that the order of discharge was tantamount to an acquittal under section 190 of the Criminal Procedure Code and that the accused could not be prosecuted again in respect of the same charge.

R. A. Don Abraham *v.* T. H. Christoffelsz 92

2. *Penal Code, s. 394—Receiving stolen property—Several articles in accused's possession—Different owners—Presumption of one offence only*—Autrefois acquit—*Criminal Procedure Code, s. 330.*

Where a person, who is found in possession of several articles belonging to different owners, is tried and acquitted of the offence of receiving stolen property in respect of some of the articles, he cannot be prosecuted again for the same offence in respect of any of the remaining articles. In that event, he is entitled to take the plea of *autrefois acquit* unless there is evidence to show that the articles were received by him on different occasions or that he came into possession of them at different times.

S. Katchimohamadu *v.* P. K. Mooyan 112

3. Autrefois acquit—*Failure of prosecutor to lead evidence—" Discharge " of accused—Right of prosecutor to institute fresh proceedings—Criminal Procedure Code, ss. 190, 191, 289 (5), 330.*

When, in a summary case, the prosecutor is not ready to proceed with his case on the date of trial, even after he has been given ample opportunity to place his evidence, an order of Court refusing postponement and " discharging " the accused operates as an acquittal. It is not open then to the prosecutor to institute fresh proceedings upon the same charge.

Senaratne v. Lenohamy (1917) 20 N. L. R. 44, distinguished.

Adrian Dias *v.* Weerasingham.. 135

Bail—

1. *Bail—Forfeiture of bond—Circumstances when it is wrong.*

Where a person who gave bail for the appearance of an accused person did all that was possible to see that the accused was brought before court—

Held, that the bond should not be forfeited.

In re M. L. M. Saleem 311

2. *Excise officer—Power to release on bail an arrested person—Excise Ordinance (Cap. 42), ss. 7, 33 (1), 34, 37—Criminal Procedure Code, ss. 2, 36, 39.*

An excise officer is not *prima facie* a peace officer. When he arrests a person without a warrant, under section 34 of the Excise Ordinance, he has no power under section 37 to release that person on bail.

Therefore, when an excise officer takes a bond from a surety in order to secure the arrested person's attendance in court, a Magistrate has no jurisdiction to forfeit that bond if the accused fails to appear.

Andiya Vidane *v.* I. Jansze 358

Bastardy—

See Maintenance Ordinance.

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See IMPROVEMENTS (2).

Buddhist Temple—

Buddhist temple—Claim to incumbency thereof—Reference to ecclesiastical court—Binding force of decisions of extra-judicial tribunals—Computation of prescriptive period—Prescription Ordinance (Cap. 55), s. 10.

Persons who voluntarily submit a dispute to an extra-judicial tribunal must abide by its decision unless it be vitiated by misconduct or substantial irregularity of procedure or by a violation of the principles of natural justice.

Plaintiff sued the 1st defendant for a declaration that he, and not the 1st defendant, was the incumbent of a certain Buddhist temple. This dispute had been previously referred to an ecclesiastical court whose decision the rival claimants had (by necessary implication, if not expressly) agreed to regard as binding on them. After the decision of the ecclesiastical court in favour of the plaintiff, the 1st defendant requested him to refrain from enforcing his rights for about a year " until it is settled amicably without getting into litigation ". After the period of indulgence asked for had expired, 1st defendant repudiated his obligation to obey the decision of the ecclesiastical court and reasserted his false claim to the incumbency.

Held, (i) that the decision of the ecclesiastical court was binding on the parties and could be enforced in a court of law.

(ii) that the conduct of the 1st defendant in repudiating the decision of the ecclesiastical court gave rise to a fresh cause of action entitling the plaintiff to claim the protection of a declaratory decree against further interference with his enjoyment of the rights which had been vindicated in the ecclesiastical court. As the present action was instituted within three years of the date on which this fresh cause of action arose, the plaintiff's remedy, which fell within section 10 of the Prescription Ordinance, was not barred by limitation.

KIRIKITTA SARANANKARA THERO *v.* MEDEGAMA DHAMMANANDA THERO 313

Burden of Proof—

See EVIDENCE (4), (8), (9).

Cause of Action—

Meaning of expression—Civil Procedure Code, s. 5 426

Certiorari—

See WRIT OF CERTIORARI.

Charge—

1. *Conspiracy—Accomplishment of the offence agreed upon—Proper indictment to bring in such circumstances—Penal Code, s. 113A.*

Indictment—Amendment of it by Court—Proper procedure.

Criminal Procedure Code, s. 347 (b) (ii)—Alteration of verdict on appeal—Scope of—Abetment—Different types of abetment—Penal Code, ss. 100–103.

It is undesirable to include a charge of conspiracy in an indictment which alleges the actual commission of the offence in respect of which the conspiracy was formed.

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The primary responsibility for the accuracy and suitability of an indictment rests with counsel for the prosecution, and not on the court. The court may, however, decide to amend the indictment on its own responsibility, but before such a decision is made, both the prosecution and the defence should be given an opportunity of making their submissions on the point.

The power vested in the Supreme Court under section 347 (*b*) (ii) of the Criminal Procedure Code to alter a verdict to a conviction on an amended charge which the appellant had not specifically been called upon to meet at any stage of the trial must be used with discretion, and only if the accused was not misled by the form of the charge and there is not any chance of injustice being done. The conviction for abetment under section 103 of the Penal Code could not therefore, in the circumstances of the present case, be altered to a conviction for abetment under section 102 read with section 101, Explanation 3, without injustice to the appellant.

L. T. F. Rodrigo *v.* The Queen 49

2. *See also* Joinder of Charges.

Charitable Trust—

See Trusts (3).

Citizenship—

See Indian and Pakistani Residents (Citizenship) Act.

Civil Procedure—

1. *Administration of estates—Property belonging to estate—Prescriptive claim by administrator—Conditions necessary for such claim—Civil Procedure Code. ss. 540, 741* 1

See Administration of Estates (1).

2. *Civil Procedure Code—Non-appearance of plaintiff—Decree nisi—Application to set it aside—Time limit of 14 days—Computation—Section 84* (1).

The period of fourteen days referred to in section 84 (1) of the Civil Procedure Code must be reckoned as from the date of the formal decree in form No. 21 and not from the date of the order directing that the decree nisi be entered.

K. Vyramuttu *v.* R. Mylvaganam 47

3. Lis alibi pendens—*Stay of proceedings—Conditions precedent—Civil Procedure Code, s. 839.*

An order staying all proceedings in an action until the conclusion of a litigation which is pending between the parties in a foreign Court cannot be made except upon proper material. A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in a court in Ceylon if it is otherwise properly brought.

Murugappen Chettiar *v.* Nadarajan Chettiar .. 104

4. *Maintenance Ordinance—Arrears of maintenance—Deposited in Court—Liability to attachment—Civil Procedure Code, s. 218* (*b*) .. 114

See Maintenance Ordinance (5).

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5. *Action—Thesavalamai—Action instituted by married woman—Subsequent grant of dispensation to sue alone—Date of action.*

Where a married woman governed by Thesavalamai instituted an action and her application for sanction of Court to sue alone, unassisted by her husband, was made with the presentation of the plaint—

Held, that the date of the institution of the action was the date on which the plaint was filed and not the date when the dispensation to sue alone was granted.

PIRAGASAM *v.* MARIAMMA 114

6. *Postponement—Grant or refusal—Discretion of Court* 119

See POSTPONEMENT.

7. *Action—Plaintiff described as public officer—Right to sue in personal capacity* 121

See ACTION (2).

8. *Proctor—Proxy not filed—Circumstances when failure may be excused* .. 121

See PROCTOR (2).

9. *Civil Procedure Code, s. 671—" Any party "—Appointment of receiver—Powers of Court* 158

See RECEIVER.

10. *Partition action—Minority of defendants—Summons served on them personally—Minors not legally represented—Effect on proceedings—Civil Procedure Code, s. 480* 236

See MINORS.

11. *Appeal—Stay of execution pending appeal—Quantum of security that should be furnished by judgment debtor—Civil Procedure Code, s. 761* .. 249

See APPEAL (3).

12. *Amendment of plaint—Misdescription of defendant—Substitution of proper defendant—Prescription* 335

See PLEADINGS.

13. *Execution—Mandatory decree—Application for enforcement of it—Separate action not maintainable—Damages claimable—Civil Procedure Code, ss. 334, 335, 344, 839* 378

See EXECUTION OF DECREES (3).

14. *Civil Procedure Code—Section 326—Appeal from order thereunder—Civil in nature —Scope of jurisdiction of Court under s. 326—Proceedings against minor—Requirement of appointment of guardian* ad litem *under s. 480* 406

See EXECUTION OF DECREES (4).

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15. *Civil Procedure Code—Procedure when assignee of a decree seeks to obtain execution—Validity of an order for execution preceded by substitution—Assignee in insolvency—"Representative" of insolvent—Sections 339, 344* 544

See EXECUTION OF DECREES (5).

16. *Abatement of action—Death of sole plaintiff—Circumstances when an order of abatement may be made—Civil Procedure Code, ss. 395, 396, 402, 403* 562

See ACTION (6).

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

Civil Procedure Code—

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See also ADMINISTRATION OF ESTATES ; APPEAL ; CIVIL PROCEDURE

Cognizable Offence—

Arrest without warrant—Duty to inform suspect of the charge against him.

See ARREST.

Collision—

See DELICTS.

Common Intention—

See COURT OF CRIMINAL APPEAL DECISIONS (1).

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Compensation for Improvements—

See IMPROVEMENTS

Conspiracy—

Conspiracy—Accomplishment of the offence agreed upon—Proper indictment to bring in such circumstances—Penal Code, s. 113A.

It is undesirable to include a charge of conspiracy in an indictment which alleges the actual commission of the offence in respect of which the conspiracy was formed.

L. T. F. RODRIGO *v.* THE QUEEN 49

Construction of Documents and Statutes—

See INTERPRETATION

Contempt of Court—

Contempt of Court—Extent of right to criticise Judges.

In the course of a speech at a public meeting the respondent criticised Judges in such a manner that no person who may have been persuaded by the speech to accept the views expressed in it about the judiciary could continue to have confidence in the impartiality of the courts of justice, and in particular of the courts in the city of Galle.

Held, that it is no less an offence of contempt of court to scandalise the judiciary generally than to scandalise the Judge or Judges of a particular court.

In re S. A. WICKREMASINGHE 511

Contracts—

1. *Contract—Illegality—Effect as between the parties—Hire-purchase—Ownership of goods—Is it a material factor?*

A transfer of property made in pursuance of an unlawful agreement cannot be upset merely on the ground of illegality.

Quaere, whether a condition precedent to a hire-purchase agreement is that the person who lets goods on hire should be the lawful owner of such goods at the time the agreement is entered into.

D. WARNAKULASOORIYA *v.* TRANSPORT & GENERAL FINANCE CO., LTD. 169

2. *Contract—Transfer of property—Condition for reconveyance—Provisions for damages on refusal to reconvey—Is obligation of transferee alternative? —Specific performance—Trusts Ordinance, s. 93.*

Where property is transferred subject to the terms that the transferee should reconvey it to the transferor upon payment of a certain price within a stipulated period and that, on refusal to reconvey, the transferee should pay a certain sum as damages, action for specific performance of the reconveyance would lie at the instance of the transferror if the promise to pay damages represents merely a penal stipulation which is nothing more than accessory to the principal obligation. If, on the other hand, the promise to pay damages introduces in truth an alternative obligation at the transferee's option, it is open to the transferee to discharge the contract by complying with either (and not both) of the alternative obligations stipulated in the contract.

S. SIVASAMBU *v.* KATHIRESAR AMBAGAR 176

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3. *Contract—Novation—Ingredients necessary.*

P. T., who was carrying on a business, bound himself and his heirs, executors and administrators to pay monthly a certain sum of money to the plaintiff. Subsequently a private limited liability company acquired the business. P. T. who was the managing director of the company, continued the monthly payments notwithstanding the cessation of his private business. After he died the company made similar payments subject however to the express qualification that the payments were *ex gratia*. In an action instituted by the plaintiff for a declaration that the company was liable to continue to make such monthly payments—

Held, that the claim of the plaintiff was insupportable in law. A novation of a debt cannot, in the absence of any express declaration by the parties, be held to exist except by way of necessary inference from all the circumstances of the case.

HIRDARAMANI LTD. *v.* T. A. K. DE SILVA 294

4. *Contract—Tender—Execution of a further agreement—Point of time when contract becomes binding.*

Plaintiff had been invited to make a tender for certain work on the understanding that, if the tender was accepted, he would be required within a fixed period of time to sign an agreement for the due performance of the work. He accordingly signed an agreement whereby he undertook to complete the work within a certain period.

Held, that the contract automatically became operative as soon as the plaintiff signed the agreement. It was not open to the other party thereafter to change his mind on the ground that he had not signed the agreement himself.

H. K. J. APPUHAMY *v.* ATTORNEY-GENERAL 436

5. *Privy Council—Sale of land by debtor to creditor—Agreement by transferee to reconvey the land to transferor—Parol evidence thereof—Admissibility—Prevention of Frauds Ordinance, s. 2—Trusts Ordinance, s. 5 (1) and (3).* 529

See TRUSTS (4).

Co-operative Societies Ordinance—

1. *Co-operative Societies Ordinance (Cap. 107) as amended by Co-operative Societies (Amendment) Act, No. 21 of 1949—Section 50A—Money due to Co-operative Society—Procedure for recovering it—Sentence of imprisonment cannot be imposed on defaulting debtor.*

When the Registrar of Co-operative Societies orders a person to repay money due to a co-operative society, section 50A (2) of the Co-operative Societies Ordinance as amended by the Co-operative Societies (Amendment) Act, which provides machinery for the recovery of the money under section 312 (2) of the Criminal Procedure Code, does not empower a Magistrate to sentence the debtor to a term of imprisonment if he makes default in payment.

S. THAMBIPILLAI *v.* MANMUNAI SOUTH AND ERUVIL CO-OPERATIVE AGRICULTURAL PRODUCTION AND SALES SOCIETY, LTD. .. 284

2. *Co-operative Societies Ordinance (Cap. 107), as amended by Ordinance No. 21 of 1949, ss. 2, 45—Dispute between co-operative society and ex-officer's heirs—Assistant Registrar's unauthorised reference to arbitration—Validity of award.*

Where an Assistant Registrar of Co-operative Societies acted in excess of his powers by referring to arbitration a dispute between a co-operative society and the heirs of an ex-officer of the society—

Held, that the award of the arbitrator was a nullity.

MRS. W. JAYASUNDERA *v.* KATULIYADDE CO-OPERATIVE SOCIETY LTD. 445

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3. *Co-operative Societies Ordinance (Cap. 107)—Section 45—Dispute between co-operative society and past officer—Act No. 21 of 1949—Act No. 17 of 1952—Retroactive effect—Appeal—Power of Appellate Court to re-hear case—Interpretation Ordinance (Cap. 2) s. 6 (3) (c)—Courts Ordinance (Cap. 6) s. 37.*

The provisions of neither the Co-operative Societies (Amendment) Act, No. 21 of 1949, nor the Co-operative Societies (Special Provisions) Act, No. 17 of 1952, are applicable to a dispute which had originated between a co-operative society and one of its "past officers" prior to 24th May, 1949, and which was pending in appeal to the Supreme Court at the time when Act No. 17 of 1952 came into force.

Section 2 of the Co-operative Societies (Special Provisions) Act, read with section 6 (3) (c) of the Interpretation Ordinance, does not interfere with the rights of the parties in an action which had already commenced before the Act was passed, or in a pending appeal filed before that date.

Quaere : Does the Supreme Court, when hearing appeals, sit as a Court of rehearing, with unqualified power to make such order as the Judge of first instance could have made if the case had been heard by him at the date on which the appeal was heard ? Does its power extend to the re-examination of *substantive rights* in the light of fresh legislation passed in the interval between the judgment of the Court of first instance and the hearing of an appeal against it ? *Silva v. Swaris* (1904) 1 Bal. Rep. 61, considered.

NAWADUN KORALE CO-OPERATIVE STORES UNION LTD. *v.* W. M. PREMARATNE 505

4. *Co-operative Societies Ordinance (Cap. 107)—Section 18—Contractual liability of society—Effect of by-laws.*

A co-operative society, upon registration under the Co-operative Societies Ordinance, becomes incorporated by statute (section 18), and its liability in contract is regulated by the limits of its constitution and of its by-laws. The President of a co-operative society has, therefore, no power or authority to commit the society to contractual obligations into which, according to the by-laws, the Committee alone can enter.

PARAKRAMA SAMUDRA COLONY C. A. P. S. SOCIETY, LTD. *v.* E. S. WIMALASEKERA 519

5. *Co-operative Societies Ordinance (Cap. 107), as amended by Act No. 21 of 1949—Section 50A—Money due to registered society—Mode of recovery.*

Before the machinery of a Magistrate's Court is invoked for the purpose of recovering money alleged to be due by a person to a Co-operative Society, the requirements of section 50A of the Co-operative Societies Ordinance must be strictly proved.

D. C. PANDITHA *v.* D. J. N. DE ZOYSA 571

Costs —

Criminal Procedure Code—Section 289—Absence of accused on date of trial—Postponement—Power of Court to award costs in favour of complainant. 165

See POSTPONEMENT (3).

Court of Criminal Appeal Decisions—

1. *Common intention—Deprivation of self-control by grave and sudden provocation—Co-existence—Penal Code, ss. 32 ; 294, Exception 1.*

A finding that several accused acted in furtherance of a common intention is not necessarily inconsistent with the finding that they were at the same time deprived of the power of self-control by grave and sudden provocation within the meaning of Exception 1 to Section 294 of the Penal Code.

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" A common intention does not necessarily and in all cases imply an express agreement and a plan arranged long before the assault. The agreement may be tacit and the common design conceived immediately before it is executed."

ANTHONY 35

2. *Court of Criminal Appeal—Unreasonable verdict—Certificate of trial Judge—Weight which should be attached to it—Court of Criminal Appeal Ordinance, No. 23 of 1938, ss. 4 (b), 5 (1).*

Although the certificate of the trial Judge that a case is fit for appeal is no ground in itself for setting aside a verdict, it is, however, an element which the Court of Criminal Appeal will take into consideration together with other elements in deciding whether or not a particular verdict should stand.

The Court of Criminal Appeal may, though rarely, decide that a verdict is unreasonable if upon a consideration of the case as a whole it is felt that the verdict is not satisfactory. It is not necessary for the Court to single out any particular item upon which it bases its view.

PEERIS SINGHO 173

3. *Charge of murder—Plea of self-defence—Right of private defence exceeded—Proper direction to jury—Penal Code, s. 294, Exception 2—Jury's rider recommending mercy—Effect on reasonableness of verdict.*

Appellant, who was convicted of murder, gave evidence at the trial stating that he had killed the deceased in self-defence. As regards the second exception to section 294 of the Penal Code, the presiding Judge directed the jury that if the accused exceeded the right of private defence he was guilty of culpable homicide not amounting to murder. It was contended for the appellant that the jury should also have been directed to consider whether the appellant had acted without any intention of doing more harm than was necessary for the purpose of such defence, and that the omission of such a direction made the direction that was given a misdirection.

Held, that there was no misdirection. On the contrary the direction was unduly favourable to the appellant.

R. v. Kirinelis (1946) 47 N. L. R. 443, distinguished.

Held further, that a jury's rider recommending mercy cannot be assumed to involve a view of the facts that is inconsistent with the verdict.

L. H. SOYSA 252

4. *Evidence—Indictable offence—Statement made by a witness of non-summary inquiry—Evidentiary value of it at trial.*

When a statement made by a witness at a non-summary inquiry is denied by him at the trial of the accused, it cannot be used as substantive evidence.

S. S. FERNANDO 392

5. *Charge of murder—Plea of self defence—Summing-up—Circumstances when Judge should give adequate direction on sudden fight and provocation—Penal Code, s. 294, Exceptions 1 and 4.*

In a trial for murder, questions of sudden fight or grave and sudden provocation should be left to the jury and adequately explained by the trial Judge where the facts, or the necessary inference to be drawn from them, would make it possible for the jury reasonably to form such a verdict. The mere fact that the accused himself, or his counsel, has contended for a complete acquittal on the ground of self-defence does not excuse the jury from considering, or the trial Judge from directing them upon, the question as to whether the true facts would not necessitate a verdict of culpable homicide not amounting to murder.

E. CHANDRADASA 439

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6. *Charge of murder—Defence of alibi—Intoxication alleged in dying deposition of deceased—Summing-up—Misdirection.*

In a prosecution for murder, the defence was an alibi. In his dying deposition, however, the deceased had stated that the accused was drunk and staggering at the time he inflicted the fatal injury and that there was no altercation or previous ill feeling between the accused and the deceased.

Held, that in the circumstances it was the duty of the trial Judge to have considered in his summing-up whether the accused by reason of intoxication was incapable of realising the natural and probable consequences of the violence he used on the deceased.

S. CHARLES SILVA 502

7. *Trial before Supreme Court—Failure of accused to give evidence—Adverse comment by Court—Scope of inference against accused—Misdirection.*

In a trial before the Supreme Court, the case for the prosecution rested principally upon the evidence of one witness, K. B. In the course of the Judge's summing-up the Jury were told that they could legitimately draw the inference that K. B.'s evidence, which, taken by itself, might not be regarded as trustworthy, could, in view of the failure of the accused persons to give evidence on their own behalf and contradict that evidence, be deemed to be true.

Held, that the Judge's comment on the failure of the accused to give evidence was in the circumstances a misdirection.

W. JAYASENA 514

8. *Trial before Supreme Court—Jury are sole judges of fact—Requirement of such direction in summing-up—Charge of murder—Duty of Judge to place before Jury every possible defence.*

In trial before the Supreme Court it is the duty of the Judge to caution the Jury that any views he may express on questions of fact are not to be regarded as binding upon them and that they are the sole judges of fact.

In a trial for murder, the fact that the accused or his Counsel does not advert to a possible plea of private defence that may reasonably be said to arise upon the facts does not relieve the Judge from the duty imposed upon him of placing it before the Jury in his summing-up.

D. D. THEMIS 541

Court of Requests—

See JURISDICTION.

Courts Ordinance—

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Criminal Law—

1. *Conspiracy—Accomplishment of the offence agreed upon—Proper indictment to bring in such circumstances—Penal Code, s. 113A.* .. 49

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2. *Abetment—Different types of abetment—Penal Code, ss. 100-103* .. 49

See ABETMENT.

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3. *Penal Code, s. 394—Receiving stolen property—Several articles in accused's possession—Different owners—Presumption of one offence only*—Autrefois acquit—*Criminal Procedure Code, s. 330* .. 112

See AUTREFOIS ACQUIT (2).

4. *Mischief—Trespassing cow—Right to destroy it* 160

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5. *Common intention—Deprivation of self-control by grave and sudden provocation—Co-existence—Penal Code, ss. 32, 294, Exception 1* .. 35

See COURT OF CRIMINAL APPEAL DECISIONS (1).

6. *Charge of murder—Plea of self-defence—Right of private defence exceeded—Proper direction to jury—Penal Code, s. 294, Exception 2—Jury's rider recommending mercy—Effect on reasonableness of verdict* 252

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7. *Charge of murder—Plea of self-defence—Summing up—Circumstances when Judge should give adequate direction on sudden fight and provocation—Penal Code, s. 294, Exceptions 1 and 4* 439

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

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1. *Indictment—Amendment of it by Court—Proper procedure* .. 49

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2. *Conspiracy—Accomplishment of the offence agreed upon—Proper indictment to bring in such circumstances—Penal Code, s. 113A* .. 49

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3. *Joinder of charges—"In the same transaction"—Criminal Procedure Code, s. 184* .. .. .. 65 ; 287

See JOINDER OF CHARGES, CAUSES OF ACTION AND PARTIES.

4. Autrefois acquit—*Failure of prosecutor to lead evidence—"Discharge" of accused—Right of prosecutor to institute fresh proceedings—Criminal Procedure Code, ss. 190, 330* 92

See AUTREFOIS ACQUIT (1).

5. *Appeal—Order of Supreme Court—Duty of Court of first instance to execute it—Power of Supreme Court to permit conditional release of offenders—Criminal Procedure Code, ss. 325, 350* 100

See APPEAL (2).

6. Autrefois acquit—*Failure of prosecutor to lead evidence—"Discharge" of accused—Right to prosecutor to institute fresh proceedings—Criminal Procedure Code, ss. 190, 191, 289* (5), *330* 135

See AUTREFOIS ACQUIT (3).

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7. *Criminal Procedure Code—Section 289—Absence of accused on date of trial—Postponement—Power of Court to award costs in favour of complainant* 165

See POSTPONEMENT (3).

8. *Criminal Procedure Code—Sections 297 and 407—Accused absconding—Evidence of witnesses recorded in his absence—Procedure for reading it over at the trial.*

Where an accused person absconds and evidence is recorded in his absence under section 407 of the Criminal Procedure Code, the evidence so recorded may be read over to the deponents at the trial of the accused. Section 407 must be read in conjunction with section 297.

Jane Sinno v. Ratnapura Police (1949) 39 C. L. W. 79, not followed.

D. FERNANDO *v.* S. I. POLICE, WELIKADE 322

9. *Joinder of charges—Different offences committed in same transaction—Splitting up of charges—Criminal Procedure Code, ss. 178, 180* .. 374

See JOINDER OF CHARGES (3).

10. *Indictable offence—Assumption of summary jurisdiction by Magistrate—Adequate material a condition precedent for forming necessary opinion—Criminal Procedure Code, s. 152 (3).*

Before a Magistrate assumes summary jurisdiction under section 152 (3) of the Criminal Procedure Code in respect of a non-summary case, there must be adequate material available to him to form the opinion that the case is one which may properly be tried summarily.

S. BOTEJU *v.* MOORTHY 374

11. *Arrest without warrant—Cognizable offence—Duty to inform suspect of the charge against him—Criminal Procedure Code, ss. 23 (1), 32 (1) (b), 35, 53—Penal Code, ss, 69, 333, 348* 457

See ARREST.

12. *Post Office Ordinance (Cap. 146)—Sections 71 (1) and 88 (1)—Applicability of Sections 11 and 152 (3) of Criminal Procedure Code* .. 537

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

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See also COURT OF CRIMINAL APPEAL DECISIONS ; CRIMINAL PROCEDURE.

Customs Ordinance—

1. *Customs Ordinance (Cap. 185)—Offence of failure to pay export duty—Ingredient of fraud necessary—Sections 59, 64, 128, 139A.*

In a prosecution under section 128 of the Customs Ordinance for non-payment of export duty in respect of goods liable to such duty there must be proof that the accused was guilty of fraud or fraudulent evasion.

PRINCIPAL COLLECTOR OF CUSTOMS *v.* T. M. A. WIJESEKERA .. 19

2. *Customs Ordinance—Section 158—Prosecution thereunder—Burden of proof.*

In a prosecution under section 158 of the Customs Ordinance for possessing an article suspected to have been stolen from any ship, boat, quay, &c., a duty is cast upon the Court to satisfy itself that there were reasonable grounds for suspecting that the article was stolen from any ship, &c. It is only after the Court is so satisfied that it would become incumbent on the accused to give an account as to how he came by the article.

A. HUTCHINSON *v.* D. D. WIJESINGHE 431

Damages—

See DELICTS (1), (2), (5), (6).

Decree—

1. *Civil Procedure Code—Non-appearance of plaintiff—Decree nisi—Application to set it aside—Time limit of 14 days—Computation—Section 84 (1).*

The period of fourteen days referred to in section 84 (1) of the Civil Procedure Code must be reckoned as from the date of the formal decree in form No. 21 and not from the date of the order directing that the decree nisi be entered.

K. VYRAMUTTU *v.* R. MYLVAGANAM 47

2. *See also* EXECUTION OF DECREES.

Delicts—

1. *Collision—Negligence—Award of damages—Circumstances when court of appeal will interfere.*

In a running down case, a court of appeal will interfere with an award of damages if it is satisfied that the trial judge has misapprehended the facts and has for that reason made a wholly erroneous estimate of the damage suffered.

J. G. DIAS *v.* S. A. G. SILVA .. .. ..

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2. *Collision—Contributory negligence—Test of reasonableness—Damages for loss of income—Proof necessary.*

A collision took place between plaintiff's hiring car and defendant's omnibus at a junction where two highways met. Plaintiff's car was admittedly being driven along the " major road ". Moreover, it had reached the junction before the other vehicle.

Held, that the issue whether the plaintiff was guilty of contributory negligence should be decided by " the test of reasonableness " and depended on whether the plaintiff, assuming he knew of defendant's driver's negligence, could reasonably have been expected to avert the accident.

Held further, that when the owner of a car which has been damaged claims damages for loss of income owing to the fact that he has been deprived of the means of earning his living, he should adduce precise proof of the pecuniary loss suffered.

W. H. Bus Co., Ltd. *v.* J. Samaranayake 182

3. *Delict—Master and servant—Distinction between " servant " and " independent contractor "—Servant vested with discretion as to how he should carry out his duties—Negligence—Scope of master's liability—" Course of employment ".*

An employer cannot escape liability for his servant's torts by pleading that he had vested in the servant a discretion as to how he should carry out his duties. In distinguishing between a servant and an independent contractor, " the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done ".

The owner of a vehicle may be responsible for the consequences of the negligence of a person who was driving it if the owner had an interest in the journey being undertaken, i.e., if the vehicle was " being used wholly or partly on the owner's business or for the owner's purposes ".

Plaintiff, when he was travelling in a motor car belonging to the defendant insurance Company, was seriously injured when the car went off the road in consequence of the negligent driving of one of the occupants of the car. There was evidence that the car had been placed by the Company at the disposal of an employee under a " contract of loan " but that, at the time of the accident, the employee was travelling in the car together with the plaintiff on the Company's business. There was also evidence that the Company had vested in the employee a discretion as to how he should carry out his duties.

Held, that the defendant Company was liable to compensate the plaintiff for the injuries which he sustained in the accident.

T. H. I. de Silva *v.* Trust Co., Ltd. 241

4. *Seduction—Corroborative evidence.*

In an action for damages for seduction, a false denial by the defendant of more than the barest acquaintance with the plaintiff at the material time may properly be considered to lend some corroboration to the woman 's story.

D. D. Somapala *v.* Muriel Sirr 247

5. *Delict*—Actio legis Aquiliae—*Computation of prescriptive period—Damage is gist of action—Prescription Ordinance (Cap. 55), s. 9.*

In actions under the lex Aquilia and in other actions in which proof of patrimonial loss is a condition of liability, the period of prescription does not begin to run until some damage has actually occurred.

Plaintiff was the Headmaster, and the defendant an Assistant Master, of a school. Plaintiff alleged that defendant " falsely and maliciously in order to put the plaintiff into trouble and to cause him loss " falsified certain attendance registers of the school on June 15, 1944, and that in consequence of an investigation by his employers into these irregularities his services as Headmaster were discontinued on December 1, 1947.

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He claimed that a cause of action accrued to him for the recovery of Rs. 7,500 as damages from the defendant. Defendant pleaded that the action, which was instituted on May 28, 1948, was prescribed.

Held, that the date of commencement of the prescriptive period of two years under section 9 of the Prescription Ordinance was December 1, 1947, and not June 15, 1944.

W. M. D. D. G. WIJERATNE *v.* K. D. GABRIEL .. 433

6. *Motor Car—Accident—Vehicle damaged beyond repair—Basis of valuation.*

Where a motor car is damaged beyond repair as the result of an accident, the value of the car at the time of loss is to be calculated, apart from special factors, upon a basis of depreciation depending on the theoretical life of the car.

GENERAL INSURANCE CO. *v.* C. SOMASUNDERAM .. 467

Discharge of Accused—

See AUTREFOIS ACQUIT (1), (3).

Divorce

1. *Divorce—Decree nisi entered in favour of wife—Re-marriage before decree is made absolute—Right to claim maintenance as wife—Marriage by habit and repute—Maintenance Ordinance, s. 2* 87

See MARRIAGE.

2. *Divorce—Malicious desertion—Proof—Mutual aversion to marital relations—Is there constructive malicious desertion ?*

There were many disputes between a husband and his wife because the wife insisted that her brother should remain in the house contrary to the desire of the husband. There was evidence that the husband was assaulted on two occasions by the wife's brother and that, on the second occasion, the husband left the home.

Held, that in the circumstances the husband's depature from the home did not constitute malicious desertion on his part.

Further, the wife claimed divorce from her husband on the ground of constructive malicious desertion " in that he intentionally ceased to cohabit with the plaintiff and thereby repudiated the state of marriage between the parties ". She admitted, however, that she herself would not have agreed to sexual intercourse.

Held, that the legal concept of constructive malicious desertion was not involved in a husband's alleged lack of interest in a mutual matrimonial obligation which his wife herself admittedly disdained.

V. R. SINNATHAMBY *v.* ANNAMMAH 349

3. *Divorce action—Requisite standard of proof—Condonation of adultery—No issue raised at trial—Circumstances when Court is put upon inquiry—Civil Procedure Code, s. 602.*

In an action for divorce on the ground of adultery—

Held, (i) that the words " satisfied on the evidence " in section 602 of the Civil Procedure Code mean that in actions for divorce the Court must demand the same general standard of proof beyond reasonable doubt as is required to support a conviction in a criminal court.

(ii) that, even in the absence of an issue as to condonation of the alleged adultery, the trial judge is put upon inquiry as to whether there has been condonation or not if the evidence discloses that the parties had resumed living together under circumstances which would justify the belief that a reconciliation had taken place. " Conjugal cohabitation "

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within the meaning of section 602 (2) of the Civil Procedure Code can be resumed even without a renewal of sexual intercourse between the spouses after reconciliation.

JAYASINGHE *v.* JAYASINGHE 410

Election Petitions—

See PARLIAMENTARY ELECTIONS.

Emphyteusis—

See SERVITUDES (2).

Estate Duty—

1. *Estate Duty—Hindu undivided family—Way of proving a question of foreign law—Death of "co-parcenary member" in 1934—Liability of his estate to pay estate duty—"Passing" of property—"Executor"—Ordinance No. 8 of 1919, ss. 7, 8, 17 (6)—Ordinance No. 1 of 1938 (Cap. 187), ss. 24, 77, 79—Wills Ordinance (Cap. 49), s. 7—Partition Ordinance (Cap. 56), s. 18.*

A. C., a Natucottai Chettiar, and his father were the only "coparcenary members" of a Mitakshara Hindu undivided family which, regarded as an entity, owned considerable "joint property" in various countries including Ceylon. A. C. predeceased his father in 1934. During his lifetime, there had been neither a complete nor a partial division of title or separation of interests in the joint property of the family.

The Crown claimed estate duty in respect of A. C.'s estate in Ceylon. The assessees were the administrators of the estate of his father, who had himself died subsequently in 1938.

Held, (i) that the law governing a Mitakshara Hindu undivided family involved a question of foreign law which must be regarded as a "question of fact" of which the Courts in Ceylon cannot take judicial notice. The decision of the Court must, therefore, be based upon the testimony of the qualified experts who gave evidence and upon the references to textbooks and judicial decisions which were incorporated in their evidence.

(ii) that, under the Mitakshara law, the joint property belonged to the entire family group to the exclusion of its individual members. Upon the death of A. C. no effective change occurred in the title or possession of the joint property belonging to the undivided family. His father who survived him did not, in consequence of the death, receive any "property" which he did not have before. The Crown's claim to estate duty failed, because there was neither an actual nor a notional "passing" of property within the meaning of sections 7 and 8 of the Estate Duty Ordinance, No. 8 of 1919.

(iii) that in regard to the immovable property which formed part of the estate sought to be taxed, section 7 of the Wills Ordinance and/or section 18 of the Partition Ordinance had no relevancy to the "devolution" of a "co-parcener's" interests in any part of the joint property of a Hindu undivided family.

(iv) that the present assessees could not be made accountable in the present case for any estate duty levied under section 8 (1) (*a*) of the Estate Duty Ordinance, No. 8 of 1919, in view of sections 79 and 24, and the meaning of "executor" in section 77, of the later Estate Duty Ordinance (Cap. 187).

ATTORNEY-GENERAL *v.* V. RAMASWAMI IYENGAR .. 481

2. *Estate Duty—Hindu undivided family—Death of sole surviving "co-parcenary member"—Liability of estate for estate duty—Estate Duty Ordinance (Cap. 187), ss. 6 and 73, as amended by Ordinance No. 76 of 1938, s. 5.*

The sole surviving "co-parcenary member" of a Mitakshara Hindu undivided family died in February, 1938, leaving no male issue in existence. His son had predeceased him, and the actual survivors of the family were all females and included his widow.

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Adopting the *ratio decidendi* in *Attorney-General v. Ramaswami Iyengar* (55 N. L. R. 481) and following it to its logical conclusion—

Held, that all the property which was in the possession of the deceased at the time of his death was the joint property of the undivided family. Although the deceased had been "competent to dispose" of the joint property after his son's death, and although the joint property would, for that reason, normally be deemed to have "passed" on his death within the meaning of section 6 of the Estate Duty Ordinance so as to attract estate duty, the exempting provisions of section 73 protected the property from taxation.

V. RAMASWAMI IYENGAR *v.* ATTORNEY-GENERAL .. 496

Evidence—

1. *Evidence—Character—Evidence of pending prosecution—Presumption of innocence—Evidence Ordinance, s. 54—Effect of reception of inadmissible evidence in Magistrate's Court.*

An accused person who put his "good character" in issue was asked in cross-examination whether there was not pending against him a criminal case—

Held, that the question was inadmissible.

Where a trial Judge has permitted himself, through an improper appreciation of the law, to allow evidence to be led which is of such a character as to prejudice the chances of a fair trial on the real issues in the case, the improper reception of the evidence is fatal to the conviction of the accused, although the accused has been tried not by lay jurors but by a Magistrate trained in the law.

P. M. PETER SINGHO *v.* M. B. WERAPITIYA 155

2. *Evidence—Criminal intimidation—Competency of spouse of accused to give evidence—Penal Code, s. 486—Evidence Ordinance, ss. 100, 120.*

Under section 120 (4) of the Evidence Ordinance the wife is a competent witness for the prosecution where a husband is charged under section 486 of the Penal Code with intimidating his wife.

S. ARUMUGAM *v.* SEETHEVI 162

3. *Evidence Ordinance—Sections 8 (1), (2), 11 and 32 (1)—Statements made by a deceased person—Admissibility—Motive—Conduct—Evidence of trifling weight but gravely prejudicial to accused—Propriety of excluding it.*

Accused was charged with murdering his wife. The prosecution sought to produce as part of its case a letter which the deceased had, in anticipation of the accused's return to Ceylon from abroad, written to a third party. The letter, however, amounted at best to mere general expressions indicating fear or suspicion of the accused and not directly related to the occasion of the death of the deceased.

Held, (i) that the letter was not admissible under section 32 (1) of the Evidence Ordinance.

(ii) that the letter was not admissible to prove motive for the crime, under section 8 (1) of the Evidence Ordinance, or to prove conduct on the part of the deceased, under section 8 (2) read with section 11, unless, in the former case, there was independent evidence that the allegations in the letter had induced resentment in the accused's mind against the deceased, and, in the latter case, there was independent evidence to support the suggestion that the deceased was apprehensive of danger to her safety after the accused had returned to Ceylon.

Held further, that evidence of trifling weight affecting an accused person, even though technically admissible, ought to be excluded if the potential prejudice which its reception is almost certain to produce will be out of proportion to its true evidential value.

THE QUEEN *v.* M. SATHASIVAM 255

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4. *Evidence Ordinance—Section 106—" Especially within the knowledge of any person "—Quarantine and Prevention of Diseases Ordinance—Contravention of Regulation 46—Burden of proof.*

By section 106 of the Evidence Ordinance,

" When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Held, that when the section refers to a fact as especially within the knowledge of a party, the term " especially " means " almost exclusively ", if not " altogether exclusively ", within the knowledge of a party.

The charge that was preferred against the accused was under the Quarantine and Prevention of Diseases Ordinance alleging that he did " being permanently or temporarily resident in a building in which was a person affected with a contagious disease, to wit, small pox, fail to inform the proper authority forthwith in contravention of Regulation 46 of the Regulations made under the Ordinance ".

Held, that section 106 of the Evidence Ordinance did not cast on the accused the burden of proving that he had given information to the proper authority until some *prima facie* evidence at least had been first led by the prosecution of the failure on his part to give the information.

The presumption of innocence casts on the prosecution the burden of proving every ingredient of an offence even though negative averments be involved therein.

SANITARY INSPECTOR, MIRIGAMA *v.* THANGAMANI NADAR 302

5. *Criminal Procedure Code—Sections 297 and 407—Accused absconding—Evidence of witnesses recorded in his absence—Procedure for reading it over at the trial.*

Where an accused person absconds and evidence is recorded in his absence under section 407 of the Criminal Procedure Code, the evidence so recorded may be read over to the deponents at the trial of the accused. Section 407 must be read in conjunction with section 297.

Jane Sinno v. Ratnapura Police (1949) 39 C. L. W. 79, not followed.

D. FERNANDO *v.* S. I. POLICE, WELIKADE 322

6. *Evidence—Indictable offence—Statement made by a witness at non-summary inquiry—Evidentiary value of it at trial.*

When a statement made by a witness at a non-summary inquiry is denied by him at the trial of the accused, it cannot be used as substantive evidence.

S. S. FERNANDO *v.* THE QUEEN 392

7. *Privy Council—Fresh evidence—Admissibility in appeal.* .. 409

See APPEAL (7).

8. *Customs Ordinance—Section 158—Prosecution thereunder—Burden of proof* 431

See CUSTOMS ORDINANCE (2).

9. *Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172), ss. 26, 76 (1) (a)—Charge of unlawful possession of seeds, &c., of hemp plant—Burden of proof—Evidence Ordinance, s. 106* 451

See POISONS, OPIUM AND DANGEROUS DRUGS ORDINANCE.

10. *Way of proving a question of foreign law.* 481

See ESTATE DUTY (1).

11. *See also* COURT OF CRIMINAL APPEAL DECISIONS; EVIDENCE ORDINANCE.

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See also COURT OF CRIMINAL APPEAL DECISIONS ; EVIDENCE.

Excess Profits Duty—

See INCOME TAX (2).

Excise Ordinance—

1. *Excise officer—Power to release on bail an arrested person—Excise Ordinance (Cap. 42), ss. 7, 33 (1), 34, 37—Criminal Procedure Code, ss. 2, 36, 39.*

An excise officer is not *prima facie* a peace officer. When he arrests a person without a warrant, under section 34 of the Excise Ordinance, he has no power under section 37 to release that person on bail.

Therefore, when an excise officer takes a bond from a surety in order to secure the arrested person's attendance in court, a Magistrate has no jurisdiction to forfeit that bond if the accused fails to appear.

ANDIYA VIDANE *v.* I. JANSZE 358

2. *Excise Ordinance (Cap. 42)—Authority of police officer to prosecute thereunder—Sections 2, 43, 49.*

A police officer is an excise officer within the meaning of section 49 of the Excise Ordinance and is therefore competent to institute a prosecution under section 43 of that Ordinance.

CICILIN PERERA *v.* SAMARADIWAKARA 453

3. *Excise Ordinance—Local option poll—Voting area—Procedure for defining its boundaries—Rules 5, 10, 11, 12, 13*—Mandamus.

By Rule 13 of the Local Option Rules of 1928 :—

"The Government Agent with the advice of the Advisory Committee shall have the power to define the exact boundaries of any area in accordance with the provisions of Rules 10, 11 and 12."

Held, that Rule 13 would have no application if the boundaries of the villages involved are already definite and well known.

D. W. JAYASINGHE *v.* D. G. DAYARATNE 469

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

Execution of Decrees—

1. *Maintenance Ordinance—Arrears of maintenance—Deposited in Court—Liability to attachment—Civil Procedure Code, s. 218 (l)* .. 114

See MAINTENANCE ORDINANCE (5).

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2. *Appeal—Stay of execution pending appeal—Quantum of security that should be furnished by judgment debtor—Civil Procedure Code, s. 761* .. 249

See APPEAL (3).

3. *Execution—Mandatory decree—Application for enforcement of it—Separate action not maintainable—Damages claimable—Civil Procedure Code, ss. 334, 335, 344, 839.*

A separate action cannot be maintained when it claims relief for which the appropriate remedy is an application for execution under section 334 of the Civil Procedure Code.

Ismail v. Ismail (1920) 22 N. L. R. 190, doubted.

Vindictive damages cannot be awarded under section 335 of the Civil Procedure Code in an application made under section 334 for enforcement of a mandatory decree.

P. M. SILVA *v.* L. B. M. J. PERERA 378

4. *Civil Procedure Code—Section 326—Appeal from order thereunder—Civil in nature—Scope of jurisdiction of Court under s. 326—Proceedings against minor—Requirement of appointment of guardian* ad litem *under s. 480.*

Proceedings under section 325 *et seq.* of the Civil Procedure Code are not criminal in their nature but are steps in aid of execution, and an appeal under these sections should be constituted as an appeal in a civil case.

A minor may be dealt with under section 326 for obstructing a Fiscal's officer although he is not represented by a guardian *ad litem*. Section 480 can only apply to actions or applications in which the civil rights of minors are affected and not in any matter where only their personal liberty is at stake.

In committing a person under section 326 the Court should merely order him to be committed to jail for a specified period. The terms "simple imprisonment" or "rigorous imprisonment" cannot be used. Nor can such person be ordered to enter into a bond to be of good behaviour for any period.

W. S. PETER *v.* W. S. CAROLIS 406

5. *Civil Procedure Code—Procedure when assignee of a decree seeks to obtain execution—Validity of an order for execution preceded by substitution—Assignee in insolvency—"Representative" of insolvent—Sections 339, 347.*

(i) Where the assignees of a decree first applied for substitution as plaintiffs and, after that application was granted, made a separate application for execution, without a formal petition—

Held, that the applications, taken together, constituted substantial and sufficient compliance with the requirements of section 339 of the Civil Procedure Code.

(ii) The assignee in insolvency of a judgment-debtor is a "representative" of the judgment-debtor within the meaning of section 339 of the Civil Procedure Code. Therefore, where a mortgagor against whom a hypothecary decree has been entered is subsequently adjudged insolvent and the hypothecary decree is thereafter transferred by assignment from the mortgagee to any other person, such assignee, when he applies for execution of the decree under section 339 of the Civil Procedure Code, must name as respondent the assignee in insolvency of the jugdment-debtor and/or a person who has purchased the mortgaged property from the assignee in insolvency. Failure to do so will render null and void the sale in execution of the hypothecary decree.

R. T. SIRIMALA VEDA *v.* P. T. SIRIPALA 544

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Executors and Administrators—

See ADMINISTRATION OF ESTATES.

Fideicommissa—

Kandyan Law—Fideicommissary deed of gift—Revocability.

The creation of a *fideicommissum* by a Kandyan deed of gift does not by itself affect its revocability.

P. THEPANISA *v.* P. HARAMANISA 316

Fiduciary Relations—

See ADMINISTRATION OF ESTATES.

Frauds—

See PREVENTION OF FRAUDS ORDINANCE.

Habeas Corpus—

Habeas corpus—*Surrender and abandonment of a child by its parents—Custodian's duty of registration—Adoption of Children Ordinance, No. 24 of 1941, ss. 19, 26.*

Where the custody of a child is transferred by its natural parent to a third party in circumstances not amounting to adoption, it is generally the duty of the third party, under section 19 of the Adoption of Children Ordinance, to have himself registered as the custodian of the child. Failure to register renders him liable to restore the child's custody to the natural parent, even if the restoration is prejudicial to the best interests of the child.

I. F. ABEYAWARDENE *v.* C. E. JAYANAYAKE 54

Habitatio—

See SERVITUDES (3).

Hindu Temple—

Hindu temple—No evidence of express dedication—Charitable trust—Inference of its existence—Relevant factors—Trusts Ordinance (Cap. 72), s. 107.

In deciding, under section 107 of the Trusts Ordinance, whether or not a temple, even in the absence of an express dedication, should be deemed to be a charitable trust, such matters as the holding of public services at the temple, donations to the temple by members of the public throughout a long period of time and improvements effected to it by them are matters which can properly be taken into consideration.

SITHAMPARANATHER MAILVAGANAM *v.* KUMARASWAMY KURUKKAL RAMANATHA AIYAR 289

Hindu Undivided Family—

See ESTATE DUTY (1), (2).

Hire Purchase—

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Hotel Keepers Protection Ordinance—

Hotel Keepers Protection Ordinance (Cap. 30)—Prosecution thereunder—A necessary ingredient.

In a prosecution for failure to discharge a debt due to a hotel keeper, the complainant must prove, under section 3 of the Hotel Keepers Protection Ordinance, not only that a copy of the Ordinance was exhibited in the hotel but also that it was exhibited in some conspicuous place therein.

When a monthly lodger at a hotel becomes liable to be sued in a civil court for the recovery of what is payable by him, he is not necessarily liable to conviction under the Hotel Keepers Protection Ordinance.

LAMBERT ALWIS *v.* S. D. RATNAYAKE 187

Housing and Town Improvement Ordinance—

Housing and Town Improvement Ordinance—Section 13 (1) (b)—Deviation from approved plan—Meaning of " plan ".

Where a person is charged under section 13 (1) (*b*) of the Housing and Town Improvement Ordinance with deviating from an approved plan in respect of a building, it is not necessary for the complainant to establish that the plan was drawn to scale ; it will be sufficient if the diagrams and measurements together indicate clearly what the accused proposed to erect and what was duly approved.

A. H. M. SAHEED *v.* L. BAPTISTE 527

Improvements—

1. *Lessor and lessee—Improvements effected by lessee—Compensation.*

(i) Under the general law, and subject to any agreement to the contrary, a lessee who has erected buildings with the lessor's consent or acquiescence has, upon the expiration of the lease, the option either of removing the materials affixed to the soil or of permitting ownership in them to pass to the owner of the land ; in the latter event, he must be compensated for the loss of his materials.

(ii) Under the terms of a contract of lease the lessee was entitled at his discretion to erect buildings on the leased property, and he agreed in that event " to yield up and surrender " such buildings to the lessor at the determination of the lease. The contract did not stipulate for the payment by the lessor of compensation for the buildings.

Held, that, at the determination of the lease, the lessor was entitled to take possession of the property, including the buildings, without payment of compensation. The lessee had in effect renounced his option (under the general law) either of removing the materials or of claiming compensation for them.

A. A. JAFFERJEE *v.* CYRIL DE ZOYSA 124

2. *Improvements—Claim for compensation*—Bona fide *possession—Proof of* bona fides *and* mala fides.

Before a person can claim compensation for improvements effected upon a land on the ground that he made the improvements as a *bona fide* possessor of the land he must show that he had reasonable or probable grounds to think that he had some right of ownership in the land.

ANGLO-CEYLON AND GENERAL ESTATES CO., LTD. *v.* ABUSALIE 345

3. *Partition action—Improvements made by a co-owner—Limits of their relevancy in allotting shares.* 369

See PARTITION ACTIONS (4).

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4. *Servitude*—Jus superficiarium—*Acquisition by prescription*—*Compensation*—*Basis of assessment.*

Where A. puts up a building at his own expense on the land of B. with B.'s consent and approval, and exclusively enjoys the use of it as a superficiary for a period of ten years without interference by the soil owner B., he acquires, by prescription, the servitude known as the *jus superficiarium*. This right which a person has to a building standing on another's ground is acquired and lost like immovable property. It can be alienated by notarial conveyance or transmitted to the heirs of the superficiary on his death.

The soil owner who takes over the building from the superficiary must, in the absence of an agreement to the contrary, pay him its " present value " (and not merely its original cost if that be less). The same basis of assessment should be adopted where the servitude is extinguished, by consent of parties, at a partition sale.

H. Samarasekera *v.* L. Munasinghe 558

Income Tax—

1. *Income tax—Proceedings for recovery before Magistrate—Stage at which further time will not be granted—Income Tax Ordinance (Cap. 188), s. 80.*

In proceedings under section 80 of the Income Tax Ordinance for the recovery of unpaid tax, the assessee cannot ask for further time after the Commissioner issues his certificate under section 80 (3) confirming (or reducing) his assessment. At that stage, there is no other question outstanding which the assessee can urge as a ground for staying further proceedings for the recovery of the tax due from him.

G. F. C. Guillain *v.* Commissioner of Income Tax .. 473

2. *Excess profits duty—Partnership—Liability of each partner—Procedure for assessment—Excess Profits Duty Ordinance, No. 38 of 1941, ss. 12 (1), (2), 14 (1), 19—Income Tax Ordinance, ss. 29, 64–67, 68 (2) (b), 76 (1).*

Under section 12 (2), read with section 19, of the Excess Profits Duty Ordinance excess profits duty may be assessed on any partnership. And under section 12 (1) the procedure for assessment and notice of assessment is analogous to that which is prescribed by sections 64 to 67 of the Income Tax Ordinance.

Section 76(1) of the Income Tax Ordinance, which, by virtue of section 14(1) of the Excess Profits Duty Ordinance, is applicable " as far as may be " to the payment and recovery of excess profits duty, imposes a liability on each partner to pay, in terms of the notice served upon him, the total amount of the duty due from the partnership.

Commissioner of Income Tax *v.* Chettinad Corporation Ltd. .. 553

3. *Income Tax Ordinance (Cap. 188)—Section 16 (1) (e)—Allowance thereunder—Conditions of (a) common residence and (b) maintenance.*

An assessee who bears the expense of the maintenance of a relative is not entitled to claim allowance under section 16 (1) (*e*) of the Income Tax Ordinance unless he can also show that the relative resided or had his home with the assessee.

P. Gunasekera *v.* Commissioner of Income Tax .. 566

Indian and Pakistani Residents (Citizenship) Act—

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 3—Application for registration as citizen of Ceylon—Quantum of evidence—Costs.

In an application for registration as a citizen of Ceylon under the Indian and Pakistani Residents (Citizenship) Act—

Held, (i) that the single circumstance that the applicant had made declarations of temporary residence in " B Forms " for the purpose of remitting two sums of money should not be permitted to have an over-riding effect over all other considerations.

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(ii) that the descendant of a person who has been registered as a citizen of Ceylon on the ground of permanent settlement is entitled to a certificate of registration without proof that he himself has permanently settled in Ceylon.

Costs to be taxed as in an action in Class V in the District Court.

P. A. G. THOMAS *v.* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS 40

Indictment—

See CHARGE.

Infants—

See MINORS.

Insolvency—

Civil Procedure Code—Assignee in insolvency—" Representative " of insolvent —Sections 339, 347.

The assignee in insolvency of a judgment-debtor is a " representative " of the judgment-debtor within the meaning of section 339 of the Civil Procedure Code. Therefore, where a mortgagor against whom a hypothecary decree has been entered is subsequently adjudged insolvent and the hypothecary decree is thereafter transferred by assignment from the mortgagee to any other person, such assignee, when he applies for execution of the decree under section 339 of the Civil Procedure Code, must name as respondent the assignee in insolvency of the judgment-debtor and/or a person who has purchased the mortgaged property from the assignee in insolvency. Failure to do so will render null and void the sale in execution of the hypothecary decree.

R. T. SIRIMALA VEDA *v.* P. T. SIRIPALA 544

International Law—

International Law—Diplomatic immunity from judicial process—Scope.

Under the rules of international comity, diplomatic immunity from judicial process is extended not only to a Minister or Ambassador but also to his family, suite and servants. An assistant to a military or naval attaché, if he in fact works in an Embassy, is covered by the immunity.

G. G. APPUHAMY *v.* J. A. GREGORY 235

Interpretation—

1. *Construction of statute—Power of court to fill in gaps.*

" In the construction of a statute ' the duty of the Court '—and *a fortiori* the duty of a tribunal created by the statute— ' is limited to interpreting the words used by the Legislature, and it has no power to fill in any gaps disclosed. To do so would be to usurp the function of the Legislature. ' "

SUFFRAGAM RUBBER AND TEA CO., LTD. *v.* M. J. M. MUHSIN .. 44

2. *Retrospective effect of amending Ordinance* 260

See THESAVALAMAI (4).

3. *Servitude—Habitatio—Its precise nature—Grant to a person and " his heirs, executors, administrators and assigns "—Effect of such grant* .. 387

See SERVITUDES (3).

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4. *Public Servants (Liabilities) Ordinance (Cap. 88)—Sections 2 and 3—Amending Act No. 10 of 1951—Retroactive effect—Interpretation Ordinance (Cap. 2), s. 6 (3) (b)* 442

See PUBLIC SERVANTS AND OFFICERS (4).

5. *Co-operative Societies Ordinance (Cap. 107)—Section 45—Dispute between co-operative society and past officer—Act No. 21 of 1949—Act No. 17 of 1952—Retroactive effect—Interpretation Ordinance (Cap. 2) s. 6 (3) (c)* .. 505

See CO-OPERATIVE SOCIETIES ORDINANCE (3).

Irrigation Ordinance—

Irrigation Ordinance, No. 32 of 1946—Section 92 (a)—Prosecution thereunder—Nature of evidence required.

In a prosecution under section 92 (*a*) of the Irrigation Ordinance for wilfully and mischievously blocking up an irrigation channel there must be proof that the channel is part of an irrigation work.

Y. D. BABY APPUHAMY *v.* R. SIVAGURU 455

Jaffna Matrimonial Rights and Inheritance Ordinance—

See THESAVALAMAI (4).

Joinder of Charges, Causes of action and Parties—

1. *Joinder of Charges—"In the same transaction"—Criminal Procedure Code, s. 184.*

For joinder of charges in respect of offences committed in the same transaction, it is not necessary that the charges must expressly state that the offences were committed in the course of the same transaction. If the sameness of the transaction is manifest or implicit in the chrages themselves there is no misjoinder.

A. M. JOHARDEEN *v.* T. J. AHMATH 65

2. *Criminal Procedure—Joinder of accused and charges—Same transaction—No averment of it in plaint or charge—Irregularity.*

Several accused persons were jointly tried in respect of several offences. There was no allegation either in the report filed in terms of section 148 (1) (*b*) of the Criminal Procedure Code or in the charge framed by the Magistrate that the offences with which the accused were severally charged were committed in the same transaction.

Held, that the accused could not have been jointly tried.

M. M. A. DHARMATUNGA *v.* SUB-INSPECTOR OF POLICE, PADDAWELA 287

3. *Criminal Procedure Code—Joinder of charges—Different offences committed in same transaction—Splitting up of charges.*

Under section 180 of the Criminal Procedure Code it is not obligatory that all the offences committed by a person in the course of the same transaction should be tried at one single trial. The word "may" in the section renders possible, unless substantial prejudice is caused to the accused, the institution of separate cases in accordance with the general rule in section 178 which provides for separate trials for distinct offences.

S. BOTEJU *v.* MOORTHY 374

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Jurisdiction—

1. *Jurisdiction—Trespass by licensee—Action in ejectment—Valuation thereof—Test to be applied—Evidence Ordinance, s. 116—Courts Ordinance, s. 75.*

The value which should be placed on an action in ejectment instituted by an employer against an overstaying servant or licensee in respect of premises which the latter had been permitted to occupy free of rent is only a nominal value, and not the value of the premises ; if, however, the servant was given a month's notice to quit the premises, the value would be a reasonable amount payable for the use and occupation of the premises.

" The principle that a tenant cannot deny his landlord's title extends to the case of a person coming in by permission as a mere lodger, a servant or other licensee. "

M. A. PONNIAH *v.* R. SELLAN 116

2. *Indictable offence—Assumption of summary jurisdiction by Magistrate—Adequate material a condition precedent for forming necessary opinion—Criminal Procedure Code, s. 152 (3)* 374

See CRIMINAL PROCEDURE (10).

3. *Post Office Ordinance (Cap. 146)—Sections 71 (1) and 88 (1)—Applicability of Sections 11 and 152 (3) of Criminal Procedure Code.*

A Magistrate who is also a District Judge has power under Section 152 (3) of the Criminal Procedure Code to assume jurisdiction to try an offence punishable under Section 71 (1) of the Post Office Ordinance and which, by reason of Section 88 (1) of that Ordinance, is triable in a District Court. The reference to the District Court in Section 88 is permissive and not exclusive.

Section 152 (3) of the Criminal Procedure Code is a provision contemplated by proviso (*b*) of Section 11 of that Code.

A. G. DE MEL *v.* R. C. DE NEISE 537

Jury—

Jury's rider recommending mercy—Effect on verdict 252

See COURT OF CRIMINAL APPEAL DECISIONS (3).

Jus superficiarium—

See SERVITUDES (4).

Kandyan Law—

1. *Kandyan Marriage Ordinance (Cap. 96)—Dissolution of marriage—Maintenance—Temporary re-union—Effect on future maintenance—Section 20 (6).*

Where a wife obtains an order of maintenance against her husband on dissolution of their marriage under the provisions of the Kandyan Marriage Ordinance, a temporary re-union between them subsequently with a view to re-marriage does not amount to a waiver of her right to future maintenance if the contemplated re-marriage does not take place.

L. WIMALAWATHIE KUMARIHAMY *v.* W. S. B. IMBULDENIYA .. 13

2. *Kandyan Law*—Binna *marriage—Subsequently registered as* Diga—*Effect of such registration*—Binna *married daughter who leaves* mulgedera—*Her rights of inheritance.*

Where a Kandyan marriage contracted in *binna* was registered three years later and was described in the marriage register as a *diga* marriage—

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Held, that the entry in the register as to the nature of the marriage was rebuttable by other evidence.

Held further, (i) that the marriage, upon its registration, became valid as from the date of the original association of the parties as man and wife.

(ii) that a *binna* married daughter, who severs her connection with the *mulgedera* after her father's death, does not forfeit her paternal inheritance.

L. A. DISSANAYAKE *v.* G. M. PUNCHI MENIKKE .. 108

3. *Kandyan Law—Fideicommissary deed of gift—Revocability.*

The creation of a *fideicommissum* by a Kandyan deed of gift does not by itself affect its revocability.

T. THEPANISA *v.* P. HARAMANISA 316

4. *Kandyan Law—Kandyan widow—*Diga *association with another man after death of husband—Forfeiture of her rights in former husband's property.*

A Kandyan widow (whose husband died before the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, came into operation) forfeits her life-interest in her husband's acquired property if, without contracting a valid marriage, she forms a *diga* association with another man.

FREDA WICKREMASINGHE *v.* D. H. KIRIMUTTU 382

Labour—

See WAGES BOARDS ORDINANCE.

Land Acquisition—

1. *Writ of Prohibition—Land Acquisition Act, No. 9 of 1950—Order for taking immediate possession of a land—Effect of—Claim for compensation—Scope of acquiring officer's inquiry—Sections 4, 5, 9, 10, 16, 36, 37, 41.*

Where, by virtue of the special powers vested in him under proviso (*a*) to section 36 of the Land Acquisition Act, the Minister of Agriculture and Lands makes order directing an " acquiring officer " to take immediate possession of a land on the ground of urgency, the property vests absolutely in the Crown from the date of the publication of the order in the *Gazette*, and the " acquiring officer " has no jurisdiction thereafter to commence or continue (once commenced) an inquiry into claims for compensation under section 9 or to make an award under section 16. In such cases, the common law jurisdiction of the regular Courts of Justice to determine disputes between the private individual (whose property has been compulsorily acquired) and the Crown has not been superseded by the Act either expressly or by necessary implication.

SUFFRAGAM RUBBER & TEA CO., LTD. *v.* M. J. M. MUHSIN .. 44

2. *Land acquisition—Valuation—Intervention by interested parties.*

In awarding compensation in respect of compulsory acquisition of land, the value to be ascertained is the value to the vendor, not its value to the purchaser. Therefore, any increase in value consequent on the execution of the undertaking in connection with which the acquisition is made must be disregarded.

In land acquisition proceedings, tenants and others claiming compensation for improvements effected on the land to be acquired may be allowed to intervene.

P. B. RATWATTE *v.* P. ARTHUR SILVA 543

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Landlord and tenant—

1. *Rent Restriction Act, No. 29 of 1948—Alternative accommodation—Can it be provided by altering substantially the structural identity of the protected premises ?—Section 13, sub-sections 1, proviso (c), and 3.*

A landlord sued his tenant for ejectment on the ground that he "reasonably required" the leased premises for the purposes of his petroleum agency business. The trial Court passed a decree in favour of the landlord whereby (*a*) the landlord was to be restored to possession of a substantial portion of the premises which would suffice for the purpose of the landlord's business, and (*b*) the tenant should be allowed to remain in possession, at a reduced monthly rental to be subsequently determined, of the rest of the premises which, in the opinion of the Court, would (but only after certain necessary structural alterations had been effected) meet the requirements of the tenant's business as a timber merchant which was being carried on in the premises.

Held, that the decree was quite inappropriate for the reasons (*a*) that it would admittedly be impossible to provide the tenant with the suggested alternative accommodation until certain substantial alterations were first completed, (*b*) that it was demonstrably impracticable to afford the necessary protection to the tenant's business interests during the interval of time.

Held further, that a landlord who is restored to possession of his premises on the ground that he reasonably requires them is not entitled substantially to alter the structural identity of the protected premises before the period of time fixed by section 13 (3) of the Rent Restriction Act has elapsed.

S. DEERASOORIYA *v.* C. L. MASILAMANY 56

2. *Landlord and tenant—Enhancement of rent—Not effective until there is agreement—Refusal of landlord to accept rent due—Resulting position—Rent Restriction Act, No. 29 of 1948, s. 13 (1) (a).*

Where a tender of payment of the rent due was made by the tenant and was refused by the landlord on the ground that, as the monthly rent had been enhanced by him, a larger amount was due—

Held : (i) A landlord's unilateral act in demanding payment of a higher rent than that agreed upon does not render the tenant liable to pay the higher rent demanded.

(ii) Where a landlord refuses to accept the rent due when it is tendered to him, and has by his conduct made it clear that he will not, in the future, accept rent at the rate agreed upon, the tenant is not obliged to tender the rents for the subsequent months as and when they fall due. The tenant must, however, pay all the unpaid rent within a reasonable time if the landlord subsequently demands it or signifies his readiness to accept it.

(iii) Where the tenant has been given reasonable time to pay all unpaid rent, he cannot be said to be in arrear within the meaning of section 13 (*a*) of the Rent Restriction Act until one month elapses after the expiry of such reasonable time.

VADIVEL CHETTY *v.* ABDU 67

3. *Lessor and lessee—Improvements effected by lessee—Compensation* .. 124

See IMPROVEMENTS.

4. *Rent Restriction Act, No. 29 of 1948—Death of tenant—Continuance of tenancy—Scope of Section 18.*

Where a monthly tenant, who has been given due notice to quit residential premises to which the Rent Restriction Act applies, dies during the pendency of an action for ejectment instituted against him by the landlord, his widow and family are no longer entitled to occupy the premises as against the landlord. Section 18 of the Rent Restriction Act, which provides for continuance of tenancy upon the death of a tenant, has no application where the original contractual tenancy had already been

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determined according to the common law so that all that the former "tenant" thereafter enjoyed was a statutory protection which was personal to him.

MRS. HENSMAN *v.* MRS. STEPHEN 89

5. *Rent Restriction Act—Distinction between tenancy and licence—Test of exclusive possession.*

When a prospective purchaser of certain premises is permitted, pending his purchase, to occupy the premises on payment of a stipulated sum of money, his occupation is, at best, that of a licensee and not that of a contractual tenant entitled to claim the protection of the Rent Restriction Act. If the contemplated sale does not take place, the duration of the licence expires and the licensee becomes a trespasser liable to be ejected at the instance of the owner of the property.

"Although a person who is let into exclusive possession is *prima facie* to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

SWAMI SIVAGNANANDA *v.* BISHOP OF KANDY 130

6. *Rent Restriction Act—Notarial lease—Lessee in arrears of rent—Right of lessor to eject lessee—Termination of lease—Condition precedent.*

A lessor cannot sue his lessee for ejectment under the Rent Restriction Act for being in default of rent unless he can first establish the termination of the contract of lease either by due notice or by effluxion of time.

CHETTINAD CORPORATION LTD. *v.* A. M. M. ZANEEK .. 152

7. *Rent Restriction Act—Action for ejectment—Tenant's divestment, pending action, of alternative accommodation—Factor for consideration.*

In determining the question of the relative hardships which would be incurred by the landlord and the tenant by the granting or withholding of an order for possession in an action for ejectment under the Rent Restriction Act, it would be proper for the court to take into conisderation that the tenant had, in the interval between the service of the notice to quit and the hearing of the action, deliberately divested himself of property which was under his hand in order to defeat the landlord's claim for possession of the leased premises.

N. SIVAGURU *v.* MRS. C. JANAKI 153

8. *Rent Restriction Act—Business premises—"Reasonable requirement" of landlord—Section 13 (1).*

In a tenancy action, the landlord obtained a decree for his tenant's ejectment on the ground that he "reasonably required" the premises in question for his own business within the meaning of the Rent Restriction Act. It was established that the tenant was already carrying on a business in the premises and that the effect of the decree against him would be to throw him out of business altogether and to involve him in very considerbale financial loss. If, on the other hand, the *status quo* remained, the landlord would only lose the additional profits which he hoped to make by moving into the premises from his present shop.

Held, that, in the circumstances, it would be wholly unreasonable to authorise a decree for ejectment.

ABDUL W. M. N. HAMEEN *v.* H. S. P. SUGATHADASA .. 180

9. *Rent Restriction Act, No. 29 of 1948—Area of operation—Section 2—Interpretation.*

Where the limits of an area which was within the operation of the Rent Restriction Ordinance, No. 60 of 1942, are extended subsequent to the date of proclamation of the Rent Restriction Act, No. 29 of 1948,

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the latter Act is not applicable to premises situated within the extended area until such area is brought within the operation of the Act by means of notification under section 2 (*b*) of the Act.

C. A. SAMARAKOON *v.* A. H. K. JAYAWARDENA 239

10. *Landlord and tenant—Sub-letting—Sub-tenant's possession is not that of a trespasser.*

A sub-tenant cannot be said to be in wrongful occupation of the leased premises if the landlord, after obtaining a decree of ejectment against the tenant, has since revived the contract of tenancy by continuing regularly to receive rent from the tenant. In such a case, a *rei vindicatio* action cannot be instituted by the landlord against the sub-tenant.

JUSTIN FERNANDO *v.* ABDUL RAHUMAN 275

11. *Rent Restriction Act, No. 29 of 1948—Section 13—Letting of co-owned premises—Partition sale thereafter—Effect of such sale on the tenancy agreement.*

Per PULLE J.—Where premises which are owned in common are let under a contract of tenancy and, subsequently, one of the co-owners purchases the premises at a partition sale, the certificate of sale has the effect of terminating the relationship of landlord and tenant and of constituting the purchaser an independent title holder to whom the restriction contained in section 13 of the Rent Restriction Act cannot apply. The certificate confers a title which is not subject to the tenancy agreement.

W. HEENATIGALA *v.* L. G. BIRD 277

12. *Rent Restriction Act, No. 29 of 1948—"Non-occupying tenant"—Meaning of expression—Forfeiture of statutory protection.*

The theory of forfeiture of the rights of a "statutory tenant" by "non-occupation" is not applicable in a case where the tenant has lawfully sub-let the premises without violating either the terms of his contract of tenancy or the provisions of any statute.

Sabapathy v. Kularatne (1951) 52 N. L. R. 425, explained.

K. P. M. SURIYA *v.* BOARD OF TRUSTEES OF MARADANA MOSQUE 309

13. *Rent Restriction Act, No. 29 of 1948—Section 13 (1) (a)—Rent in arrears—Tender of it before institution of action—Landlord's right to eject tenant.*

By section 13 (1) of the Rent Restriction Act :—

"Notwithstanding anything in any other law, no action or proceedings for the 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 :

Provided, however, that the authorisation of the Board shall not be necessary, and no application for such authorisation may be entertained by the Board, in any case where—

(*a*) rent has been in arrear for one month after it has become due ; or

(*b*) . . . . ."

Held, that once a tenant has been in arrear of rent for one month after it has become due he forfeits the protection given to him by the Act against being ejected. He cannot regain the protection by the mere act of tendering the arrears before the institution of the action.

George v. Richard (1948) 50 N. L. R. 128, overruled.

M. M. DIAS *v.* P. VINCENT GOMES 337

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14. *Municipal Councils Ordinance, No. 29 of 1947—Sections 236 (1) and 325 (1)—Annual value of premises—Scope of assessee's objection to assessment—Principles applicable in assessing annual value—Relevancy of economic factors of supply and demand—Rent Restriction Act, No. 29 of 1948.*

When the annual value of a house is assessed for rating purposes, the owner may, under section 236 (1) of the Municipal Councils Ordinance, institute an action against the Municipal Council to have the annual value increased so that the premises may be taken outside the scope of the Rent Restriction Act.

In assessing the annual value of premises which, at the time of assessment are not rent-controlled, the proper test of " annual value " as defined in section 325 (1) of the Municipal Councils Ordinance is what a man of ordinary prudence and foresight, who has duly advised himself as to the state of the market existing at the relevant time, would offer to pay as rental for the premises rather than fail to obtain the tenancy. The test prescribed is concerned only with the reasonableness of the expectation that a certain rent would be obtained in a commercial transaction ; the " fairness " of the bargain is irrelevant.

BANK OF CHETTINAD *v.* MUNICIPAL COUNCIL OF COLOMBO .. 361

15. *Lessor and lessee—Expiration of notarial lease—Right of lessee to continue in occupation as statutory tenant—Duty to pay rent as it falls due—Tender of rent—Instance when it is not necessary—Rent Restriction Act, No. 29 of 1948, ss. 13 (1) (a) and 14.*

A tenant who enjoys, under the Rent Restriction Act, a statutory right of occupation notwithstanding the termination of the earlier contract of tenancy must continue to pay " rent " at the original monthly rate ; if he fails to honour this obligation and is in arrear of " rent " for one month after it has become due, section 13 (1) (*a*) may be brought into operation to eject him.

A tenant need not formally tender payment of rent due when the landlord has in anticipation refused to accept it.

A. H. M. SIDEEK *v.* A. R. M. SAINAMBU NATCHIYA .. 367

16. *Rent Restriction Act—Deposit held by landlord—Right of tenant to set off monthly rent against the deposit.*

Where a monthly tenant deposits a sum of money with the landlord on the agreement that it is to be held by the landlord and paid back to the tenant when the premises are handed over to him, it is not open to the tenant to set off the rent, as it falls due each month, against the deposit held by the landlord. If he does so set off, he is liable to be held to be in arrears of rent.

E. DAVID APPUHAMY *v.* K. SUBRAMANIAM 397

17. *Rent Restriction Act, No. 29 of 1948—Section 13 (1) (d)—Intrepretation.*

If a tenant of premises to which the Rent Restriction Act applies is convicted of an offence which has been committed on the premises and for the purpose of committing which the premises have been used, he is liable to be ejected by his landlord on the ground that he has been convicted of using the premises for an illegal purpose within the meaning of section 13 (1) (*d*) of the Act.

K. V. SARIS APPUHAMY *v.* CEYLON TEA PLANTATIONS CO., LTD. .. 447

18. *Rent Restriction Act—Authorised rent—Mode of proof.*

Defendant, who was sued for ejectment under the Rent Restriction Act on the ground that rent was in arrear, pleaded that rent was not in arrear considering the fact that he had been paying rent at a higher rate than the authorised rent. He stated that he had paid rent at the rate of Rs. 18 and even Rs. 20 per month when, in fact, the authorised rent of the premises (which were situated within the Municipality of Galle) was only Rs. 12.50. The plaintiff stated that the agreed rent was Rs. 20.

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Held, that the burden was on the defendant to prove the amount of the authorised rent by the production of the Municipal assessment register, and secondary evidence could only have been admitted if the best evidence was for some reason not available.

MRS. C. PREMARATNE *v.* M. K. OLIVER DE SILVA .. 448

19. *Rent Restriction Act—Appropriation of payments—Onerous nature of debt due as rent.*

When the tenant who is protected by the Rent Restriction Act owes his landlord not only rent but also money due on certain money lending transactions, any payment made by him must, if its purpose is unspecified, be first appropriated to pay off the arrears of rent. The payment " must be carried to that account which it is most beneficial to the debtor to reduce ".

C. N. FERNANDO *v.* M. J. C. FERNANDO 465

20. *Rent Restriction Act, No. 29 of 1948—Section 14—Continuance of original contract of tenancy—Retrospective force.*

During the pendency of an action for ejectment under the Rent Restriction Act the tenant must continue to pay rent as it falls due. Failure to do so may, by virtue of the retrospective force of section 14 of the Act, render him liable to be sued again for ejectment, in a subsequent action, on the ground of non-payment of rent.

L. W. A. VINCENT *v.* K. G. SUMANASENA 478

21. *Rent Restriction Act, No. 29 of 1948—Sub-letting by tenant—Condonation by landlord—Landlord's right to claim cancellation of tenancy—Sections 9 and 13.*

A tenant wrongfully sub-let a portion of the premises without the the landlord's prior written consent, but the landlord, although he was aware of that fact, made no protest of any kind and continued to demand, and to accept from the tenant, rent for each subsequent month.

In an action brought subsequently by the landlord claiming cancellation of the tenancy on the ground that the tenant had sub-let the premises in contravention of the provisions of Section 9 of the Rent Restriction Act—

Held, that the landlord's conduct after he became aware of the sub-tenancy disentitled him to have recourse to his statutory remedy under Section 9. When a landlord becomes aware of the contravention of Section 9, he must forthwith elect whether or not to treat the contract of tenancy as terminated ; if he does not so elect, the contravention is condoned, and the contractual tenancy continues.

Wimalasuriya v. Ponniah (1951) 52 N. L. R. 191, distinguished.

D. T. ROBERT *v.* MRS. P. RASHAD 517

22. *Possessory action—Right of a tenant to bring it—Test of* possessio civilis *—Limits of its applicability—Prescription Ordinance (Cap. 55), s. 4—Rent Restriction Act.*

A contractual or statutory tenant who has been forcibly ousted from his premises is entitled to maintain a possessory suit against the person dispossessing him.

As against a spoliator the person dispossessed need not prove *possessio civilis* to be restored to possession.

M. U. M. SAMEEM *v.* W. W. DEP 523

23. *Rent Restriction Ordinance, No. 60 of 1942—Section 9—Payments in excess of authorised rent—Recovery thereof—Computation of prescriptive period.*

Action was instituted on June 17, 1952, against a tenant for ejectment on the ground that he was in arrears of rent. The tenant admitted that no payment of rent was made by him after October 31, 1949, but

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pleaded that he was not in arrears of rent if credit was given to him for payments made regularly in excess of the authorised rent from the commencement of the tenancy on January 1, 1944, up to October 31 1949.

Held, that under section 9 of the Rent Restriction Ordinance, No. 60 of 1942, the tenant was entitled to credit for overpayments only for the prescriptive period of three years reckoned from October 31, 1949.

G. H. D. WIJESEKERA *v.* K. KANAPATHIPILLAI 575

Last Will—

See WILLS.

Lease—

See LANDLORD AND TENANT.

Limitation of Actions—

See PRESCRIPTION.

Lis alibi pendens—

Lis alibi pendens—*Stay of proceedings—Conditions precedent—Civil Procedure Code, s. 839.*

An order staying all proceedings in an action until the conclusion of a litigation which is pending between the parties in a foreign Court cannot be made except upon proper material. A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in a court in Ceylon if it is otherwise properly brought.

MURUGAPPAN CHETTIAR *v.* NADARAJAN CHETTIAR .. 104

Local Authorities—

1. Quo warranto—*Local Authority—Municipal Council—Procedure for election of Mayor—Irregularity—Acquiescence—Estoppel—Municipal Councils Ordinance, No. 29 of 1947, as amended by Local Authorities (Election of Officials) Act, No. 39 of 1951—Section 14 (4)—" Candidate ".*

A member of a local authority is estopped from coming forward as a relator to impeach a title conferred by an election in which he has concurred or acquiesced. Where, therefore, in the election of the Mayor of a Municipal Council, the provisions of section 14 (4) of the Municipal Councils Ordinance, No. 29 of 1947, as amended by the Local Authorities (Election of Officials) Act, No. 39 of 1951, which prescribe the procedure, have been infringed, a Councillor who participated in the irregularity is not entitled, by way of an application for a writ of *quo warranto*, to impeach the title of the person who was elected Mayor. In such a case, the Councillor cannot plead ignorance of the law as an excuse.

The word " candidate " in section 14 (4) of the Municipal Councils Ordinance means no more than a Councillor who has consented to his name being proposed and seconded for election.

A. R. M. THASSIM *v.* W. T. WIJEKULASURIYA 59

2. *Municipal Councils Ordinance, No. 29 of 1947—Sections 236 (1) and 325 (1)—Annual value of premises—Scope of assessee's objection to assessment—Principles applicable in assessing annual value—Relevancy of economic factors of supply and demand—Rent Restriction Act, No. 29 of 1948.*

When the annual value of a house is assessed for rating purposes, the owner may, under section 236 (1) of the Municipal Councils Ordinance, institute an action against the Municipal Council to have the annual value increased so that the premises may be taken outside the scope of the Rent Restriction Act.

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In assessing the annual value of premises which, at the time of assessment, are not rent-controlled, the proper test of " annual value " as defined in section 325 (1) of the Municipal Councils Ordinance is what a man of ordinary prudence and foresight, who has duly advised himself as to the state of the market existing at the relevant time, would offer to pay as rental for the premises rather than fail to obtain the tenancy. The test prescribed is concerned only with the reasonableness of the expectation that a certain rent would be obtained in a commercial transaction ; the " fairness " of the bargain is irrelevant.

BANK OF CHETTINAD *v.* MUNICIPAL COUNCIL OF COLOMBO .. 361

3. Mandamus—*Alternative remedy available—Circumstances when writ would nevertheless lie—Local Government Service Ordinance, No. 43 of 1945, s. 51 (a)—Pension payable thereunder—Remedy for collecting it from local authority.*

Mandamus would lie where an alternative remedy by way of ordinary action would not be convenient or effective.

A writ of *Mandamus* is available to the Local Government Service Commission in order to compel a local authority to pay money due to it under section 51 (*a*) of the Local Government Service Ordinance in respect of a pension granted to a retired member of the Local Government Service. The obligation imposed on the local authority in such a case is in the nature of a public duty and can be enforced by way of *Mandamus* because an ordinary action would not be a convenient or effective remedy.

LOCAL GOVERNMENT SERVICE COMMISSION *v.* URBAN COUNCIL, PANADURA 429

Local Option—

See EXCISE ORDINANCE (3)

Maintenance Ordinance—

1. *Maintenance Ordinance (Cap. 76)—Section 6—Illegitimate child—Equivocal acts—Corroborative value thereof.*

Where, in an application for the maintenance of an illegitimate child, the acts relied upon as corroboration are equivocal, it is for the Magistrate to decide whether in the circumstances of the particular case such equivocal acts in fact corroborate the applicant's story.

PUNCHIAPPUHAMY *v.* WIMALAWATHIE 11

2. *Kandyan Marriage Ordinance (Cap. 96)—Dissolution of marriage—Maintenance—Temporary re-union—Effect on future maintenance —Section 20 (6)* 13

See KANDYAN LAW.

3. *Divorce—Decree* nisi *entered in favour of wife—Re-marriage before decree is made absolute—Right to claim maintenance as wife—Marriage by habit and repute—Maintenance Ordinance (Cap. 76), s. 2.*

The applicant, who had obtained a decree *nisi* in divorce proceedings against her husband K., alleged that she contracted a second marriage with S. and claimed maintenance for herself from S. before the decree *nisi* in the divorce proceedings had been made absolute.

Held, that the applicant was not entitled to claim maintenance as wife of S. under section 2 of the Maintenance Ordinance. In such a case, the presumption of marriage by habit and repute is not applicable.

N. SUBRAMANIAM *v.* PAKKIYALEDCHUMY 87

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4. *Maintenance—Application by wife and child—Denial of paternity of child—Burden of proof.*

Where a wife sued her husband for maintenance for herself and a child and the husband admitted that the applicant was his wife but denied the paternity of the child—

Held, that the burden was on the defendant to establish his defence first.

VELENIS *v.* EMMIE 95

5. *Maintenance Ordinance—Arrears of maintenance—Deposited in Court—Liability to attachment—Civil Procedure Code, s. 218 (l).*

Arrears of maintenance and costs paid into a Magistrate's Court to the credit of an applicant in proceedings instituted under the Maintenance Ordinance are liable to be seized in execution of a decree obtained against her.

PIRAGASAM *v.* MARIAMMA 114

6. *Maintenance Ordinance, s. 6—Application on behalf of illegitimate child—Evidence—Silence may amount to admission—Corroboration.*

In an application for the maintenance of an illegitimate child, evidence of the failure of the putative father to refute allegations made against him by a headman on an occasion which demanded a denial or a protest may amount to corroboration.

H. NANDUWA *v.* R. NANDAWATHIE 188

7. *Maintenance—Illegitimate child—Quantum of evidence.*

Where a Magistrate dismissed an application for the maintenance of an illegitimate child without considering whether the defendant was the father of the child and solely on the ground that there was no evidence to prove that the child had been maintained by the defendant within one year of its birth—

Held, that the parternity of the child was a relevant factor in deciding the question whether or not the child had been maintained by the defendant.

W. SOMAWATHIE *v.* E. JOHN FERNANDO 381

Mandamus—

See WRIT OF MANDAMUS.

Marriage—

1. *Divorce—Decree nisi entered in favour of wife—Re-marriage before decree is made absolute—Right to claim maintenance as wife—Marriage by habit and repute—Maintenance Ordinance (Cap. 76), s. 2.*

The applicant, who had obtained a decree *nisi* in divorce proceedings against her husband K., alleged that she contracted a second marriage with S. and claimed maintenance for herself from S. before the decree *nisi* in the divorce proceedings had been made absolute.

Held, that the applicant was not entitled to claim maintenance as wife of S. under section 2 of the Maintenance Ordinance. In such a case, the presumption of marriage by habit and repute is not applicable.

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2. *Marriage—Presumption of marriage by habit and repute—Not applicable where cohabitation follows a marriage ceremony which is invalid.*

The presumption of marriage by habit and repute cannot prevail where there is evidence that the parties had gone through a marriage ceremony and that the solemnization was invalid for the reason that one of the parties was, at the time of the ceremony, already lawfully married. Cohabitation of the parties and general recognition of them as husband and wife subsequent to the dissolution of the prior marriage are inadequate in law for the application of the doctrine of presumption of marriage.

S. KANDIAH *v.* THANGAMANY 568

Master and Servant—

See DELICTS (3); WAGES BOARDS ORDINANCE.

Minors—

1. *Partition action—Minority of defendants—Summons served on them personally—Minors not legally represented—Effect on proceedings—Civil Procedure Code, s. 480.*

Some of the defendants in a partition action were minors. No appointment of a guardian *ad litem* had been made in respect of them, and service of summons was made on them personally. After final decree was entered they moved under section 480 of the Civil Procedure Code to have the decree set aside.

Held, that the final decree could be set aside for the reasons (1) that as the defendants were minors, the service of summons on them personally was ineffective, and (2) that section 480 of the Civil Procedure Code, which declares that an order made in an action in which a minor is a party without such minor being represented by a guardian *ad litem* may be discharged on application made for the purpose, is not inapplicable to actions filed under the Partition Ordinance.

SETUN BIBEE *v.* ABUSALLY MARIKAR 236

2. *Civil Procedure Code—Section 326—Proceedings against minor—Requirement of appointment of guardian* ad litem *under s. 480.*

A minor may be dealt with under section 326 of the Civil Procedure Code for obstructing a Fiscal's officer although he is not represented by a guardian *ad litem*. Section 480 can only apply to actions or applications in which the civil rights of minors are affected and not in any matter where only their personal liberty is at stake.

W. S. PETER *v.* W. S. CAROLIS 406

Mischief—

Mischief—Trespassing cow—Right to destroy it.

Accused shot a cow after he had made several unsuccessful attempts to drive it away and as a last means of saving his field from further damage.

Held, that there was no offence of mischief.

D. Y. EDIRISINGHE *v.* P. S. NANAYAKKARA 160

Misdirection—

See COURT OF CRIMINAL APPEAL DECISIONS.

Misjoinder—

See JOINDER OF CAUSES OF ACTION, CHARGES AND PARTIES.

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Mohamedan Law—

See MUSLIM LAW.

Mortgage—

Thesavalamai—*Pre-emption—Mortgagor's rights as against pre-emptor.*

A co-owner's right of pre-emption cannot defeat the rights of a *bona fide* mortgagee for value whose interests had been created before the right of pre-emption was asserted in a Court of law.

V. SIVAPRAGASAM *v.* S. VELLAIYAN 298

Motor Vehicles—

1. *Privy Council—Motor Car Ordinance, No. 45 of 1938—Insurance against third party risks—Notice of action to insurer by third party—Particulars which should be furnished—Sections 133, 134, 136, 137.*

Where notice of action was given to an insurer setting out the name and address of the proposed plaintiff, the name of the owner and number of the car which caused injuries, the date of the accident and the sum which was being claimed from the owner as damages—

Held, that there was a sufficient notice of action under section 134 of the Motor Car Ordinance.

THE CEYLON MOTOR INSURANCE ASSOCIATION LTD. *v.* P. P. THAMBUGALA 25

2. *Motor Traffic Act, No. 14 of 1951—Section 158—" Running board ".*

In a prosecution for riding on a running board of a motor vehicle in contravention of section 158 of the Motor Traffic Act—

Held, that a running board which is inside a bus or car and does not project outside is not covered by the enactment.

T. T. PERERA *v.* T. P. B. MEDAWELA 184

3. *Motor Traffic Act, No. 14 of 1951—Section 239, Regulation 17—Stop light—Not a basic requirement of every motor vehicle.*

Regulation 17 of the Regulations framed under section 239 of the Motor Traffic Act does not lay down that every motor vehicle should have a stop light.

PODI APPUHAMY *v.* H. A. PERERA 286

4. *Omnibus Service Licensing Ordinance, No. 47 of 1942—Sections 6 (2), 7, 14 (3)—Tribunal of Appeal—Scope of its jurisdiction.*

Under section 14 (3) of the Omnibus Service Licensing Ordinance it is not open to a Tribunal of Appeal to grant a road service licence to a party to run along a particular route when there is no appeal for such a route before the Tribunal.

If the Tribunal of Appeal agree with the termini and the line of a route selected by the Commissioner but are confronted with an insurmountable obstacle raised by section 7, they should leave it to the Commissioner under section 6 (2) to vary the conditions attached to an existing licence. It is essential that where the statute expressly states that a function is to be performed by the Commissioner it should be left to him in the first instance to come to a decision.

EBERT SILVA BUS CO., LTD. *v.* COMMISSIONER OF MOTOR TRANSPORT 371

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5. *Motor Traffic Act, No. 14 of 1951—Regulations 15 and 45—Section 216 (2) (b)—Meaning and effect of expression " in contravention of ".*

Driving an omnibus not fitted with an accurate speedometer or with seats not fitted with cushions does not amount to a use of the vehicle in contravention of regulations 15 and 45 of the regulations made under sections 19 and 239 of the Motor Traffic Act so as to render the driver guilty of an offence under section 226 read with section 216 (2) (*b*).

W. A. Don Thomas Singho *v.* S. I. Police, Gampaha .. 395

7. *Omnibus Service Licensing Ordinance, No. 47 of 1942, ss. 4 (b), 13 (8)—Case stated—Instance when a case may be stated—Route licence—Past representation by local authority—Relevancy—Certain other factors for consideration.*

In a case where a route licence is revoked by the Tribunal of Appeal, the Commissioner of Motor Transport may, under section 4 (6) of the Motor Car Ordinance, No. 45 of 1938, read with section 13 (8) of the Omnibus Service Licensing Ordinance, assist the licence holder to place his case before the Supreme Court by himself moving to have a case stated. This does not necessarily mean that from the point of view of the executive the licence must be restored to the licence holder.

A communication addressed by a local authority drawing the attention of the Commissioner of Motor Transport to the congestion of traffic on a road within its area can be regarded as a representation under section 4 (*b*) of the Omnibus Service Licensing Ordinance, even though the communication was not addressed in connexion with the selection of a route of which that road forms a part.

A Tribunal of Appeal should not interfere in matters left purely to the discretion of the Commissioner of Motor Transport.

A company providing an omnibus service exclusively within an urban area has no overriding claims as against a company operating both within and outside the urban area.

In re South Western Bus Co., Ltd. 399

8. *Motor Car—Accident—Vehicle damaged beyond repair—Basis of valuation* 467

See Delicts (6)

Municipal Councils Ordinance—

See Local Authorities.

Murder—

See Court of Criminal Appeal Decisions.

Muslim Law—

Muslim law—Custody of children—Preferential right thereto after mother's death.

Under the Muslim law the custody of a male child remains, at least up to his seventh year, with the maternal relations, the mother being dead, and, in the case of female children, until they are married.

A. R. A. Hassen *v.* C. L. M. Marikkar 190

Negligence—

See Delicts.

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Notaries Ordinance—

1. *Notaries Ordinance (Cap. 91)—Breach of paragraph (a) of rule (35) in Section 30—Burden of proof.*

The charge against the accused was that he did " being a notary and not being a proctor fail to live and hold office at the place approved by the Governor by warrant ", in breach of paragraph (*a*) of rule (35) in section 30 of the Notaries Ordinance.

Held, that there was no burden on the prosecution to prove that the accused was not a proctor. The burden was on the defence to prove that he was.

D. S. GNANAMUTTU *v.* THANGIAH.. 354

2. *See also* WILLS.

Omnibus—

See MOTOR VEHICLES.

Onus of Proof—

See BURDEN OF PROOF.

Parliamentary Elections—

1. *Election Petition—Summons to produce a document—Date when witness should appear—Civil Procedure Code, ss. 121, 126, 127—Ceylon (Parliamentary Elections) Order in Council, 1946, s. 78 (3).*

The power conferred by section 78 (3) of the Parliamentary Elections Order in Council on an Election Judge to summon or compel the attendance of witnesses is not greater than that of a District Judge. Section 121 of the Civil Procedure Code is, therefore, applicable. Accordingly, an Election Judge has no power to summon a witness to produce a document on any date other than at the hearing of the election petition.

S. J. V. CHELVANAYAKAM *v.* S. NATESAN 16

2. *Election Petition—Security for respondent's costs—Proper time for withdrawing it—Parliamentary Elections (Amendment) Act, No. 19 of 1948, s. 82 (c).*

Neither party to an election petition is entitled to draw during the appealable period, or during the pendency of an appeal, the money deposited by the petitioner as security for the respondent's costs.

R. B. KADRAMER *v.* M. L. M. CASSIM 39

3. *Election Petition—Status of petitioner to present petition—Burden of proof—Evidence Ordinance, s. 103—Ceylon (Parliamentary Elections) Order in Council, 1946, s. 79.*

In an election petition it is incumbent on the petitioner to lead evidence to prove his qualification to present the petition under section 79 of the Parliamentary Elections Order in Council.

Objection by the respondent that the petitioner's status has not been proved may be raised by him at the close of the petitioner's case.

M. J. ABEYWARDENE *v.* C. A. DHARMAPALA 138

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4. *Election Petition—Right of appeal—Scope—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 81, 82A, 82B, as amended by Parliamentary Elections (Amendment) Act, No. 19 of 1948.*

An election petition was dismissed by the Election Judge on the ground that notice of the presentation of the petition had not been served on the respondent as required by Rule 15 of the Parliamentary Election Rules. In the appeal preferred by the petitioner, the respondent raised the preliminary objection that appeal did not lie against the order of the Election Judge.

Held, that there was no right of appeal. One pre-requisite for an appeal under section 82A (1) of the Parliamentary Elections (Amendment) Act, No. 19 of 1948, is that it must be against the "determination" of an Election Judge under section 81. In the present case, there had been no " determination " within the meaning of section 81 of the Act.

K. RAMALINGAM *v.* V. KUMARASWAMY 145

5. *Election Petition—Particulars relating to certain charges—What particulars should be given and when they should be given—Scope of Rule 5 of Schedule 3 of Ceylon (Parliamentary Elections) Order in Council, 1946.*

Where the date of trial of an election petition has been fixed, the election judge is entitled to specify a particular date for the filing of particulars.

Where the petitioner relies upon a false statement made by the respondent to a particular individual or group of known individuals regarding the petitioner's character and conduct, he may be ordered to give the name or names of such individual or individuals and their addresses, occupations and numbers (if any) on the electoral register. The names of the witnesses however, need not be stated. (Rule 5 of Schedule 3 of the Parliamentary Elections Order in Council, 1946.) Similar particulars should also be given where the petitioner relies on charges of undue influence or distribution of improper advertisements or handbills to any particular individual or group of known individuals. Where posting of placards and posters is alleged, the petitioner may be directed to give, where possible, the places of posting.

With regard to the charge of hiring, borrowing and using prohibited vehicles for the conveyance of voters, the petitioner must furnish *inter alia* the details of each trip, namely the starting-point and the destination and, if known, the number of persons conveyed, their names, addresses, occupations and numbers on the electoral register, and if known, the amounts paid and to whom they were paid.

With regard to the charge of making a false return concerning election expenses, the petitioner cannot be compelled to state the names, &c., of the witnesses to be called to prove each alleged omitted or impugned item of expense.

S. J. V. CHELVANAYAKAM *v.* S. NATESAN 140

6. *Election Petition—False declaration as to election expenses—Ground for unseating member—Time limit for presenting election petition—" Candidate "—Corrupt practice of printing and publishing handbills, &c., without disclosing addresses of printer and publisher—Corrupt intention—Necessary ingredient—" Publisher "—Statute with retrospective operation—Scope of its effect—Ceylon (Parliamentary Elections) Order in Council of 1946, ss. 3 (1), 58 (1) (c) and (f), 70, 73A, 77, 82A and B, 83 (1), 83 (1) (b) (i) and (ii), 83 (2)—Ceylon (Parliamentary Elections) (Amendment) Act, No. 26 of 1953, ss. 5, 6.*

Held, by NAGALINGAM A.C.J. and PULLE J. (GRATIAEN J. dissenting), that knowingly sending a false return of election expenses, being a corrupt practice under section 58 (1) (*f*) of the Parliamentary Elections Order in Council of 1946, falls within the ambit of sections 77 (*c*) and 83 (1) (*a*). The act of making the declaration is an act done " in pursuance or in furtherance " of that corrupt practice, and no other act is necessary before a petition can be presented within the period of twenty-eight days prescribed in section 83 (1) (*a*). The definition of " candidate " in section 3 (1) is applicable to a candidate even after his election as member.

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Held, by GRATIAEN J. and PULLE J. (NAGALINGAM A.C.J. observing to the contrary), that, under section 58 (1) (*c*) of the Parliamentary Elections Order in Council of 1946, a corrupt intention must be proved in order to establish the corrupt practice of publishing handbills, posters and placards without the name and address of the publisher appearing thereon.

The Parliamentary Elections (Amendment) Act, No. 26 of 1953, has, in the absence of express provision to that effect, no relevancy to the issues involved in determining an election petition appeal which was pending at the time it was passed. Scope of its retrospective operation considered.

Per GRATIAEN J.—Section 58 (1) (*c*) of the Parliamentary Elections Order in Council of 1946 requires both the " printer " and " publisher " to be disclosed in the documents specified. The term " publisher " is not confined in the context to persons professionally engaged in the publishing trade.

E. L. SENANAYAKE *v.* H. M. NAVARATNE 193

7. *Election Petition—Impersonated and tendered votes—Scrutiny—Addition of tendered votes—Striking out of corresponding impersonated votes necessary first—" Particular elector "—Missing ballot papers—Absence of evidence as to how they were lost—Non-compliance with the provisions of the Order in Council relating to elections—Effect on validity of election—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 45, 49, 51 (1), 77 (b), 85 (1) (c) and (3).*

Sub-paragraph (*c*) of paragraph (1) of section 85 of the Parliamentary Elections Order in Council of 1946 should be construed as the complement of paragraph (3) of the same section. On a scrutiny, therefore, at the trial of an election petition, the election judge is not entitled to add a tendered vote unless he is in a position to strike out the corresponding impersonated vote.

Before a person can be issued a tendered ballot paper under section 45 of the Order in Council, that person must show that he is " a particular elector named in the register ". Where there are two or more voters with identical names in the register and the address given is not distinctive enough to identify any one of such voters with one or other of the entries, it is not possible for any one of them to prove that he is a " particular elector " within the meaning of the section.

Where certain ballot papers that had been issued are found missing and there is no evidence as to how they were lost, it is not possible to attribute to any officer charged with the conduct of elections non-compliance with the provisions of the Order in Council within the meaning of section 77 (*b*).

Thirty-two out of 26,054 ballot papers that had been issued were not taken into account in counting the votes cast in favour of any of the candidates, the Returning Officer having rejected them in terms of section 49 as they were not stamped or perforated with the official mark. The failure to perforate was due to the omission on the part of the election officers, but the omission was not due to any deliberate fraud or dishonesty on their part. The successful candidate defeated the runner-up by a majority of eight votes only.

Held, that the omission of the officers entrusted with the conduct of the election to perforate duly the 32 ballot papers was not a non-compliance with the provisions of the Parliamentary Elections Order in Council within the meaning of section 77 (*b*). To invalidate an election under section 77 (*b*), there should be a violation of the *principles* underlying the conduct of the election ; the non-compliance should be of such degree and magnitude that it could reasonably be said that as a result of such non-compliance the electorate had not been given a fair opportunity of electing the candidate of its choice. The fact that out of 26,054 ballot papers, only 32 had no perforations, was the most satisfying proof that the election had been conducted in accordance with the principles laid down in that behalf in the provisions of the Order in Council. To ascertain whether or not the election was conducted in accordance with the principles laid down in the Order in Council it was entirely unjustifiable to take into consideration whether the number of ballot papers unperforated was greater than the majority by which the successful candidate was declared duly elected.

J. C. W. MUNASINGHE *v.* S. C. S. CORREA 265

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8. *Ceylon (Parliamentary Elections) Order in Council, 1946, as amended by Parliamentary Elections (Amendment) Act, No. 19 of 1948—Sections 81 and 82—Point of time at which election judge becomes functus—" At the conclusion of the trial "—Corrupt or illegal practice—Notice on parties who are to be reported—May be given after judgment and issue of certificate—Persons who can be reported.*

By sections 81 and 82 of the Parliamentary Elections Order in Council, 1946, as amended by Act No. 19 of 1948 :—

" 81. 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 in writing under his hand.

Such certificate shall be kept in the custody of the Registrar of the Supreme Court to be dealt with as hereinafter provided.

82. At the conclusion of the trial of an election petition the election judge shall also make a report under his hand setting out—

(*a*) Whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, or by his agent, and the nature of such corrupt or illegal practice, if any ; and

(*b*) the names and descriptions of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice ;

Provided, however, that before any person, not being a party to an election petition nor a candidate on behalf of whom the seat is claimed by an election petition, is reported by an election judge under this section, the election judge shall give such person an opportunity of being heard and of giving and calling evidence to show why he should not be so reported.

Such report shall be kept in the custody of the Registrar of the Supreme Court, to be dealt with as hereinafter provided."

Held : (i) The words " at the conclusion of the trial " in sections 81 and 82 denote a point of time when the trial is finally concluded by the delivery of the judgment. With reference to the issue of the certificate as to the validity of the election and the making of the report as to corrupt or illegal practice, the words mean within a reasonable time of the trial being concluded. What would be a reasonable time would depend upon the circumstances of the particular case.

(ii) It is not necessary for the certificate and report to go together. A person may be asked and allowed to show cause under the proviso to section 82 after the issue of the certificate and prior to the sending of the report. The jurisdiction of an election judge continues until the election inquiry is over and the final report is sent.

(iii) An election judge is not entitled to make a report under section 82 (*b*) in respect of an election offence which was not in issue at the trial, i.e., either in the particulars filed by the petitioner or in the recriminatory case of the respondent. A person, therefore, who was only a witness in the case cannot be reported.

IN RE S. A. WICKREMASINGHE 324

9. *Election Petition—Several petitioners—Appointment of agent—Amount of stamp duty payable—Security for costs, etc.—Persons who should deposit and receive it—Amendment of petition—Determination of date of amendment—Validity of amendment—Power of trial Judge to question it—Quantum of security to be deposited in case of amendment—Parliamentary Election Petition Rules, 1946, Rules 9, 12, 13 (1)—Ceylon (Parliamentary Elections) Order in Council, 1946, s. 83 (2).*

Two petitioners on a single election petition " jointly and severally " appointed an agent under Rule 9 of the Parliamentary Election Rules. Both of them had a common interest in obtaining a declaration in terms of the prayer that the election of the respondent be declared void.

Held, that the instrument of appointment of agent should be stamped with the duty payable on a single power of attorney and not three powers of attorney.

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"Where a power of attorney is granted in one document by several grantors in favour of one person, the question whether the document constitutes one power of attorney or several distinct powers has to be determined by reference to the interest which each grantor has in the matter in respect of which the grant is given, and where such interest is common to all the grantors the position in law would seem to be that the document constitutes a single power of attorney."

Held further : (i) In regard to deposit of security for costs, etc., of an election petition, payment of it by the petitioner's appointed agent which is expressly stated to be made on behalf of the petitioner is a payment by the petitioner within the meaning of Rule 12 (3) of the Election Petition Rules.

(ii) Where an election petition is sought to be amended by the addition of a new paragraph the terms of which are set out in the application for leave to amend, the date of amendment of the original petition—for the purpose of determining whether it was amended within the time specified in section 83 (2) of the Parliamentary Elections Order in Council—is the date on which the application for leave to amend it is allowed by the Judge. No further act on the part of the petitioner by way of amendment is necessary.

(iii) The validity of an order allowing an application for leave to amend an election petition cannot be questioned by the Judge who subsequently tries the election petition.

(iv) When an election petition is amended, the petitioner need not give security afresh in respect of the charges included in the original petition. The only fresh security which he must give within three days after the amendment is in respect of the additional charges.

(v) Where the Commissioner of Elections has given authority to his Office Assistant to receive on his behalf deposits of security in connection with election petitions, payment of security made to the Office Assistant is payment to the Commissioner within the meaning of Rule 13 (1) of the Election Petition Rules.

G. G. Ponnambalam *v.* S. V. Kunasingham 418

Partition Actions—

1. *Partition action—Minority of defendants—Summons served on them personally—Minors not legally represented—Effect on proceedings—Civil Procedure Code, s. 480.*

Some of the defendants in a partition action were minors. No appointment of a guardian *ad litem* had been made in respect of them, and service of summons was made on them personally. After final decree was entered they moved under section 480 of the Civil Proeedure Code to have the decree set aside.

Held, that the final decree could be set aside for the reasons (1) that as the defendants were minors, the service of summons on them personally was ineffective, and (2) that section 480 of the Civil Procedure Code, which declares that an order made in an action in which a minor is a party without such minor being represented by a guardian *ad litem* may be discharged on application made for the purpose, is not inapplicable to actions filed under the Partition Ordinance.

Setun Bibee *v.* Abusally Marikar 236

2. *Rent Restriction Act, No. 29 of 1948—Section 13—Letting of co-owned premises—Partition sale thereafter—Effect of such sale on the tenancy agreement.*

Where premises which are owned in common are let under a contract of tenancy and, subsequently, one of the co-owners purchases the premises at a partition sale, the certificate of sale has the effect of terminating the relationship of landlord and tenant and of constituting the purchaser an independent title holder to whom the restriction contained in section 13 of the Rent Restriction Act cannot apply. The certificate confers a title which is not subject to the tenancy agreement.

W. Heenatigala *v.* L. C. Bird 277

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3. Thesavalamai—*Pre-emption—Effect of partition decree thereon.*

A co-owner's right of pre-emption under the *Thesavalamai* is extinguished by a decree for partition entered in respect of the common property.

Vyramu tu v. Periathamby (1929) 30 N. L. R. 492, overruled.

V. Sivapragasam *v.* S. Vellaiyan 298

4. *Partition action—Improvements made by a co-owner—Limits of their relevancy in allotting shares.*

Although, in a partition decree, a co-owner should, whenever possible, be given the lot which carries his improvements, this principle should not be adhered to if, in the process of giving effect to it, substantial injustice is likely to be caused to the other co-owners.

Where, however, improvements made by one co-owner fall within the portion allotted to another co-owner the latter should pay compensation to the former in respect of the improvements.

K. L. Prematheratne *v.* N. Elo Fernando 369

5. *Estate Duty—Hindu undivided family—Death of "co-parcenary member"—Devolution of his interests in the joint property—Partition Ordinance, s. 18* 481

See Estate Duty.

6. *Partition action—Interlocutory decree—Improvements made by co-owner—Special direction to Commissioner relating to them—Scope—Partition Ordinance, s. 5.*

When a Court enters interlocutory decree in an action for the partition of a land it would be acting prematurely if, without examining all the relevant considerations, it gives an *unconditional* special direction to the Commissioner to the effect that a co-owner who has made certain improvements should be allotted, in lieu of his undivided share, a specified portion which includes those improvements.

D. N. W. A. Kumarasingha *v.* H. Andirishamy .. 539

7. *Servitude*—Jus superficiarium—*Acquisition by prescription—Compensation—Basis of assessment—Partition sale.*

Where A. puts up a building at his own expense on the land of B. with B's consent and approval, and exclusively enjoys the use of it as a superficiary for a period of ten years without interference by the soil owner B., he acquires, by prescription, the servitude known as the *jus superficiarium*. This right which a person has to a building standing on another's ground is acquired and lost like immovable property. It can be alienated by notarial conveyance or transmitted to the heirs of the superficiary on his death.

The soil owner who takes over the building from the superficiary must, in the absence of an agreement to the contrary, pay him its "present value" (and not merely its original cost if that be less). The same basis of assessment should be adopted where the servitude is extinguished, by consent of parties, at a partition sale.

H. Samarasekere *v.* L. Munasinghe 558

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1. *Appropriation of payments* 347

See Prescription (3).

2. *Rent Restriction Act—Appropriation of payments—Onerous nature of debt due as rent* 465

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Housing and Town Improvement Ordinance—Section 13 (1) (b)—Deviation from approved plan—Meaning of " plan " 527

See HOUSING AND TOWN IMPROVEMENT ORDINANCE.

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See AUTREFOIS ACQUIT.

Pleadings—

Amendment of plaint—Misdescription of defendant—Substitution of proper defendant—Prescription.

Where a plaint mistakenly named the defendant as " Odiris Silva & Sons " when, in fact, the defendant was Odiris Silva & Sons, Ltd., and the Court allowed the plaintiff to amend the caption of the plaint—

Held, that, for the purpose of reckoning the period of prescription, the action against the company must be taken to have been instituted on the date of the original plaint and not upon the amendment of the caption of the plaint.

C. A. ODIRIS SILVA & SONS, LTD. *v.* P. JAYAWARDENE .. 335

Poisons, Opium and Dangerous Drugs Ordinance—

1. *Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172), ss. 26, 76 (1) (a)—Charge of unlawful possession of seeds, &c., of hemp plant—Mention of wrong person as proper authority—Curable irregularity—Criminal Procedure Code, s. 425—Burden of proof—Evidence Ordinance, s. 106.*

Appellant was charged with being in possession of certain quantity of seeds, pods, leaves and flowers of the hemp plant without a licence from the proper authority in breach of section 26 of the Poisons, Opium and Dangerous Drugs Ordinance. The " proper authority " mentioned in the plaint was the Minister of Justice instead of the Minister of Health.

Held, that the mention of the wrong person in the plaint as the proper authority was nothing more than a mere irregularity curable under section 425 of the Criminal Procedure Code.

Held further, that under section 106 of the Evidence Ordinance the burden was on the accused to prove that his possession of the prohibited seeds, &c., was lawful. *Sanitary Inspector, Mirigama v. Thangamani Nadar* (1953), 55 N. L. R. 302, distinguished.

S. P. SIMON SINGHO *v.* C. B. THORADENIYA 451

2. *See also* EXCISE ORDINANCE.

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Possession—

Bona fide *possession—Proof of* bona fides 345

See IMPROVEMENTS (2).

Possessory Action—

Possessory action—Right of a tenant to bring it—Test of possessio civilis—*Limits of its applicability—Prescription Ordinance (Cap. 55), s. 4—Rent Restriction Act.*

A contractual or statutory tenant who has been forcibly ousted from his premises is entitled to maintain a possessory suit against the person dispossessing him.

As against a spoliator the person dispossessed need not prove *possessio civilis* to be restored to possession.

M. U. M. SAMEEM *v.* W. W. DEP 523

Post Office Ordinance—

Post Office Ordinance (Cap. 146)—Sections 71 (1) and 88 (1)—Applicability of Sections 11 and 152 (3) of Criminal Procedure Code.

A Magistrate who is also a District Judge has power under section 152 (3) of the Criminal Procedure Code to assume jurisdiction to try an offence punishable under section 71 (1) of the Post Office Ordinance and which, by reason of Section 88 (1) of that Ordinance, is triable in a District Court. The reference to the District Court in section 88 is permissive and not exclusive.

Section 152 (3) of the Criminal Procedure Code is a provision contemplated by proviso (*b*) of section 11 of that Code.

A. G. DE MEL *v.* R. C. DE NEISE 537

Postponement—

1. *Postponement—Grant or refusal—Discretion of Court.*

An order refusing or granting a postponement is a typical exercise of discretionary power with which an appellate court would be slow to interfere.

W. S. FERNANDO *v.* W. J. FERNANDO 119

2. Autrefois acquit—*Failure of prosecutor to lead evidence—" Discharge " of accused—Right of prosecutor to institute fresh proceedings—Criminal Procedure Code, ss. 190, 191, 289 (5), 330.*

When, in a summary case, the prosecutor is not ready to proceed with his case on the date of trial, even after he has been given ample opportunity to place his evidence, an order of Court refusing postponement and " discharging " the accused operates as an acquittal. It is not open then to the prosecutor to institute fresh proceedings upon the same charge.

Senaratne v. Lenohamy (1917) 20 N. L. R. 44, distinguished.

ADRIAN DIAS *v.* WEERASINGHAM.. 135

3. *Criminal Procedure Code—Section 289—Absence of accused on date of trial—Postponement—Power of Court to award costs in favour of complainant.*

The accused was absent on the date of trial and was not represented by counsel or proctor. The Magistrate re-fixed the trial for another date and, purporting to act under section 289 of the Criminal Procedure Code, ordered the accused to pay to the complainant a certain sum as costs of the day.

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Held, that under section 289 of the Criminal Procedure Code a Magistrate has no power to order an accused person to pay costs to the complainant when an adjournment of the trial becomes necessary or advisable.

MALLIS SILVA *v.* I. D. USUPH 165

4. *Postponement—Application therefor—Circumstances when it should be granted.*

At the conclusion of the case for the prosecution the Proctor who was appearing for an accused person applied for a postponement stating that it was well past the ordinary working hours of the court, that he had had a heavy day and that the defence would take at least two hours.

Held, that in the circumstances the application for postponement should have been granted.

K. CYRIL *v.* DOLE 288

Pre-emption—

See THESAVALAMAI (3), (5).

Prescription—

1. *Administration of estates—Property belonging to estate—Prescriptive claim by administrator—Conditions necessary for such claim—Fiduciary relationship of administrator—Trusts Ordinance, s. 111—Prescription Ordinance, s. 3—Civil Procedure Code, ss. 540, 741.*

An administrator who enters in that capacity upon any property belonging to the estate of a deceased person cannot commence acquiring prescriptive title to that property for himself against the intestate heirs until he has divested himself of his representative character by "completing the administration" within the meaning of section 540 of the Civil Procedure Code.

An administrator in possession of property belonging to the estate owes an equal duty by virtue of his office to all the intestate heirs without discrimination, and, so long as that fiduciary relationship subsists, the law will not permit him to say, for purposes of prescription, that he held the property for the benefit only of those to whom he was bound by special ties of kinship or affection.

B. J. H. BAHAR *v.* T. K. BURAH 1

2. *Buddhist temple—Claim to incumbency thereof—Reference to ecclesiastical court—Binding force of decisions of extra-judicial tribunals—Computation of prescriptive period—Prescription Ordinance (Cap. 55), s. 10.*

Persons who voluntarily submit a dispute to an extra-judicial tribunal must abide by its decision unless it be vitiated by misconduct or substantial irregularity of procedure or by a violation of the principles of natural justice.

Plaintiff sued the 1st defendant for a declaration that he, and not the 1st defendant, was the incumbent of a certain Buddhist temple. This dispute had been previously referred to an ecclesiastical court whose decision the rival claimants had (by necessary implication, if not expressly) agreed to regard as binding on them. After the decision of the ecclesiastical court in favour of the plaintiff, the 1st defendant requested him to refrain from enforcing his rights for about a year "until it is settled amicably without getting into litigation". After the period of indulgence asked for had expired, 1st defendant repudiated his obligation to obey the decision of the ecclesiastical court and reasserted his false claim to the incumbency.

Held, (i) that the decision of the ecclesiastical court was binding on the parties and could be enforced in a Court of law.

(ii) that the conduct of the 1st defendant in repudiating the decision of the ecclesiastical court gave rise to a fresh cause of action entitling the plaintiff to claim the protection of a declaratory decree against further

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interference with his enjoyment of the rights which had been vindicated in the ecclesiastical court. As the present action was instituted within three years of the date on which this fresh cause of action arose, the plaintiff's remedy, which fell within section 10 of the Prescription Ordinance, was not barred by limitation.

KIRIKITTA SARANANKARA THERO *v.* MEDEGAMA DHAMMANANDA THERO 313

3. *Prescription Ordinance (Cap. 55)—Goods sold and delivered—Appropriation of payments—Part-payment—Section 8 and proviso to section 12.*

Where there has been a series of transactions, between two persons, of goods sold and delivered, each item of purchase constitutes a separate debt, and the mere occurrence of an item of purchase within the period of limitation does not keep the claim alive as to the older sales effected outside that period. Further, when payments are made by the debtor without any indication that they are to be appropriated on account of all the debts collectively, the creditor is entitled at his option to appropriate the payments in reduction of the earlier debts which are statute-barred, but such appropriation cannot operate by itself as a part-payment so as to take the balance due on those earlier debts out of the statute; the balance due on the earlier debts continues to be statute-barred.

G. P. BASTIAN SILVA *v.* W. G. M. WILLIAM SILVA .. 347

4. *Delict*—Actio legis Aquiliae—*Computation of prescriptive period—Damage is gist of action—Prescription Ordinance (Cap. 55), s. 9.*

In actions under the lex Aquilia and in other actions in which proof of patrimonial loss is a condition of liability, the period of prescription does not begin to run until some damage has actually occurred.

Plaintiff was the Headmaster, and the defendant an Assistant Master, of a school. Plaintiff alleged that defendant " falsely and maliciously in order to put the plaintiff into trouble and to cause him loss " falsified certain attendance registers of the school on June 15, 1944, and that in consequence of an investigation by his employers into these irregularities his services as Headmaster were discontinued on December 1, 1947. He claimed that a cause of action accrued to him for the recovery of Rs. 7,500 as damages from the defendant. Defendant pleaded that the action, which was instituted on May 28, 1948, was prescribed.

Held, that the date of commencement of the prescriptive period of two years under section 9 of the Prescription Ordinance was December 1, 1947, and not June 15, 1944.

W. M. D. D. G. WIJERATNE *v.* K. D. GABRIEL 433

5. *Possessory action—Prescription Ordinance, s. 4* 523

See POSSESSORY ACTION.

6. *Servitude*—Jus superficiarium—*Acquisition by prescription* .. 558

See SERVITUDES (4).

7. *Rent Restriction Ordinance, No. 60 of 1942—Section 9—Payments in excess of authorised rent—Recovery thereof—Computation of prescriptive period.*

Action was instituted on June 17, 1952, against a tenant for ejectment on the ground that he was in arrears of rent. The tenant admitted that no payment of rent was made by him after October 31, 1949, but pleaded that he was not in arrears of rent if credit was given to him for payments made regularly in excess of the authorised rent from the commencement of the tenancy on January 1, 1944, up to October 31, 1949.

Held, that under section 9 of the Rent Restriction Ordinance, No. 60 of 1942, the tenant was entitled to credit for overpayments only for the prescriptive period of three years reckoned from October 31, 1949.

G. H. D. WIJESEKERA *v.* K. KANAPATHIPILLAI 575

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Prevention of Frauds Ordinance— PAGE

1. *Will—Prevention of Frauds Ordinance, s. 6* 385

See WILLS.

2. *Privy Council—Trust—Sale of land by debtor to creditor—Adequate consideration—Parol evidence of agreement by transferee to reconvey the land—Admissibility—Prevention of Frauds Ordinance (Cap. 57), s. 2—Trusts Ordinance (Cap. 72), s. 5 (1) and (3)* 529

See TRUSTS (4).

Private Defence—

See COURT OF CRIMINAL APPEAL DECISIONS (3), (5).

Privy Council—

1. *Privy Council—Application for conditional leave to appeal—Valuation of "matter in dispute on the appeal"—Notice to opposite party—Grounds of appeal need not be specified—Rules 1 and 2 of Schedule to Appeals (Privy Council) Ordinance.*

Plaintiff sought to recover from defendant a sum of Rs. 2,250 as arrears of payments due to him under an agreement whereby the defendant was allegedly obliged to pay the plaintiff a monthly allowance of Rs. 150 for the rest of plaintiff's life. He further claimed the additional sum that would become due, under the agreement, from date of action till date of decree and for legal interest. The trial Court entered judgment in favour of plaintiff for a total sum of less than Rs. 5,000. The defendant appealed, and his appeal was allowed. The plaintiff, thereupon applied for conditional leave to appeal to the Queen in Council.

Held, that, for the purpose of determining the value of the matter in dispute on the appeal to the Queen in Council, (1) the amounts that became payable to the plaintiff under the alleged agreement subsequent to the date of the decree of the trial Court and up to the date when the Supreme Court pronounced judgment should not be taken into consideration, (2) although the amount at stake in the action was less than Rs. 5,000, representing only part of the instalments that had fallen due up to the date of decree of the trial Court, the action itself raised the entire question of the existence and validity of the contract between the parties, and a settlement of that question one way or the other affected the rights and liabilities of parties beyond the sum of Rs. 5,000; the plaintiff was therefore entitled, under the second part of Rule 1 (*a*) of the Schedule to the Appeals (Privy Council) Ordinance, to appeal as of right to the Queen in Council.

Held further, that the notice given by an appellant to the opposite party in accordance with Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance need not specify the particular grounds upon which it is intended to make the application for conditional leave.

Kasipillai v. Nagalinga Kurukkal (1952) 54 N. L. R. 183, overruled.

T. A. K. DE SILVA *v.* HIRDAMANI LTD. 73

2. *Privy Council—Conditional leave to appeal—Estate Duty Ordinance, ss. 40, 43—Assessee's appeal to Supreme Court—"Civil suit or action"—Appeals (Privy Council) Ordinance (Cap. 85), s. 3.*

A final judgment pronounced by the Supreme Court in an assessee's appeal under section 43 of the Estate Duty Ordinance is a judgment in "a civil suit or action" within the meaning of section 3 of the Appeals (Privy Council) Ordinance. Appeal lies, therefore, as of right to the Privy Council if the matter in dispute on the appeal is of the required value.

ATTORNEY-GENERAL *v.* V. RAMASWAMI IYENGAR .. 572

3. *See also* PRIVY COUNCIL DECISIONS.

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Privy Council Decisions—

1. *Motor Car Ordinance, No. 45 of 1938—Insurance against third party risks—Notice of action to insurer by third party—Particulars which should be furnished—Sections 133, 134, 136, 137.*

THE CEYLON MOTOR INSURANCE ASSOCIATION LTD. *v.* P. P. THAMBUGALA 25

See MOTOR VEHICLES (1).

2. *Privy Council—Fresh evidence—Admissibility in appeal.*

Where application was made, in appeal, to introduce fresh evidence by a handwriting expert—

Held, that the application could not be entertained as it disregarded the well-known rule as to the introduction of fresh evidence.

MURIEL AMARASEKERA *nee* WIJESINGHE *v.* H. D. ADLIET RATNAYAKE 409

3. *Trust—Sale of land by debtor to creditor—Adequate consideration—Parol evidence of agreement by transferee to reconvey the land—Admissibility—Prevention of Frauds Ordinance (Cap. 57), s. 2—Trusts Ordinance (Cap. 72), s. 5 (1) and (3)* 529

See TRUSTS (4).

Proctor—

1. *Proctor—Misconduct.*

The respondent, a Proctor, who had been entrusted with a sum of Rs. 4,000 by a client on February 12, 1949, for the purpose of discharging a mortgage bond executed by the client, falsely represented to the client in November 22, 1949, that he had got the bond discharged and had sent it for registration. In fact, however, he failed to return the discharged mortgage bond and title deeds until December 6, 1952, after the conclusion of an inquiry by the Disciplinary Committeee of the Law Society.

Held, that by his conduct the respondent had fallen short of that standard of conduct that, in the public interest, was required of a professional man.

In re C. E. DE S. SENARATNE 97

2. *Proctor—Proxy not filed—Circumstances when failure may be excused.*

An application for the execution of a decree was signed by a proctor in whose favour no proxy had been granted by the plaintiff. It was, however, established that he was an assistant to the proctor on record and that he had signed the application on behalf of the latter, and not as a proctor purporting to act independently on his own responsibility. Further, there was evidence of acquiescence on the part of the defendant and of ratification by the plaintiff.

Held, that in the circumstances the irregularity occasioned by the absence of a proxy in favour of the proctor was cured.

NELSON DE SILVA *v.* CASINATHAN 121

Prohibition—

See WRIT OF PROHIBITION.

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Provocation—

See COURT OF CRIMINAL APPEAL DECISIONS (1), (5).

Proxy—

See PROCTOR (2).

Public Servants and Officers—

1. *Public servant—Liability to dismissal at pleasure of Crown—Ceylon (State Council) Order in Council, 1931, Art. 86—Effect of Royal Instructions.*

By Article 86 of the Ceylon (State Council) Order in Council, 1931,

" (1) The appointment, promotion, transfer, dismissal, and disciplinary control of public officers shall be vested in the Governor, subject to any Instructions given under His Majesty's Sign Manual and Signet and, in so far as concerns the Auditor-General, to the provisions of Article 83.

(2) The Governor may, subject to such Instructions and provisions as aforesaid, and with the approval of the Secretary of State, delegate to such public officers having authority in or over Government departments as he shall think fit, subject to such conditions as he may prescribe, the appointment, promotion, transfer, dismissal and disciplinary control of officers who are not in receipt of annual pensionable emoluments exceeding such sum as may be specified in such Instructions. "

Held, that there is nothing in Article 86 that is inconsistent with the condition that is ordinarily implied in the terms of employment of a public servant other than the Auditor-General, that he holds office only during the pleasure of the Crown. Consequently a public servant who is aggrieved by any failure to comply with the procedure for dismissal prescribed by the Royal Instructions must seek his remedy by administrative process and has no remedy by action in a court of law.

M. SANTIAPILLAI *v.* ATTORNEY-GENERAL 83

2. *Public officer—Dismissal by Public Service Commission—Cannot be canvassed by* Certiorari.

Certiorari does not lie against the Public Service Commission in regard to any alleged procedural irregularity in the appointment, transfer or dismissal of a public officer.

WIJESUNDERA *v.* PUBLIC SERVICE COMMISSION 94

3. *Action—Plaintiff described as public officer—Right to sue in personal capacity* 121

See ACTION (2).

4. *Public Servants (Liabilities) Ordinance (Cap. 88)—Sections 2 and 3—Amending Act No. 10 of 1951—Retroactive effect—Interpretation Ordinance (Cap. 2), s. 6 (3) (b).*

The Public Servants (Liabilities) Amendment Act, No. 10 of 1951, does not operate retroactively so as to extend its protection to a public servant in respect of a liability incurred by him prior to March 15, 1951 (the date when the amendment came into force).

Decree was entered in favour of the plaintiff on September 30, 1952, in an action on two promissory notes dated November 19, 1949, and June 30, 1950, respectively. At the time defendant borrowed money on the promissory notes, he was a public servant receiving a monthly salary exceeding Rs. 300. During execution proceedings he pleaded that, inasmuch as the Public Servants (Liabilities) Ordinance, as amended on March 15, 1951, by Act No. 10 of 1951, protected public servants drawing a monthly salary of Rs. 520 or less, he was entitled under section 3 to be discharged from the proceedings.

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Held, that, by virtue of section 6 (3) (*b*) of the Interpretation Ordinance, the amending Act No. 10 of 1951 did not operate retroactively so as to extend to the defendant a statutory protection which he had not enjoyed at the time when his liability was incurred under the promissory notes sued on.

HAI BAI *v.* P. PERERA 442

Punishment—

See SENTENCE.

Quarantine and Prevention of Diseases Ordinance—

Evidence Ordinance—Section 106—" Especially within the knowledge of any person "—Quarantine and Prevention of Diseases Ordinance—Contravention of Regulation 46—Burden of proof.

By section 106 of the Evidence Ordinance,

> " When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Held, that when the section refers to a fact as especially within the knowledge of a party, the term " especially " means " almost exclusively ", if not " altogether exclusively ", within the knowledge of a party.

The charge that was preferred against the accused was under the Quarantine and Prevention of Diseases Ordinance alleging that he did " being permanently or temporarily resident in a building in which was a person affected with a contagious disease, to wit, small pox, fail to inform the proper authority forthwith in contravention of Regulation 46 of the Regulations made under the Ordinance ".

Held, that section 106 of the Evidence Ordinance did not cast on the accused the burden of proving that he had given information to the proper authority until some *prima facie* evidence at least had been first led by the prosecution of the failure on his part to give the information.

The presumption of innocence casts on the prosecution the burden of proving every ingredient of an offence even though negative averments be involved therein.

SANITARY INSPECTOR, MIRIGAMA *v.* THANGAMANI NADAR .. 302

Quia timet action—

1. Thesavalamai—*Wife's separate immovable property—Husband's position in regard to such property*—Quia timet *action—Jurisdiction of Court to enter a declaratory decree—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), ss. 6, 19 (b), 20 (1)—Amending Ordinance No. 58 of 1947.*

A Court has jurisdiction to grant relief in the form of a declaratory decree in *quia timet* proceedings when such a decree would accomplish the ends of precautionary justice for the protection even of future or contingent rights. The Court must, however, be satisfied that the declaratory decree asked for in any particular action relates to a concrete and genuine dispute and would, if passed, serve some real purpose in the event of future litigation between the same parties.

By a deed executed in July 1944, a wife, to whom the *Thesavalamai* applied, purported, during the subsistence of her marriage but without her husband's consent, to convey her separate immovable property. Earlier, in November, 1943, the husband had, in the exercise of his right to manage his wife's property, informally leased her interest to certain parties.

Held, (i) that, under section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance, the conveyance executed by the wife without her husband's consent was void *ab initio*.

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(ii) that although the husband had no proprietary interest in the separate property of his wife, he had other present and contingent interests therein. He was entitled, in the circumstances, to institute action asking for a declaration that the conveyance which his wife had purported to execute was null and void.

C. NAGANATHAR *v.* S. VELAUTHAM 319

2. Quia timet—*Action for declaratory decree—Scope of such action—" Cause of action "—Civil Procedure Code, s. 5.*

An owner of immovable property is entitled to enjoy it without disturbance and without fear of unjustifiable interference from outsiders. If his enjoyment is disturbed by forcible ouster, the remedies of a *rei vindicatio* action or (in appropriate cases) of a possessory action are available to him ; if it is seriously threatened, he may demand in *quia timet* proceedings a declaration of his rights so as to prevent in anticipation the apprehended invasion of his rights of ownership.

Plaintiff, who claimed to be owner of certain immovable property, alleged that the defendants, disputing his claim to be the sole owner, wanted him to pay them the value of their share of the property. He instituted the present action claiming a declaration that he was the sole owner of the property. He admitted that, notwithstanding the dispute as to title, he had continued to possess the property and enjoy its produce exclusively. The trial Judge dismissed the action on the ground that it was premature.

Held, that the plaintiff had a " cause of action " within the meaning of section 5 of the Civil Procedure Code and was, therefore, entitled to maintain the action.

A. G. SELVAM *v.* N. KUDDIPILLAI 426

Quo Warranto—

See WRIT OF QUO WARRANTO.

Receiver—

Civil Procedure Code, s. 671—" Any party "—Appointment of receiver—Powers of Court.

Under section 671 of the Civil Procedure Code a defendant may apply to Court for the appointment of a receiver against a co-defendant.

When a Court makes an order under section 671 it is not confined to the prayer of the applicant. It has jurisdiction to make any order it thinks necessary for the preservation or better custody or management of the property in question.

M. T. VELUPILLAI *v.* C. K. PALANYANDY 158

Receiving stolen property—

1. *Penal Code, s. 394—Receiving stolen property—Several articles in accused's possession—Different owners—Presumption of one offence only*—Autrefois acquit—*Criminal Procedure Code, s. 330.*

Where a person, who is found in possession of several articles belonging to different owners, is tried and acquitted of the offence of receiving stolen property in respect of some of the articles, he cannot be prosecuted again for the same offence in respect of any of the remaining articles. In that event, he is entitled to take the plea of *autrefois acquit* unless there is evidence to show that the articles were received by him on different occasions or that he came into possession of them at different times.

S. KATCHIMOHAMADU *v.* P. K. MOOYAN 112

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2. *Stolen property—Assisting in concealing or disposing of it—Penal Code, s. 396.*

The mere assisting in obtaining the return of stolen property, even if it were done with a view to protecting the original thief, does not fall within the ambit of section 396 of the Penal Code

R. K. LANEROLLE *v.* M. K. J. PERERA 357

Rent Restriction Act—

See LANDLORD AND TENANT.

Res judicata—

Appeal—Dismissed for want of appearance—Effect of such dismissed— Res judicata—*Extension of principle to points decided previously in same suit—Arbitration—Objections to validity of award—Same objection cannot be raised twice—Civil Procedure Code, ss. 687, 692 (1).*

When an appeal is dismissed, there being no appearance for the appellant, the dismissal of the appeal must be regarded as involving a rejection of all the arguments which might have been raised at the hearing of the appeal. The absent party must bear the consequence of his own *laches*.

A decision in a civil suit or other proceeding in regard to any point operates as a bar to a fresh decision on that point in all subsequent stages of that suit or proceeding. In arbitration proceedings, therefore, the requirement in section 692 (1) of the Civil Procedure Code that the parties should be notified of the day on which judgment will be given does not entitle a party to raise on the day fixed for judgment an objection to an award which he had previously raised and was the subject of an adjudication which is binding on him.

NAGALINGAM *v.* LEDCHUMIPILLAI 280

Sale—

Trust—Sale of land by debtor to creditor—Adequate consideration—Parol evidence of agreement by transferee to reconvey the land—Admissibility—Prevention of Frauds Ordinance (Cap. 57). s. 2—Trusts Ordinance (Cap. 72), s. 5 (1) and (3) 529

See TRUSTS (4).

Seduction—

See DELICTS (4).

Self-defence—

See COURT OF CRIMINAL APPEAL DECISIONS (3), (5).

Sentence—

1. *Appeal—Power of Supreme Court to permit conditional release of offenders—Courts Ordinance, s. 37—Criminal Procedure Code, s. 325.*

Although a Magistrate cannot discharge an offender conditionally under section 325 of the Criminal Procedure Code if he proceeds to conviction, the Supreme Court, when it exercises its appellate or revisionary powers, may, without disturbing the order of conviction made by a Magistrate, proceed to order the accused person to be discharged conditionally on his entering into a bond in terms of that section.

ATTORNEY-GENERAL *v.* R. DISSANAYAKE 100

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2. *Co-operative Societies Ordinance (Cap. 107) as amended by Co-operative Societies (Amendment) Act, No. 21 of 1949—Section 50A—Money due to Co-operative Society—Procedure for recovering it—Sentence of imprisonment cannot be imposed on defaulting debtor.*

When the Registrar of Co-operative Societies orders a person to repay money due to a co-operative society, section 50A (2) of the Co-operative Societies Ordinance as amended by the Co-operative Societies (Amendment) Act, which provides machinery for the recovery of the money under section 312 (2) of the Criminal Procedure Code, does not empower a Magistrate to sentence the debtor to a term of imprisonment if he makes default in payment.

S. THAMBIPILLAI *v.* MANMUNAI SOUTH AND ERUVIL CO-OPERATIVE AGRICULTURAL PRODUCTION AND SALES SOCIETY, LTD. .. 284

3. *Civil Procedure Code—Section 326—Scope of jurisdiction of Court thereunder.*

In committing a person under section 326 of the Civil Procedure Code the Court should merely order him to be committed to jail for a specified period. The terms "simple imprisonment" or "rigorous imprisonment" cannot be used. Nor can such person be ordered to enter into a bond to be of good behaviour for any period.

W. S. PETER *v.* W. S. CAROLIS 406

Servitudes—

1. *Servitude—Use of a well—Does it include the use a of the well sweep ?*

A servitude giving right to a "share of the water" in a well does not include the right to the use of the well sweep if no mention of the well sweep is made in the grant.

V. VYTHILINGAM *v.* K. VAIRAMUTTU 185

2. *Servitude*—Emphyteusis—*Proof.*

The servitude of *emphyteusis* is, as a rule, evidenced by a document. The absence, however, of such a document is not an insuperable objection.

G. DON ABRAHAM *v.* C. C. D. SAMARAKKODY 274

3. *Servitude*—Habitatio—*Its precise nature—Grant to a person and "his heirs, executors, administrators and assigns"—Effect of such grant.*

If an owner of immovable property conveys it to A but, in the same instrument, purports to grant to B "the buildings" standing on it (exclusive of any soil rights), the instrument *prima facie* operates under the Roman Dutch law as a grant of the ownership of the land and buildings to A subject only to a personal servitude of *habitatio* in favour of B.

The servitude of *habitatio*, i.e., the right of inhabiting the house of another, is a personal servitude and terminates on the death of the grantee.

Where a servitude of *habitatio* was granted in favour of a husband and wife and "their heirs, executors, administrators and assigns"—

Held, (i) that two different personal servitudes were created, one of which was subsequently acquired by the immediate heirs of the first grantees. The term "heirs" in such a case is restricted to the first generation only, and so long as one of the heirs is alive the servitude is not terminated.

(ii) that the words "executors, administrators and assigns" must, in the context, be regarded as "a notarial flourish".

(iii) that the servitude of *habitatio*, though "personal" in character, nevertheless confers on the *habitator* for the time being a real right and entitles him to bring a *rei vindicatio* action for the recovery of that right even against the true owner of the property.

S. L. SUWARIS *v.* E. D. SAMARAJEEVA 387

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4. *Servitude*—Jus superficiarium—*Acquisition by prescription—Compensation—Basis of assessment.*

Where A. puts up a building at his own expense on the land of B. with B.'s consent and approval, and exclusively enjoys the use of it as a superficiary for a period of ten years without interference by the soil owner B., he acquires, by prescription, the servitude known as the *jus superficiarium*. This right which a person has to a building standing on another's ground is acquired and lost like immovable property. It can be alienated by notarial conveyance or transmitted to the heirs of the superficiary on his death.

The soil owner who takes over the building from the superficiary must, in the absence of an agreement to the contrary, pay him its " present value " (and not merely its original cost if that be less). The same basis of assessment should be adopted where the servitude is extinguished, by consent of parties, at a partition sale.

H. SAMARASEKERA *v.* L. MUNASINGHE 558

Stamps—

1. *Election Petition—Several petitioners—Appointment of agent—Amount of stamp duty payable.*

Two petitioners on a single election petition " jointly and severally " appointed an agent under Rule 9 of the Parliamentary Election Rules. Both of them had a common interest in obtaining a declaration in terms of the prayer that the election of the respondent be declared void.

Held, that the instrument of appointment of agent should be stamped with the duty payable on a single power of attorney and not three powers of attorney.

" Where a power of attorney is granted in one document by several grantors in favour of one person, the question whether the document constitutes one power of attorney or several distinct powers has to be determined by reference to the interest which each grantor has in the matter in respect of which the grant is given, and where such interest is common to all the grantors the position in law would seem to be that the document constitutes a single power of attorney. "

G. G. PONNAMBALAM *v.* S. V. KUNASINGHAM 418

2. *Stamp Ordinance (Cap. 189)—Recovery of duty, penalty, &c.—Procedure —Right of appeal—Sections 41 (1) (b), 50, 90.*

A clerk in the Department of Income Tax, Estate Duty and Stamps made an application to a Magistrate under section 50 of the Stamp Ordinanace for the recovery of certain stamp duty due from the accused. At the foot of the application appeared the words " I authorise this application ", and beneath those words was the signature of the Deputy Commissioner of Stamps. The Deputy Commissioner recited under his signature that he was authorised by the Commissioner of Stamps to act on his behalf in respect of section 50. That authority was filed in the record.

Held, that the clerk was not an officer authorised by the Commissioner of Stamps within the meaning of section 50 of the Stamp Ordinance.

Held further, (i) that no appeal lies from a Magistrate's order made upon an application under section 50 of the Stamp Ordinance.

(ii) that a notice issued under section 41 (1) (*b*) of the Stamp Ordinance without the authority of either the Commissioner of Stamps or an officer duly authorised by him in writing is invalid and of no effect.

P. W. MUNIWEERA *v.* COMMISSIONER OF STAMPS .. 476

Statute of Frauds—

See PREVENTION OF FRAUDS ORDINANCE.

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Statutes, Interpretation of—

See INTERPRETATION.

Stolen property—

See RECEIVING STOLEN PROPERTY.

Thesavalamai—

1. *Thesavalamai—Daughter given dowry after date of marriage—Renunciation of any further rights in parents' estate.*

Under the Thesavalamai a dowried daughter loses her rights to her parents' inheritance even when the dowry is given subsequent to the date of her marriage.

A. T. P. THESIGAR *v.* V. GANESHALINGAM 14

2. *Action instituted by married woman—Subsequent grant of dispensation to sue alone—Date of action* 114

See ACTION.

3. *Thesavalamai—Pre-emption—Sale of land—Omission to give notice to pre-emptor—Justification.*

Plaintiff sought to enforce a right of pre-emption under the *Thesavalamai* by claiming to have a sale of land set aside on the ground that the property had been sold without previous notice to her.

Held, that as plaintiff had no sufficient means to purchase the property at the time it was sold the failure to give her notice of the sale was immaterial.

Velupillai v. Pulendra (1951) 53 N. L. R. 472, followed.

V. RAMALINGAM *v.* MANGALESWARI 133

4. Thesavalamai—*Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), s. 20*—Thediatheddam—*Vesting of title to it—Retrospective effect of amending Ordinance No. 58 of 1947.*

Under section 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance, before it was amended on 3rd July, 1947, by Ordinance No. 58 of 1947, title to half of *thediatheddam* property acquired by a husband vested in his wife immediately upon the acquisition of the property. Such immediate vesting of title in the wife was not inconsistent with the husband's right to sell or mortgage the property.

The amending Ordinance, No. 58 of 1947, does not operate so as to affect title to property which had already vested in a spouse prior to the date of amendment.

KANNAMMAH *v.* T. SANMUGALINGAM 260

5. Thesavalamai—*Pre-emption—Effect of partition decree thereon—Mortgagor's rights as against pre-emptor.*

A co-owner's right of pre-emption under the *Thesavalamai* is extinguished by a decree for partition entered in respect of the common property.

Vyramuttu v. Periathamby (1929) 30 N. L. R. 492, overruled.

A co-owner's right of pre-emption cannot defeat the rights of a *bona fide* mortgagee for value whose interests had been created before the right of pre-emption was asserted in a Court of law.

V. SIVAPRAGASAM *v.* S. VELLAIYAN 298

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6. Thesavalamai—*Wife's separate immovable property—Husband's position in regard to such property*—Quia timet *action—Jurisdiction of Court to enter a declaratory decree—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), ss. 6, 19 (b), 20 (1)—Amending Ordinance No. 58 of 1947.*

A Court has jurisdiction to grant relief in the form of a declaratory decree in *quia timet* proceedings when such a decree would accomplish the ends of precautionary justice for the protection even of future or contingent rights. The Court must, however, be satisfied that the declaratory decree asked for in any particular action relates to a concrete and genuine dispute and would, if passed, serve some real purpose in the event of future litigation between the same parties.

By a deed executed in July 1944, a wife, to whom the *Thesavalamai* applied, purported, during the subsistence of her marriage but without her husband's consent, to convey her separate immovable property. Earlier, in November, 1943, the husband had, in the exercise of his right to manage his wife's property, informally leased her interests to certain parties.

Held, (i) that, under section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance, the conveyance executed by the wife without her husband's consent was void *ab initio*.

(ii) that although the husband had no proprietary interest in the separate property of his wife, he had other present and contingent interests therein. He was entitled, in the circumstances, to institute action asking for a declaration that the conveyance which his wife had purported to execute was null and void.

C. Naganathar *v.* S. Velautham 319

Trusts—

1. *Administration of estates—Property belonging to estate—Prescriptive claim by administrator—Conditions necessary for such claim—Fiduciary relationship of administrator—Trusts Ordinance, s. 111 — Prescription Ordinance, s. 3—Civil Procedure Code, ss. 540, 741.*

An administrator who enters in that capacity upon any property belonging to the estate of a deceased person cannot commence acquiring prescriptive title to that property for himself against the intestate heirs until he has divested himself of his representative character by " completing the administration " within the meaning of section 540 of the Civil Procedure Code.

An administrator in possession of property belonging to the estate owes an equal duty by virtue of his office to all the intestate heirs without discrimination and, so long as that fiduciary relationship subsists, the law will not permit him to say, for purposes of prescription, that he held the property for the benefit only of those to whom he was bound by special ties of kinship or affection.

B. J. H. Bahar *v.* T. K. Burah 1

2. *Contract—Transfer of property—Condition for reconveyance—Provision for damages on refusal to reconvey—Is obligation of transferee alternative ? —Specific performance—Trusts Ordinance, s. 93* 176

See Contracts (2).

3. *Hindu temple—No evidence of express dedication—Charitable trust—Inference of its existence—Relevant factors—Trusts Ordinance (Cap. 72), s. 107.*

In deciding, under section 107 of the Trusts Ordinance, whether or not a temple, even in the absence of an express dedication, should be deemed to be a charitable trust, such matters as the holding of public services at the temple, donations to the temple by members of the public throughout a long period of time and improvements effected to it by them are matters which can properly be taken into consideration.

Sithamparanather Mailvaganam *v.* Kumaraswamy Kurukkal Ramanatha Aiyar 289

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4. *Privy Council—Trust—Sale of land by debtor to creditor—Adequate consideration—Parol evidence of agreement by transferee to reconvey the land—Admissibility—Prevention of Frauds Ordinance (Cap. 57), s. 2—Trusts Ordinance (Cap. 72), s. 5 (1) and (3).*

Although in some cases the provisions of section 2 of the Prevention of Frauds Ordinance have been relaxed on proof of fraud on the ground that the " Statute of Frauds may not be made an instrument of fraud ", this proposition has only a limited application, and it is necessary that Courts should approach with caution the facts and the law on which any case is claimed to be an exception to the general rule that a transaction relating to immovable property is invalid unless the terms of the transaction have been embodied in a notarially attested document.

A. transferred for adequate consideration certain immovable property to B. by Deed No. 3. The property in question had previously been the subject matter of a mortgage decree on which, at the date of the transfer, a balance amount of Rs. 2,000 was payable by A. to B. It was stated in Deed No. 3 that the consideration for the transfer was the balance amount due on the mortgage decree. Satisfaction of the decree was duly certified of record, and, on the face of it, Deed No. 3 was an unqualified transfer for consideration. Immediately after the execution of Deed No. 3, on the same day, B. by Deed No. 4 leased the property to A. for a period of six years.

In a *rei vindicatio* action instituted (after the expiry of the lease) against A. by B.'s successor in title, A. sought to assert by evidence of an informal agreement that the transfer to B. was subject to a condition that B. was to hold the land in trust for A. and reconvey it to A. on payment to B. of a sum of Rs. 2,000 with interest.

Held, that the informal agreement relied on by A. amounted not to a trust but to a contract for the transfer of immovable property and was therefore invalid as it contravened the provisions of section 2 of the Prevention of Frauds Ordinance.

Valliamma Atchi v. Abdul Majeed (1947) 48 N. L. R. 289, distinguished.

S. SAVERIMUTTU *v.* P. THANGAVELAUTHAM 529

Valuation—

1. *Land Acquisition—Valuation* 343

See LAND ACQUISITION (2).

2. *Municipal Councils Ordinance, No. 29 of 1947—Sections 236 (1) and 325 (1)—Annual value of premises—Principles applicable in assessing annual value* 361

See LOCAL AUTHORITIES (2).

3. *Motor Car—Accident—Vehicle damaged beyond repair—Basis of valuation* 467

See DELICTS (6).

Vendor and Purchaser—

See SALE.

Wages Boards Ordinance—

Wages Boards Ordinance, No. 27 of 1941—Section 44—Prosecution for dismissal of worker—Implied condition that dismissal should be wrongful.

An employer cannot be prosecuted under section 44 (1) of the Wages Boards Ordinance for dismissing a worker for any of the reasons set out in that section if the dismissal was at the same time otherwise lawful and

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can be justified on the grounds, for instance, of due payment of wages in lieu of notice or insubordination or irregularity of attendance and absence from work without lawful excuse.

G. B. MIDDLETON *v.* A. G. MANUEL 262

Wills—

1. *Will—Loss of original document—Presumption of destruction by testator—Protocol—Not a duplicate—Prevention of Frauds Ordinance, s. 6—Evidence Ordinance, s. 114.*

If a will is shown to have been in the testator's possession, and is not forthcoming at his death, it is presumed to have been destroyed by him *animo revocandi*. The presumption is applicable even where the missing document is a joint will.

The protocol preserved by the attesting Notary under the provisions of the Notaries Ordinance cannot be regarded as an original document capable as such of being propounded.

RALIYA UMMA *v.* MOHAMED 385

2. *Estate Duty—Hindu undivided family—Death of "co-parcenary member"—Devolution of his interests in the joint property—Wills Ordinance (Cap. 49), s. 7* 481

See ESTATE DUTY.

Writ of Certiorari

Public officer—Dismissal by Public Service Commission—Cannot be canvassed by Certiorari.

Certiorari does not lie against the Public Service Commission in regard to any alleged procedural irregularity in the appointment, transfer or dismissal of a public officer.

WIJESUNDERA *v.* PUBLIC SERVICE COMMISSION 94

Writ of Mandamus—

1. Mandamus—*Alternative remedy available—Circumstances when writ would nevertheless lie—Local Government Service Ordinance, No. 43 of 1945, s. 51 (a)—Pension payable thereunder—Remedy for collecting it from local authority.*

Mandamus would lie where an alternative remedy by way of ordinary action would not be convenient or effective.

A writ of *Mandamus* is available to the Local Government Service Commission in order to compel a local authority to pay money due to it under section 51 (*a*) of the Local Government Service Ordinance in respect of a pension granted to a retired member of the Local Government Service. The obligation imposed on the local authority in such a case is in the nature of a public duty and can be enforced by way of *Mandamus* because an ordinary action would not be a convenient or effective remedy.

LOCAL GOVERNMENT SERVICE COMMISSION *v.* URBAN COUNCIL, PANADURE 429

2. *Excise Ordinance—Local option poll—Voting area—Procedure for defining its boundaries—Rules 5, 10, 11, 12, 13*—Mandamus ... 469

See EXCISE ORDINANCE (3).

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Writ of Prohibition—

Writ of Prohibition—Land Acquisition Act, No. 9 of 1950—Order for taking immediate possession of a land—Effect of—Claim for compensation—Scope of acquiring officer's inquiry—Sections 4, 5, 9, 10, 16, 36, 37, 41 .. 44

See LAND ACQUISITION (1).

Writ of Quo Warranto—

Quo warranto—Local Authority—Municipal Council—Procedure for election of Mayor—Irregularity—Acquiescence—Estoppel—Municipal Councils Ordinance, No. 29 of 1947, as amended by Local Authorities (Election of Officials) Act, No. 39 of 1951—Section 14 (4)—" Candidate ".

A member of a local authority is estopped from coming forward as a relator to impeach a title conferred by an election in which he has concurred or acquiesced. Where, therefore, in the election of the Mayor of a Municipal Council, the provisions of section 14 (4) of the Municipal Councils Ordinance, No. 29 of 1947, as amended by the Local Authorities (Election of Officials) Act, No. 39 of 1951, which prescribed the procedure, have been infringed, a Councillor who participated in the irregularity is not entitled, by way of an application for a writ of *quo warranto*, to impeach the title of the person who was elected Mayor. In such a case, the Councillor cannot plead ignorance of the law as an excuse.

The word " candidate " in section 14 (4) of the Municipal Councils Ordinance means no more than a Councillor who has consented to his name being proposed and seconded for election.

A. R. M. THASSIM *v.* W. T. WIJEKULASURIYA 59

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THE

NEW LAW REPORTS OF CEYLON

VOLUME LV

1952 *Present:* **Gratiaen J. and Pulle J.**

B. J. H. BAHAR, Appellant, *and* T. K. BURAH *et al.*, Respondents

S. C. 481—D. C. Tangalle, 5,838

Administration of estates—Property belonging to estate—Prescriptive claim by administrator—Conditions necessary for such claim—Fiduciary relationship of administrator—Trusts Ordinance, s. 111—Prescription Ordinance, s. 3—Civil Procedure Code, ss. 540, 741.

An administrator who enters in that capacity upon any property belonging to the estate of a deceased person cannot commence acquiring prescriptive title to that property for himself against the intestate heirs until he has divested himself of his representative character by "completing the administration" within the meaning of section 540 of the Civil Procedure Code.

An administrator in possession of property belonging to the estate owes an equal duty by virtue of his office to all the intestate heirs without discrimination, and, so long as that fiduciary relationship subsists, the law will not permit him to say, for purposes of prescription, that he held the property for the benefit only of those to whom he was bound by special ties of kinship or affection.

APPEAL from a judgment of the District Court, Tangalle.

H. V. Perera, Q.C., with *J. M. Jayamanne* and *J. N. David*, for the plaintiff appellant.

N. E. Weerasooria, Q.C., with *C. V. Ranawake*, for the defendants respondents.

Cur. adv. vult.

August 7, 1952. GRATIAEN J.—

The facts which arise for consideration on this appeal are beyond dispute. A young married woman named Dhane Bahar died intestate on October 18, 1926, leaving her husband (who is the first defendant) and two infant children (who are the second and third defendants). The learned trial Judge has held that according to the Muslim law which is applicable the deceased's parents—namely, the late Mr. B. J. H. Bahar and his widow the fourth defendant—also became her intestate heirs in addition to the first, second and third defendants. No arguments

2——J. N. B 27971—1,590 (7/53)

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were addressed to us in this Court to suggest that this conclusion was wrong, and I must assume for the purpose of this appeal that it is correct.

The late Mr. Bahar himself died intestate shortly afterwards, leaving as his heirs his widow (the fourth defendant) and his three sons (the plaintiff and the fifth and sixth defendants) who thereby succeeded to his interests in his daughter's estate.

Dhane Bahar's estate was duly admitted to administration in Testamentary action No. 995 of the District Court of Tangalle, and letters of administration were issued without opposition to the first defendant by virtue of his undoubted preferential claim to the appointment as the deceased's widower. The property which is the subject matter of this action, comprising 10 allotments of land slightly exceeding 78 acres in the aggregate, were correctly inventorised as forming part of the deceased's estate, and the learned District Judge has held that, subject to the issue of prescription, the plaintiff and the first to the sixth defendants inclusively were, in accordance with the Muslim law, co-owners of the property in the proportions set out in paragraph 11 of the plaint. The plaintiff instituted this action on September 17, 1948, for the partition of the property on this basis. The 7th to the 26th defendants intervened in the action to obtain recognition of their admitted interests as planters who had improved the property.

The learned District Judge, after hearing the evidence, dismissed the plaintiff's action on the ground that the title of the plaintiff and of the fourth, fifth and sixth defendants had been defeated by prescription before the action commenced. He held that the first defendant who, as administrator and as an heir of his deceased wife's estate, had consistently and unequivocally refused to acknowledge her parents' claims to heirship, had since about the year 1930 possessed the property on behalf of himself and his minor children on the footing that the property belonged exclusively to them. The learned Judge accordingly decided that, by virtue of the provisions of section 3 of the Prescription Ordinance, the original rights of the first, second and third defendants as intestate heirs of Dhane Bahar became enlarged into full joint ownership at the expense of the other co-owners.

I have examined the evidence led at the trial, and I am satisfied that if the nature of the possession of the property by the first defendant which commenced in 1930 could properly be regarded as that of a co-owner *simpliciter* or as that of a mere agent, there was probably sufficient proof of an "overt ouster" to support the plea of prescription in accordance with the rules laid down by the Privy Council in *Corea v. Appuhamy*[1] and in *Nagenda Marikar v. Mohammad*[2] respectively. But the issue in the present case is complicated by the circumstance that the first defendant had in the first instance not entered into possession of the property *in his own right* but by virtue of the statutory powers and duties vested in and imposed on him *as the duly appointed administrator of his wife's estate*. Admittedly his *de facto* possession of the property has continued without interruption ever since, but at no stage did he divest himself of the representative character in which he first entered

[1] (*1912*) *15 N. L. R. 65.* [2] (*1903*) *7 N. L. R. 91.*

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upon the land in such a manner as the law would consider sufficient to relieve him of the fiduciary obligations attaching to his office. In that state of things, he cannot, in my opinion, be heard to say that there arose some point of time when his possession *qua* administrator became converted into possession *ut dominus* to the detriment of the other co-heirs to whom he stood in a position of fiduciary relationship.

The first defendant did not choose to take any of the elementary precautions available to him under the Civil Procedure Code. He could very well have taken steps to protect his own interests in the property which had come into his hands as administrator so as to prevent any conflict between his subsequent possession with the responsibilities attaching to his office. Having first settled, out of the assets available to him, the claims of the creditors which had been brought to his notice, he should have applied for and obtained a judicial settlement of his accounts and then proceeded, after an *inter partes* adjudication as to the disputed claims of his parents-in-law to heirship, to obtain a decree under section 741 for the distribution of the estate (including the property in dispute) among the heirs. In that event, he could properly have claimed that, as far as the property in dispute was concerned, he had " completed the administration " within the meaning of section 540 and thus become free to possess his share of the property and that of his minor children in his own right and on their behalf.

So much for what the first defendant might have done. Let us now consider what he did in fact. On September 23, 1929, he purported to file what is popularly but somewhat loosely described as a " final account " whereby he " charged " himself *qua* administrator with a sum of Rs. 28,435 (including the inventorised value of the property in dispute) and " credited " himself with various expenses and disbursements amounting to Rs. 2,806·46 " leaving "—to quote his signed statement P13—" *a balance of Rs. 25,629 to be distributed to those entitled thereto* ". He did not however obtain a judicial settlement of his account or even have it " passed " by the Court in accordance with some less formal procedure which, though not sanctioned by the Code, seems to have gained increasing popularity with executors and administrators in recent years. Nor did he invite the Court to inquire into the disputed claims to heirship which had been notified to him and to the Court by Mr. Bahar and the fourth defendant. Instead, he continued, exactly as he had previously done, to possess the property in dispute until the present action commenced. Can he now be heard to say that he had long since divested himself of the character of an administrator by reason of what the learned District Judge seems to regard as a " *de facto* distribution " of the property to himself on his own account and on account of his two children ? As I understand the law relating to the duties and responsibilities attaching to the office of an administrator, I think that, for the reasons which I shall now proceed to set out, this is an entirely untenable position.

We must not permit ourselves, by a process of loose reasoning or by an imperfect appreciation of the *ratio decidendi* of certain earlier rulings of this Court, to assume that an administrator who has failed to obtain

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a judicial settlement of his accounts or to secure a decree for payment and distribution of assets under section 740, can too readily be regarded as having divested himself of his fiduciary status. The question whether an estate has been "closed" or not, and whether the assets in the administrator's hands have been distributed or not, is always a question of fact to be determined with special reference to the particular circumstances of a given case. For instance, when a creditor sues an administrator for the recovery of a debt alleged to have been incurred by the deceased, the administrator can successfully plead *plene administravit* if he proves that he has already parted with the assets in his hands by the settlement of the claims of other creditors or by their distribution among the heirs. *Arunasalem Chetty v. Mootatamby*[1]; *Ramalingam v. Kalasipillai*[2] and *Ramalingampillai v. Adguwad*[3]. In such cases the maintainability of the plea of *plene administravit* is not necessarily concluded by the administrator's failure to protect himself by obtaining a formal judicial settlement of his accounts. Indeed, the real issue arising upon the plea is whether or not the administrator still retains assets out of which the creditor's claim can be met wholly or in part. *Suppramanian Chetty v. Palainappa Chetty*[4]. If, to take a situation of a different kind, an administrator who claims to have closed the administration *de facto* is subsequently confronted with a claim by an heir for judicial settlement or for some other form of relief in the testamentary proceedings, different considerations would apply according to the circumstances of the particular case. *In re Baban*[5], *Valipillai v. Ponnasamy*[6] and *Perera v. Simno*[7]. Mr. Weerasuriya argued that, in the testamentary action with which we are now concerned, the time for an adjudication as to Mr. and Mrs. Bahar's claims to heirship had long since passed. I do not agree. These claims had been duly notified to the Court and to the administrator, and the time for their adjudication would only have arisen if and when a decree for distribution among the heirs was applied for. Indeed, a consideration of that issue at an earlier stage, being immaterial to the question as to who should be appointed to administer the estate, would have been premature. *Fernando v. Fernando*[8]. The contrary opinion expressed by Lyall Grant J. in *Nonohamy v. Punchiappuhamy*[9] is at best an *obiter dictum*, for in that case Dalton J. and Lyall Grant J. were merely considering the validity of a belated claim to heirship by a person who was, in fact, held not to be an heir.

The present action is not concerned with the claim of a creditor or an heir in respect of assets belonging to the estate which have ceased to remain in the administrator's hands. On the contrary, it is concerned with the claims of certain intestate heirs to a declaration as to their title to the deceased's property which had in the first instance come into the hands of the administrator *qua* administrator, and which still remained in his possession and under his control when the action commenced. His defence is that he had defeated that title by his adverse prescriptive

[1] (*1906*) *2 A. C. R. 90.*
[2] (*1942*) *43 N. L. R. 425.*
[3] (*1942*) *43 N. L. R. 361.*
[4] (*1904*) *3 Bal. 57.*
[5] (*1891*) *1 C. L. Rep. 41.*
[6] (*1913*) *17 N. L. R. 126.*
[7] (*1915*) *4 Bal. N. C. 77.*
[8] (*1914*) *18 N. L. R. 24.*
[9] (*1929*) *31 N. L. R. 220.*

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enjoyment, partly in his own right and partly as the natural guardian of his minor children, commencing at some date after he had taken possession of it *qua* administrator.

In the circumstances of this case, the first defendant's plea of prescription under section 3 of the Prescription Ordinance is incompatible with the character in which he commenced to occupy the land. In the words of Bowen L.J. in *Soar v. Ashwell* [1] " his possession of the property was . . . . coloured from the first by the trust and confidence in virtue of which he first received it. He never can discharge himself except by restoring (to the beneficiaries, *i.e.*, the true intestate heirs of Dhane Bahar's estate) the property which he has never had otherwise than upon this confidence ". The duration of the status of an administrator in relation to property which he has taken over in the exercise of his powers of administration *and which he still retains in his hands* is indicated in the provisions of section 540 of the Civil Procedure Code. His office, and the fiduciary relationship attaching to it, endures until the death of the administrator or the completion of the administration, whichever first occurs. In the present case, neither of those events having taken place, the first defendant's possession of the property in dispute has not yet ceased to be possession *qua* administrator. To my mind, this circumstance effectively disposes of the plea of prescription.

Even before the Trusts Ordinance was enacted, this Court has declared that, as in England, prescription does not run between trustee and *cestui que trust*. *Antho Pulle v. Christoffel Pulle* [2]. In that case Clarence J. pointed out that " the Court would watch jealously any proposal to divest the trustee of his fiduciary character ". In *Fernando v. Fonseka* [3] Middleton J. and Grenier J. decided that " so long as a fiduciary relationship continues, a trustee cannot set up a plea of prescription in bar of a claim by the *cestui que trust* ", and Middleton J. said, " the fact that the trustee had not strictly carried out his obligations under the trust deed . . . . cannot be relied upon by him as proving a termination of his fiduciary position ". Both these decisions were concerned with *express trusts*, and the same ruling was authoritatively laid down by the Privy Council in *Arunasalam Chetty v. Somasunderam Chetty* [4] where the Judicial Committee, after referring to *Soar v. Ashwell* [1], indicated that the position would be different in the case of a bare constructive or resulting trust which could not in the special circumstances be equated to an express trust.

After the Trusts Ordinance came into operation in 1918, Bertram C.J. held *inter alia* in *Supramaniam v. Erampakurukal* [5] that section 111 (5) was intended to incorporate in statutory form the English rule laid down in *Soar v. Ashwell* [1]. Section 111 expressly declares that a claim to recover " trust property " shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance, and section 111 (5) extends the operation of this rule to constructive trusts *in cases where such trusts are " treated as express trusts by the law of England "*.

[1] (*1893*) *2 Q. B. 390 at p. 397.*
[2] (*1889*) *1 N. L. R. 120.*
[3] (*1912*) *15 N. L. R. 398.*
[4] (*1920*) *21 N. L. R. 389.*
[5] (*1922*) *23 N. L. R. 417.*

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Whenever an administrator enters in that capacity upon property belonging to the deceased's estate, the law requires him " to act in a fiduciary relation in regard to it, and a Court of Equity will impose upon him all the liabilities of an express trustee and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge himself by accounting to the beneficiaries for all such property *without regard to lapse of time* ". *Per* Lord Esher M.R. in *Soar v. Ashwell* [1] at page 394. Similarly, Giffard L.J. said in *Burdick v. Garrick* [2], " where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time ". These words, if I may say so with respect, perfectly describe the responsibilities imposed on the first defendant in relation to the property in dispute, and I would therefore reject his claim to have acquired prescriptive title, either for himself or for his children, to the shares which it was his duty to distribute among the other heirs. The long established rule that " possession is never considered adverse if it can be referred to a lawful title " applies with special and, indeed, with uncompromising force where a trust is impressed upon such possession.

I had suggested to Mr. H. V. Perera in the course of the argument that some distinction might perhaps be drawn between the case of the first defendant (whose plea of prescription on his own account must necessarily fail) and that of his minor children (who could not themselves be regarded as affected by any obligation in the nature of an express trust). Mr. Perera conceded, and I am satisfied, that the position of the second and third defendants would have been different if they had effectively received from the administrator certain shares in excess of what they were legally entitled to as heirs, for in that event they could thereafter have relied on their possession *ut dominus* of those additional shares for purposes of prescription. But in the present case, as Mr. Perera points out, it was the administrator and the administrator alone who purported by his own acts of possession to enlarge the rights of himself and his children to the detriment of the others. I agree that this circumstance makes all the difference to the issue of prescription. An administrator in posses sion of property belonging to the estate owes an equal duty by virtue of his office to all the intestate heirs without discrimination, and, so long as that fiduciary relationship subsists, the law will not permit him to say that he held the property for the benefit only of those to whom he was bound by special ties of kinship or affection.

I would set aside the judgment under appeal, and hold that the pleas of prescription set up on behalf of the first, second and third defendants cannot be sustained. The property in dispute belongs to the parties in undivided shares as set out in paragraph 11 of the plaint, and the record must go back to the lower Court with a direction that a decree for partition should be entered allotting shares to the plaintiff and to the first, second, third, fourth, fifth and sixth defendants on this basis, subject to the interests and claims of the seventh to the twenty-sixth defendants upon which the learned District Judge, after the inquiry, must proceed to adjudicate according to law.

[1] *(1893) 2 Q. B. 390 at p. 397.* [2] *L. R. 5 Ch. 233.*

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The first defendant must pay to the plaintiff the costs of this appeal and of the contest in the Court below. All other costs will be in the discretion of the learned District Judge.

PULLE J.—I agree.

Judgment set aside.

1953 *Present :* **Gratiaen J. and Gunasekara J.**

J. G. DIAS, Appellant, *and* S. A. G. SILVA, Respondent

S. C. 87—D. C. Colombo, 20,506

Collision—Negligence—Award of damages—Circumstances when court of appeal will interfere.

In a running down case, a court of appeal will interfere with an award of damages if it is satisfied that the trial judge has misapprehended the facts and has for that reason made a wholly erroneous estimate of the damage suffered.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the plaintiff appellant.

H. V. Perera, Q.C., with *H. Wanigatunga* and *M. Ramalingam*, for the defendant respondent.

Cur. adv. vult.

April 28, 1953. GUNASEKARA J.—

The plaintiff, a clerk in the employ of Messrs. Hoare and Co., 37 years of age, was injured in a collision, brought about by the defendant's negligence, between a motor bicycle ridden by him and one ridden by the defendant. He sued the latter in the District Court of Colombo to recover a sum of Rs. 15,000 as damages for the personal injuries so caused, and was awarded a sum of Rs. 3,500. He appeals on the ground that this sum is inadequate. In his assessment the learned judge allowed a sum of Rs. 1,900 as expenses incurred by the plaintiff in consequence of the injuries. The question raised in the appeal is the adequacy of the award of Rs. 1,600 under other heads of damage.

The accident occurred on the 28th May, 1948, and the plaintiff was treated for the resulting injuries at the General Hospital in Colombo from that day till the 11th June, 1948, as an in-patient, and for some time after that as an out-patient. Three metatarsal bones of the right foot were fractured. One of these injuries was a compound, comminuted

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fracture of the first metatarsal bone, and the head of that bone as well as other fragments of bone had to be removed, and the plaintiff had to have his foot and leg in plaster for about six weeks. In the opinion of the senior surgeon of the hospital, Mr. Jayasuriya, who had him under his care and treatment, he " would have been in great pain on account of this injury ". After an examination on the 18th September, 1948, four months after the accident, the surgeon stated in a report :

> " At present there is slight shortening of the right big toe and inability to put his weight on inner side of foot. There is also slight oedema of the foot and ankle. At present he is not fit to perform any duties that require standing or walking any distance."

On the 4th February, 1949, eight months after the accident, he said in a further report :

> " At present there is shortening of the right big toe with slight dorsiflexion of toe. There is a drop of the anterior arch of the foot and neuralgic pain in sole of foot on standing or walking. He has to put his weight on outer part of foot. This disability is permanent and the loss of earning capacity may be assessed at ten per cent."

These statements he supported by evidence given at the trial, on the 30th August, 1950. Explaining the nature of the permanent disablement, he said:

> " It means that the plaintiff has no longer the free and complete use of his right foot. He would not be able to walk freely, easily and well. He cannot rest on any part of that foot, except the outer portion, when he stands. That will be a great strain on his foot. He would probably feel a certain amount of strain when he stands for a long period. I doubt plaintiff's being able to walk long distances normally. He will have a definite limp in his walk. I doubt very much plaintiff's being able to play cricket. It is very doubtful that he will be able to play football freely. If the plaintiff is prepared to suffer a certain amount of discomfort and pain probably he would be able to play tennis but not as he was able to do before the accident. If he plays cricket he will not be able to run about. There are some people who dance even with an artificial limb. Certainly he would not be able to dance gracefully. "

He added that the plaintiff would be able to ride a motor bicycle, but with some discomfort, and that he could " walk a quarter mile with a certain amount of discomfort and pain ". An anterior arch support " would to a certain extent reduce the deficiency of the foot ", but he would still be " a disabled man ".

The effect of this evidence is stated by the learned District Judge in these terms :

> " According to Dr. Jayasuriya plaintiff cannot use his foot very well now. He could walk but he cannot walk so rapidly now as before. Dr. Jayasuriya further says that the plaintiff may be able to take to

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games like football and tennis or cricket or dance but he will not be able to do so with the same freedom and without strain as he had done before the accident. There is undoubtedly an impairment of plaintiff's physical powers. Of course Dr. Jayasuriya says that the man may be able to ride a motor cycle but the movement of his foot will certainly not be as free as before the accident."

He goes on to say that the plaintiff " undoubtedly must have undergone great pain of mind and body " and that he " certainly is entitled to some damages ".

With all respect to the learned judge, it seems to me that he has quite misapprehended the effect of the surgeon's evidence. The understatement in " plaintiff cannot use his foot very well now " is not a mere figure of speech, as is shown by the rest of the passage, but is apparently intended to be taken literally as a statement of the gist of Mr. Jayasuriya's evidence. The learned judge has failed to appreciate that the effect of the injury on the plaintiff's ability to walk is that he can never again walk like a normal man, and that he can walk only a short distance at a time and that too with discomfort and pain : it is not merely that he " could walk but he cannot walk so rapidly as before ". The surgeon does not undertake to say that the plaintiff may be able to play football and cricket. On the contrary, he is strongly inclined to the view that he cannot. " I doubt very much, " he says, " plaintiff's being able to play cricket ", and he goes on to say that " if he plays cricket he will not be able to run about " : that is to say, I suppose, that if he does venture to play at all he must not hope to bowl or field, and he must cultivate a one-footed stance for batting. What he says about football is that it is " very doubtful that he will be able to play football freely ". It is clear from this witness's evidence that any football that the plaintiff may play he must play without running or kicking. What he says about the likelihood of the plaintiff's being able to dance is that " certainly he would not be able to dance gracefully ". Seeing that such an assurance should be enough to keep any normal person off the dance floor, the evidence surely means that the plaintiff is prevented for the rest of his life from dancing.

It appears from the plaintiff's evidence that before this accident he was a man of robust constitution who led a very active life. He says that he was in the Army during the war, from 1940 to 1945, as a bombardier in the Ceylon Garrison Artillery. Up to the time of the accident, according to him, he used to play cricket and football and he used to dance. " Now ", he says, " I cannot do any of these things. I cannot even walk for exercise." He was not cross-examined or contradicted on these points. It is evident that as a result of this accident he has been compelled, while yet in the prime of life, to give up for good his main recreations ; and that from being a healthy man who delighted in physical exercise and whose recreations included dancing, he has become a cripple who must for the rest of his life be content to walk with an ungainly limp and with discomfort and pain. He is clearly entitled to very substantial damages, and not merely to " some damages ",

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for the injury sustained in his physical capacity of enjoying life, and for the bodily pain and discomfort that he has suffered and must yet suffer for the rest of his days.

The plaintiff's earnings by way of salary and allowances amounted to Rs. 145 a month at the time of the accident and Rs. 180 at the time of the trial in August 1950. He stated, however, that owing to his injury, on the one hand he has been deprived of an opportunity that he used to have of earning an additional sum of Rs. 20 or Rs. 30 a month for going on board ships and supervising the clearing of goods, while on the other it now costs him more to travel to work because he cannot ride a motor bicycle. He also said that he must now abandon an idea that he had of rejoining the Army where he could get better pay. It does not appear that the learned judge has included reduction of earnings among the heads of damage, and I do not think that it can be said that any substantial loss under that head has been proved.

The principles that should govern a court of appeal in deciding whether it should interfere with a finding as to the question of damages by a judge sitting without a jury have been stated by Lord Wright in *Davies v. Powell Duffryn Associated Collieries, Ltd.*[1] in these terms :

> " In effect the court before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered."

In the present case I am satisfied that the learned district judge has misapprehended the facts and has for that reason made a wholly erroneous estimate of the damage suffered. The award of Rs. 1,600 appears to be based upon an entirely erroneous view that in the matter of physical activity the plaintiff can continue to do much the same sort of thing as before the accident though not with quite the same ease or speed or skill or grace. I appreciate that in cases such as this, when damages have to be awarded for bodily pain and suffering and loss of amenities, a court can do no more than try " to compensate a person in the plight of the plaintiff by awarding what might fairly be described as notional or theoretical compensation to take the place of that which is not possible, viz., actual compensation ". (per Romer L.J. in *Rushton v. National Coal Board* [2]). I do not doubt, however, that a more correct view of the result of the injury would have led the learned district judge to make a proportionate assessment of the " theoretical compensation " and to estimate it at many times the sum of Rs. 1,600. In my opinion it would be reasonable to award a sum of Rs. 10,000 under this head, so that the total would be Rs. 11,900, inclusive of the sum awarded by the learned judge, as special damage. I would, therefore, order that the damages be increased from Rs. 3,500 to Rs. 11,900. The plaintiff must have his costs in both courts.

GRATIAEN J.—I agree.

Appeal allowed.

[1] [*1942*] *A. C. 601 at 617.* [2] [*1953*] *1 All E. R. 314 at 317.*

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1952 *Present :* **Rose C.J.**

PUNCHIAPPUHAMY, Appellant, *and* WIMALAWATHIE, Respondent

S. C. 112—M. C. Kurunegala, 56,227

Maintenance Ordinance (Cap. 76)—Section 6—Illegitimate child—Equivocal acts—Corroborative value thereof.

Where, in an application for the maintenance of an illegitimate child, the acts relied upon as corroboration are equivocal, it is for the Magistrate to decide whether in the circumstances of the particular case such equivocal acts in fact corroborate the applicant's story.

APPEAL from a judgment of the Magistrate's Court, Kurunegala.

H. V. Perera, Q.C., with *Austin Jayasuriya*, for the defendant appellant.

Vernon Wijetunge, for the applicant respondent.

Cur. adv. vult.

July 23, 1952. ROSE C.J.—

This appeal turns upon the question as to whether there was sufficient corroboration in law of the applicant's story that the appellant was the father of her child.

There is no doubt that the Magistrate disbelieved the story of the appellant *in toto*, but as Counsel for the appellant in my opinion rightly contends the question of corroboration should be considered apart from this fact.

The circumstances upon which the applicant relies as corroboration are as follows, (1) the payment of Rs. 125 by the appellant to a Tamil woman as a fee for her looking after the respondent's baby after the respondent's departure from hospital, (2) the fact that the respondent was taken by the appellant to Kegalle Hospital which was not the nearest hospital to the respondent's house, or *prima facie* the most appropriate for a confinement, (3) the prompt action taken by the appellant to rid himself of the baby as soon as the mother and the child were discharged from the hospital, (4) the absence of any attempt to trace the true father, (5) the fact that the appellant permitted the respondent to remain in his house, where his wife was already in residence, for an indefinite period.

The appellant seeks to discount these factors by reciting that the respondent was, in effect, an adopted daughter of his of some years standing ; that she had originally come to the house when she was of tender years ; that he had grown fond of her as indeed had his wife ; and that his actions which might in normal circumstances be interpreted as

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equivocal were due to charitable feelings towards the respondent as a result of their long association and her dependency upon him.

Having regard to this background, learned Counsel for the appellant contends that the items of corroboration relied upon by the respondent in the present case should be subject to the comment of Lord Justice Atkin in *Thomas v. Jones* [1], where he says, " It may be that light may be thrown upon something which in itself is innocent and irrelevant, by some other circumstance which though not itself conclusive may yet be illuminating. But, apart from that, it appears to me impossible, when dealing with the question of corroboration, that the accumulation of pieces of evidence, each of which by itself is not admissible as corroborative evidence, can amount in the whole to corroboration. *Ex nihilo nihil fit.* "

It is to be noted in this passage that Lord Justice Atkin is referring to pieces of evidence each of which by itself is not admissible as corroborative evidence. That seems to me to be a very different thing from pieces of evidence which may or may not be regarded as corroboration by the Magistrate, according to the surrounding circumstances. In regard to these matters it must be borne in mind that the person to be satisfied as to whether or not a particular fact is corroborative of the petitioner's story is the Magistrate, and that in deciding whether or not he should be satisfied he should apply the test which is conveniently stated by Lord Justice Atkin at page 45 in the same case as follows, " It (corroborative evidence) must be evidence which tends to prove that the man is the father of the applicant's child. In other words it must be evidence implicating the man, evidence which makes it more probable than not that the respondent is the father of the child ". In the light of that test and bearing in mind that it is the satisfaction of the learned Magistrate which is in question, I consider that it is not open to me to hold that the items of alleged corroboration which I have enumerated now cannot properly be considered to be corroborative evidence. It is no doubt true that each individual item— and indeed all the items taken collectively—is capable of explanation. But in my opinion it is for the learned Magistrate to decide whether the explanation offered is acceptable to him. If it is not, then in my view an appellant cannot be heard to complain that his explanation should or must have been accepted. Where in cases of this kind the acts relied upon as corroboration are equivocal—as I am prepared to concede is the case in the present matter—I consider that it is for the Magistrate to decide whether in the circumstances of the particular matter, including of course any explanation offered by the applicant, such equivocal acts in fact corroborate the applicant's story. I am certainly not prepared to hold that the items of corroboration relied upon for the present respondent are incapable of being regarded as corroborative evidence.

For these reasons the appeal must be dismissed with costs.

Appeal dismissed.

[1] *(1921) 1 K. B. 22 at p. 48.*

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1953 *Present :* **Gratiaen J.**

L. WIMALAWATHIE KUMARIHAMY, Appellant, *and*
W. S. B. IMBULDENIYA, Respondent

S. C. 785—M. C. Kandy, 30,754

Kandyan Marriage Ordinance (Cap. 96)—Dissolution of marriage—Maintenance—Temporary re-union—Effect on future maintenance—Section 20 (6).

Where a wife obtains an order of maintenance against her husband on dissolution of their marriage under the provisions of the Kandyan Marriage Ordinance, a temporary re-union between them subsequently with a view to re-marriage does not amount to a waiver of her right to future maintenance if the contemplated re-marriage does not take place.

APPEAL from an order of the Magistrate's Court, Kandy.

N. D. M. Samarakoon, with *C. Manohara*, for the applicant appellant.

H. V. Perera, Q.C., with *Ivor Misso*, for the respondent.

Cur. adv. vult.

February 23, 1953. GRATIAEN J.—

The appellant was until March 29th, 1949, the respondent's wife. On that date their marriage was dissolved by an order made by the Provincial Registrar, Kandy, under the provisions of the Kandyan Marriage Ordinance. This order also directed that the respondent should pay to the appellant a sum of Rs. 75 per mensem for her future maintenance.

On 21st January, 1952, the appellant applied to the Magistrate's Court of Kandy for the enforcement, in terms of sec. 20 (6) of the Ordinance, of the order for maintenance in her favour in respect of the months of October, November and December, 1951. A distress warrant was duly issued by the learned Magistrate, but the respondent intervened and moved that the warrant be recalled on the ground that the appellant had, on 21st June, 1951, entered into an agreement with him whereby she waived her right to claim future maintenance under the Registrar's order.

After inquiry the learned Magistrate upheld the respondent's objection and recalled the warrant.

The parties gave conflicting versions as to the circumstances in which the appellant had signed a document dated 21st June, 1951, whereby, *inter alia*, she " promised not to proceed with the case or claim any money from (the respondent) ". It is common ground that in or about February, 1951, after their marriage had been dissolved, the parties lived together for approximately three months as if they were still man and wife. The learned Magistrate has found as a fact that the applicant signed the

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document in question " with full knowledge of the contents thereof and . . . with a view to remarrying the respondent ". He held that in the circumstances she had " waived all her rights to enforce the order of the Registrar ".

The learned Magistrate seems to have taken the view that when the parties resumed their association with one another they genuinely contemplated remarriage, and that this contemplated regularisation of their renewed relationship formed the basis of the appellant's so-called waiver of her right to future maintenance. It is unnecessary for me to consider Mr. Samarakoon's submission that such a waiver would be contrary to public policy, because it is clear that in the present case the entire foundation for the alleged agreement disappeared when the respondent decided (as he was undoubtedly entitled to do) not to remarry his former wife. It is impossible to interpret the document in question as an unconditional promise by the woman to release the respondent from his obligation even if the contemplated remarriage did not take place.

Mr. H. V. Perera submitted that, upon the admitted facts, the respondent is entitled to a cancellation of the Registrar's order for maintenance because the appellant has been " habitually cohabiting with a man "—namely, the respondent himself—within the meaning of the proviso to sec. 20 (6) of the Ordinance. Suffice it to say that no application for cancellation on this ground has yet been made to the Registrar. If the question were to arise for consideration in proper proceedings, I should certainly hesitate, without further consideration of the true meaning of the proviso, to hold that a man's temporary irregular cohabitation with his former wife would relieve him for all time of his obligation to maintain her in terms of an order previously pronounced against him. In any event, I am not disposed to pronounce an *obiter dictum* on the point.

I set aside the order made by the learned Magistrate and direct that the appellant's application dated 21st January, 1952, be allowed. The appellant is entitled to her costs both here and in the Court below.

Appeal allowed.

1952 *Present:* **Gratiaen J. and Choksy A.J.**

A. T. P. THESIGAR, Appellant, *and* V. GANESHALINGAM *et al.*, Respondents

S. C. 451—D. C. Jaffna, 3,968

Thesavalamai—Daughter given dowry after date of marriage—Renunciation of any further rights in parents' estate.

Under the Thesavalamai a dowried daughter loses her rights to her parents' inheritance even when the dowry is given subsequent to the date of her marriage.

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APPEAL from a judgment of the District Court, Jaffna.

H. W. Tambiah, with *C. Renganathan* and *A. Vythilingam*, for the plaintiff appellant.

C. Chellappah, with *A. Nagendra*, for the defendants respondents.

Cur. adv. vult.

February 20, 1952. GRATIAEN J.—

Mr. Thambiah raised only one point for our consideration in this appeal. The question had not been precisely formulated as an issue in the Court below, but the material facts are sufficiently clear to enable us to give a decision on the point.

It is common ground that " under the Tesawalamai a dowried daughter loses her rights to her parents' inheritance ". *Eliyan v. Vellan et al.*[1] Mr. Thambiah contends, however, that the effect of a more recent ruling of this Court in *Kandappu v. Veeragathy* [2] is to limit the operation of this principle to cases where the dowry has been received either before or at the time of the daughter's marriage.

I find myself unable to give the ruling in *Kandappu v. Veeragathy* (supra) such a narrow interpretation. In that case a Tesawalamai daughter who was not proved to have received any dowry from her parents on the occasion of her marriage subsequently obtained by way of gift a certain property from her father, brother and uncle. The Court decided, *upon the facts of that particular case*, that the deed of gift could not be construed as a *doty ola* so as to disinherit the donee.

As I understand the true principle, the question whether a subsequent gift by a parent to a married daughter operates and was intended to operate as a donation *simpliciter* or as a postponed fulfilment of the earlier obligation to provide her with a dowry is essentially a question of fact.

In the present case the deed of gift to the married daughter expressly purports to be " *by way of dowry* in consideration of her having married the said (Vaithialingam) as I desired ". Moreover, the gift was accepted on the face of the document in the following terms, " I the said . . . . dowry grantee with the consent of my husband . . . *do hereby accept this dowry with full satisfaction and gratitude* ".

Persons subject to the Tesawalamai are no doubt well aware of the legal incidence of the granting and acceptance of dower—and these questions cannot therefore be determined with reference only to the point of time when the gift was made. Adopting the language of Lyall Grant J. in

[1] (*1929*) *31 N. L. R. 356.* [2] (*1951*) *53 N. L. R. 119.*

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Eliyavan v. Velan (supra), I would say that in this instance " the acceptance of the gift *as dowry* necessarily implies the renunciation of any further rights to a share in the parents' estate ". For this reason I would reject Mr. Thambiah's submission and dismiss the appeal with costs.

CHOKSY A.J.—I agree.

Appeal dismissed.

1953 *Present :* **Swan J.**

S. J. V. CHELVANAYAKAM, Petitioner, *and* S. NATESAN, Respondent

Election Petition No. 17 of 1952, Kankesanthurai

Election Petition—Summons to produce a document—Date when witness should appear—Civil Procedure Code, ss. 121, 126, 127—Ceylon (Parliamentary Elections) Order in Council, 1946, s. 78 (3).

The power conferred by section 78 (3) of the Parliamentary Elections Order in Council on an Election Judge to summon or compel the attendance of witnesses is not greater than that of a District Judge. Section 121 of the Civil Procedure Code is, therefore, applicable. Accordingly, an Election Judge has no power to summon a witness to produce a document on any date other than at the hearing of the election petition.

APPLICATION for summons on a witness to produce a document in Election Petition No. 17 of 1952, Kankesanthurai.

C. S. Barr Kumarakulasinghe, with *A. Vythilingam* and *Ananda de Silva*, for the petitioner.

H. V. Perera, Q.C., with *G. E. Chitty*, *C. C. Rasaratnam* and *N. Nadarasa*, for the respondent.

E. B. Wikramanayake, Q.C., with *S. Sharvananda*, for the proprietors and manager of Thirumakal Press.

Cur. adv. vult.

March 31, 1953. SWAN J.—

This inquiry was occasioned as the result of an application made by the petitioner's proctor on February 16, 1953, for summons on the Proprietors and Manager of the Thirumakal Press, Chunnakam, to produce certain documents said to be now in their hands on a date to be fixed by Court.

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Mr. Wikramanayake appearing for the parties on whom summons was asked said that he had cause to show. I intimated to him that he would be heard after I decided (1) whether I had the power to summon a witness to produce a document at any date other than at the hearing, and (2) if I had the power or the discretion to do so whether I should grant the present application or not.

Mr. Perera's contention in brief is that I have no power or authority whatsoever to issue summons on a witness to appear or to produce a document except at the trial.

Section 78 (3) of the Order in Council sets out that

> " For the purpose of summoning or compelling the attendance of witnesses at the trial of an election petition, the election judge shall have the same power, jurisdiction, and authority as are possessed and exercised by the judge of a District Court in the trial of a civil action and witnesses shall be sworn in the same manner, as near as circumstances will admit, as in the trial of such an action, and shall be subject to the same penalties for the giving of false evidence. "

Mr. Kumarakulasinghe for the petitioner supports the application on two grounds, namely,

(1) that my being appointed election judge to dispose of this petition does not in any way detract from my powers as a judge of the Supreme Court and that one of my inherent powers in that capacity is to make any order that would ensure or promote the ends of justice. It is, he submits, in the interests of justice that an order such as the one asked for should be made.

(2) that even if my " power, jurisdiction and authority " in this behalf were no more than those of a District Judge I should still grant the application because a District Judge could do so under the provisions of the Civil Procedure Code.

I shall first deal with the so called inherent powers of the Supreme Court. What exactly those powers are nobody can say with any degree of exactitude ; but that the judges of the Supreme Court have from time to time stated that they were doing a certain thing in the exercise of the inherent powers invested in them there can be no doubt. Section 78 (3) of the Order in Council, however, does not seem to suggest that an election judge has in the matter of summoning or compelling the attendance of witnesses at the trial of an election petition any greater power, jurisdiction or authority than possessed and exercised by a District Judge in the trial of a civil action.

I shall now examine the second submission put forward on behalf of the petitioner, namely, that a District Judge can summon a witness to attend or to produce a document on any date other than a date of trial. This contention is based upon Section 121 of the Civil Procedure Code which provides :—

> " The parties may, after the summons has been delivered for service on the defendant, obtain, on application to the court or to such officer as the court appoints in that behalf, before the day fixed for the hearing,

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summonses to persons whose attendance is required either to give evidence or to produce documents. A list of witnesses shall be filed in court by the party applying for such summonses, after notice to the other side, and within such time before the trial as the Judge shall consider reasonable, or at any time before the trial with the consent of the other side appearing on the face of such list."

Mr. Kumarakulasinghe contends that inasmuch as this section does not specify the date on which the witness is required to attend or to produce documents a District Judge has a discretion in the matter—he can summon a witness to attend or produce a document at any time his presence is necessary or desirable. I do not think that one can reasonably draw this inference from the omission to state in Section 121 to give evidence or to produce documents *at the hearing*. Apparently the compilers of the Civil Procedure Code thought it unnecessary to use the words "at the hearing". To me it seems inconceivable that a witness could be required to give evidence or to produce a document except at the hearing. Nor is there anything in Sections 126 and 127 or in the form of summons (Schedule II, No. 16) that would warrant the construction which Mr. Kumarakulasinghe seeks to put on Section 121.

Undoubtedly a District Judge has power to make order for discovery, inspection, production, impounding and return of documents. There is special provision in the Civil Procedure Code for that purpose. But those sections only apply to parties to the action. There is also provision for evidence to be taken *de bene esse* and in the course of such evidence a witness may produce or be required to produce a document in his possession. But none of these sections has any bearing on the present application.

I hold that under Section 78 (3) of the Order in Council I have no power, jurisdiction or authority to allow the petitioner's application.

I will now consider the application in the light of the provision made in Section 86 (2) of the Order in Council which sets out that

"If any matter of procedure or practice on an election petition shall arise which is not provided for by this Order or by such rules or by any Act of Parliament, the procedure or practice followed in England on the same matter shall, so far as it is not inconsistent with this Order or any such rules or Act of Parliament and is suitable for application to the Island, be followed and shall have effect."

No case or instance has been cited of a similar application having been made and allowed in England.

The application is refused. The petitioner will pay the respondent the costs of this inquiry but those costs will not be taxed nor will execution be levied in respect thereof till the final determination of the election trial.

Application refused.

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1953

Present : **H. A. de Silva J.**

PRINCIPAL COLLECTOR OF CUSTOMS, Appellant, *and*
T. M. A. WIJESEKERA, Respondent

S. C. 235—M. C. Colombo, 19,430

Customs Ordinance (Cap. 185)—Offence of failure to pay export duty—Ingredient of fraud necessary—Sections 59, 64, 128, 139A.

In a prosecution under section 128 of the Customs Ordinance for non-payment of export duty in respect of goods liable to such duty there must be proof that the accused was guilty of fraud or fraudulent evasion.

APPEAL from a judgment of the Magistrate's Court, Colombo.

T. S. Fernando, Acting Solicitor-General, with *A. Mahendrarajah*, Crown Counsel, for the complainant appellant.

S. Nadesan, with *E. B. Vannithamby*, for the accused respondent.

Cur. adv. vult.

January 19, 1953. H. A. DE SILVA J.—

This is an appeal taken with the sanction of the Attorney-General against an order of acquittal of the accused entered in this case by the Magistrate of Colombo. The complainant in this case is the Principal Collector of Customs and the accused is T. M. A. Wijesekera of Wijesekera & Co., Ltd. The accused-respondent was charged on three counts in the charge, to wit, that the accused on or about the 23rd day of November, 1948, at Colombo within the jurisdiction of this court :

(i) was knowingly concerned in the fraudulent evasion of the customs duties payable on the exportation of 1630·458 tons of naked unrefined coconut oil,

(ii) did export 1630·458 tons of naked unrefined coconut oil, being goods liable to duty the duties for which had not been paid or secured,

(iii) did deal with 1630·458 tons of naked unrefined coconut oil being goods liable to duties of customs with intent to defraud the revenue of such duties, and that the accused abovenamed became liable to forfeit treble the value of the said goods, to wit, a sum of Rs. 6,600,000 and that he was thereby by virtue of section 139A of the Customs Ordinance (Cap. 185) as amended by Ordinance No. 3 of 1939 guilty of offences punishable under the said section 139A of the Customs Ordinance as so amended.

After trial the learned Magistrate found the accused not guilty and acquitted him. It is from that order that this appeal is taken. The learned Magistrate has in his judgment set out the facts clearly. It is hardly necessary for me to detail the facts upon which he has come to his finding except to refer to such of the evidence as having a particular bearing on the points that the parties are at issue.

I may say at the outset that on most questions of fact there does not seem to be much variance between the prosecution and the defence.

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As a matter of fact the accused called no oral evidence but relied on certain documents produced by him.

In the year 1942 the Ceylon Government entered into a contract with the United Kingdom Ministry of Food to supply to it the entire exportable surplus of copra and coconut oil. The Commissioner of Commodity Purchase who was also an Assistant Controller of Exports (coconut products) was the sole exporter of copra and coconut oil.

In August, 1948, the contract with the United Kingdom Ministry of Food was revised. The revision of the contract resulted in only a fraction of the Ceylon produced copra and coconut oil being exported to the United Kingdom by the Commissioner of Commodity Purchase and private parties were permitted on a licence to export copra and coconut oil to any destination subject to the condition that the best price was obtained for the commodity exported. In accordance with that policy adopted by the Government, Messrs. Wijesekera & Co., Ltd., of which the accused was the Managing Director at the material dates took steps to export two consignments of coconut oil to the United States of America. The first consignment was 280 tons which was shipped on the steamer ss. *Mount Mansfield*. In respect of this shipment Wijesekera & Co. paid the export duty before the oil was put on board, but no entry was made or passed under the provisions of section 59 of the Customs Ordinance.

The present charge has arisen on a consignment of 1630·458 tons of naked unrefined coconut oil shipped on the vessel ss. *Iris Bank*. The value of the coconut oil purchased from the Commissioner of Commodity Purchase and shipped on the vessel ss. *Mount Mansfield* was duly paid for and customs duty due thereon either paid or secured as required by the Customs Ordinance. The 1630·458 tons of coconut oil put on board the *Iris Bank* by Messrs. Wijesekera & Co., Ltd., were purchased by them from the Commissioner of Commodity Purchase and duly paid for and the necessary licence was obtained therefor. The local agents of the *Iris Bank*, Messrs. Aitken Spence & Co., Ltd., were paid by Wijesekera & Co. a sum of Rs. 112,533·54 being the freight for the said shipment of coconut oil. Wijesekera & Co., Ltd., purchased the oil from the Commissioner of Commodity Purchase, which oil was stored in the Government Bulk Oil Installation (the oil tanks at Summer Hill). This quantity of oil was upon an allocation made by the Commissioner of Commodity Purchase supplied by Messrs. J. H. Vavasseur & Co., Ltd., and the British Ceylon Corporation. Those two companies were probably in charge of the Oil Installation. No bill of entry was passed in respect of this shipment in terms of section 59 of the Customs Ordinance. Mr. Turpie, the Lloyds' surveyor, issued his certificate giving the total quantity of oil pumped into the hold of the *Iris Bank*, the quantity being 1630·458. The actual quantity pumped could not have been ascertained until the certificate of the Lloyds' surveyor was received. A sample of the oil pumped into the hold of this vesssel was taken and duly analysed by the Government Analyst. All payments due to the various parties concerned except the customs duty was duly paid by Messrs. Wijesekera & Co., Ltd. The learned Magistrate by a careful and full analysis of the evidence has found that all matters relating to the shipment was attended to by the accused as Managing Director of the company. The learned Magistrate

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has found that the accused as Director of the company was aware that it had to pay the export duty on the coconut oil to the Customs notwithstanding the letter P 42. This letter P 42 looms large in this case. Now this was a letter sent by Commissioner of Commodity Purchase to the Principal Collector of Customs and it runs as follows: "I have the honour to inform you that the undernoted shipments of coconut oil will be effected on the above vessel on my behalf. Please issue shipping order direct/permit shipment. Inspect shipment.

Messrs. J. H. Vavasseur & Co., Ltd. ..	807 tons
Messrs. British Ceylon Corporation., Ltd. ..	807 tons
	1,614 tons ".

This was in a cyclostyled form which was in use when the Commissioner of Commodity Purchase was the sole exporter of coconut oil. The words which were inapplicable in this instance, such as, "on my behalf", "issue shipping orders direct", and "inspect shipment" would seem to have been not deleted before Biddell signed that letter P42 on behalf of the Commissioner of Commodity Purchase. This letter is dated the 23rd November, 1948. Under the same date letter P41 was sent by the Assistant Controller of Export (coconut products) to the Principal Collector of Customs in which it was stated that the shipper was Wijesekera & Co., Ltd. It does not seem quite clear how the Customs officials could have made any mistake about the identity of the shipper in the face of this letter P 41. The Commissioner of Commodity Purchase would appear to have been allowed the concession of delivery to the Principal Collector of Customs the usual bill of entry on a date subsequent to the export of goods.

Section 59 of the Customs Ordinance after making provision for the delivery of a bill of entry, &c., and for payment of duties and dues in respect of goods mentioned in such entry goes on to say "if such goods are removed from the warehouse or other place appointed for shipment before such entry is passed and all duties paid, and in the absence of any explanation to the satisfaction of the Collector the same shall be forfeited, and such forfeiture shall include all other goods which shall be entered or packed with them as well as the packages in which they are contained".

The resulting position is clearly this. Wijesekera & Co., Ltd., of which the accused is the Managing Director who on behalf of the company attended to all the arrangements regarding the export of this quantity of oil has failed to enter the bill of entry and pay the necessary duty and dues to the Collector of Customs. There is no gainsaying the fact that the accused was well aware and was concerned in the export of this consignment of oil. The knowledge and intention of its servants have to be imputed to the body corporate. Vide *Director of Public Prosecutions v. Kent and Sussex Contractors, Ltd., and another*[1]. Viscount Caldecote L.C.J. has thus observed in the above case: "Bearing that in mind, I

[1] *(1944) 1 A. E. R. 119.*

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think that a great deal of the argument of counsel for respondents as to whether you can impute to a Co. the knowledge or intent which the agent of the company has, falls to the ground, because although the directors or general manager of a company are its agents, a company is incapable of acting or speaking or even thinking except in so far as its secretary or general manager or directors and so on have either spoken, acted or thought". In *R. v. I. C. R. Haulage, Ltd.* [1], the Court of Criminal Appeal held, " whether the criminal act of an agent including his state of mind, intention, knowledge or belief is the act of the company employing him depends on the nature of the charge, the relative position of the officer or agent to the company and other relevant facts and circumstances. In the present case the fraud of Robarts was fraud of the company ". See also *Moore v. L. Bresler, Ltd.* [2]. It has been held that error in regard to the date of the commission of an offence is never material unless time is of the essence of the offence. *Vide* judgment of Soertsz J. [3]

The section of the Customs Ordinance which needs careful consideration is section 128 in order to determine the charges that are laid against the accused. Section 128 runs thus, " every person who shall be concerned in exporting or taking out of the Island or attempting to export or take out of the Island any prohibited goods or any goods the exportation of which is restricted contrary to such prohibition or restriction, whether the same be laden for shipment or not and every person who shall export or attempt to export any goods liable to duty the duties for which have not been paid or secured, or in any manner deal with any goods liable to duties of customs with intent to defraud the revenue of such duties or any part thereof, or who shall be knowingly concerned in any fraudulent evasion or attempt at evasion of such duties or any part thereof, shall in each and every of the foregoing cases forfeit either treble the value of the goods, or be liable to a penalty of one thousand rupees at the election of the Collector of Customs ".

It is obvious that in order to bring a person within the ambit of section 128, fraud is a necessary element to be proved. There must be proof that the person concerned was guilty of fraud. In fact learned Acting Solicitor-General very properly conceded that at least on counts one and three of the charge the element of fraud on the part of the accused had to be proved by the prosecution, such as deception, &c. His argument is that under section 59 of the Customs Ordinance a non-payment of all duties and dues involves a forfeiture of the goods. A reading of section 59 shows that the forfeiture is in respect of the goods for which the bill of entry was not delivered and for which the duties and dues were not paid and also other goods which shall be entered or packed with them as well as the packages in which they are contained, in the absence of any explanation to the satisfaction of the Collector. In this instance the Collector purported to act under section 128 of the Customs Ordinance when he forfeited treble the value of the goods which amount he reduced to two million rupees in the exercise of his discretion as authorised by the Ordinance. The grand total of the export duty and dues in respect of the

[1] *(1944) 1 A. E. R. 691.* [2] *(1944) 2 A. E. R. 515.*
[3] *S. C. 826—M. C. Avissawella.*

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shipment came to Rs. 529,888·25, *vide* evidence of Mr. Thambiah, Collector of Customs.

The learned Magistrate has, in his judgment, analysed section 128 and has come to the conclusion that in order to bring home the guilt to the accused it was incumbent upon the prosecution to prove an element of fraud on the part of the accused in respect of all three counts of the charge. The contention of the learned Acting Solicitor-General is that on count 2 no question of fraud arises. The mere non-payment of export duty and dues results in the accused being liable criminally.

The argument of the learned counsel for the accused-respondent is that section 128 falls within part 12 of the Customs Ordinance and that said part has the following heading, "Smuggling", "Seizures" " and prosecutions generally". He argues that section 128 of the Customs Ordinance is intended to prevent smuggling, &c., of goods. He supports the finding of the learned Magistrate that the prosecution must prove fraud and fraudulent intent to sustain the charge under every one of the three counts. In my opinion that contention must succeed. The first count in the charge runs as follows :—" was knowingly concerned in the fraudulent evasion of the customs duties . . . ". The wording of the 1st count follows that in the last part of section 128. The wording of the 3rd count follows more or less words in the middle part of the said section—" in any manner deal with any goods liable to duties of customs with intent to defraud the revenue . . . . ". The wording of count 2 follows that used in the earlier part of section 128 which runs thus—" every person who exports or attempts to export any goods liable to duty the duties for which have not been paid secured . . . . ". Section 128 read as a whole clearly indicates that the following words " with intent to defraud the revenue of such duties or any part thereof" qualified both the sentences " every person who shall export any goods liable to duty, the duties for which have not been paid or secured " and " in any manner deal with any goods liable to duties of customs ". Now has the prosecution successfully brought home to the accused the charge of fraud? That leads one to the question, What is fraud? I have been referred to the case of *Robert Abraham Cohen* [1]. Lord Chief Justice who delivered the judgment of the Court in this case made the following observation—" another ingredient of the offence is the intent to defraud, and of this the jury should be reminded. But as in all cases where an intent to defraud is a necessary ingredient, the intent must usually be inferred from the surrounding circumstances. If a jury is satisfied that the defendant knew, which, of course, would include a case in which he had wilfully shut his eyes to the obvious, that the goods were uncustomed, and he had them in his possession for use or sale, it would follow, in the absence of any other circumstance, that he intended to defraud the revenue. That there may be cases where the circumstances would negative the intent is possible, but ordinarily speaking it is indeed difficult to see how it could be found that he did not intend to defraud the revenue, certainly in such a case as the present, where the appellant not only had the goods in his possession for the purpose of selling but told lies to the officers when he challenged on the matter ".

[1] *(1950) 34 Criminal Appeal Reports 239 at p. 245.*

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The principle enunciated in this case was followed by the Queen's Bench Division Divisional Court in *Sayce v. Coupe* [1]. In *Cohen's case* the Lord Chief Justice had used the words " had wilfully shut his eyes to the obvious ". This leads one to a consideration of the meaning of the words " wilfully " as understood in a penal statute. In *Chellappa v. Commissioner of Income Tax* [2] Basnayake J. has considered the meaning of the words " wilfully with intent to evade tax in a criminal prosecution ". Basnayake J. thus observed, " in order to understand the scope of the section it is necessary to ascertain the meaning of the words ' wilfully ' ' evade '. The dictionary gives the following meaning of the word ' wilfully ' : ' with free exercise of the will; voluntarily; in law, designedly, as opposed to inadvertently; in a penal statute, purposely, with evil intent' ". The meaning of the word " evade " is given by Basnayake J. in the same case; he observes thus, " the word ' evade ' has several meanings according to the dictionary. It means: ' to avoid by artifice; elude or get away by craft or force; save oneself from, as an impending evil; to escape; get away '. It is also used in the sense of ' defeat the intention of the law while complying with its letter ' ".

The facts in this case do not show that the accused or the company for whom he was acting resorted to any misrepresentation or under-hand contrivance or any other unlawful act deliberately or purposely with the evil intent of depriving the revenue of duties and dues.

The accused has in a lawful manner by taking lawful steps secured the loading of the oil on the vessel *Iris Bank*. The Collector of Customs undoubtedly was aware of the fact that his oil was put on board the vessel. Apart from the documentary and oral evidence led in this case which undoubtedly shows that the Customs authorities were aware of the loading of this oil on this vessel by the accused or his company in compliance with the requirements of section 64, the Master of the ship would have undoubtedly apprised the Customs authorities that the quantity of oil was on board this vessel when it left the Port of Colombo bound for its destination. One is not considering the civil aspect of the claim made by the Collector of Customs which will be duly considered in the District Court of Colombo. The result of a criminal prosecution does not in any manner affect the rights of parties in the civil suit. The negligence or otherwise on the part of officials of the Customs is beside the point in this case. All that we are concerned in this case is whether the accused's action in omitting to pay the customs duty and other Port dues in the circumstances deposed to amounts to an act done with intent to defraud the revenue or duties or any part thereof or any fraudulent evasion or attempt at evasion of such duties or any part thereof.

The consideration of the evidence taken as a whole and the circumstances in this case do not, in my opinion, prove the element of fraud or fraudulent evasion as contemplated in section 128 in respect of the duty and dues of this shipment of oil.

I am, therefore, of opinion that the learned Magistrate has arrived at a correct verdict and the appeal is dismissed.

Appeal dismissed.

[1] *44 Weekly Notes 473.* [2] *(1951) 52 N. L. R. 416.*

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[PRIVY COUNCIL]

1953 *Present:* **Lord Porter, Lord Tucker, Lord Asquith of Bishopstone, The Chief Justice of Canada (Mr. T. Rinfret) and Mr. L. M. D. de Silva**

THE CEYLON MOTOR INSURANCE ASSOCIATION LTD., Appellant, *and* P. P. THAMBUGALA, Respondent

PRIVY COUNCIL APPEAL NO. 33 OF 1952

S. C. 57—D. C. Colombo, 22,799

Motor Car Ordinance, No. 45 of 1938—Insurance against third party risks—Notice of action to insurer by third party—Particulars which should be furnished—Sections 133, 134, 136, 137.

Where notice of action was given to an insurer setting out the name and address of the proposed plaintiff, the name of the owner and number of the car which caused injuries, the date of the accident and the sum which was being claimed from the owner as damages—

Held, that there was a sufficient notice of action under section 134 of the Motor Car Ordinance.

APPEAL from a judgment of the Supreme Court reported in (*1952*) *53 N. L. R. 511.*

Geoffrey Cross, Q.C., with *R. K. Handoo*, for the defendant appellant.

Stephen Chapman, for the plaintiff respondent.

Cur. adv. vult.

July 21, 1953. [*Delivered by* MR. L. M. D. DE SILVA.]—

This is an appeal from a decree of the Supreme Court of Ceylon dated the 20th May, 1952, dismissing an appeal from a decree of the District Court of Colombo dated the 24th October, 1950, in favour of the respondent.

The respondent had been injured by a car belonging to one K. Stephen Perera who had been duly insured against third party risks with the appellant company in accordance with the requirements of the Motor Car Ordinance No. 45 of 1938. In an earlier action in the District Court of Colombo the respondent obtained a decree against Perera for Rs. 10,000 with legal interest and costs. The amount due on that decree on the 5th April, 1950, was Rs. 13,881·22. The respondent, availing himself of the provisions of sec. 133 of the Motor Car Ordinance, brought this action on that day for the recovery of the said sum from the appellant company.

2——J. N. B 27972–1,590 (7/53)

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Section 133 of the Ordinance says :—

" 133—(1) If after a certificate of insurance has been issued under section 128 (4) to the persons by whom a policy has been effected, a decree in respect of any such liability as is required by section 128 (1) (*b*) to be recovered by a policy of insurance (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of sections 134 to 137, pay to the persons entitled to the benefit of the decree any sum payable thereunder in respect of that liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum under such decree.

(2) In this section, 'liability covered by the terms of the policy' means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy. "

Section 134 is to the following effect :—

" 134. No sum shall be payable by an insurer under the provisions of section 133—

(*a*) in respect of any decree, unless before or within seven days after the commencement of the action in which the decree was entered, notice of the action had been given to the insurer by a party to the action ; or

(*b*) in respect of any decree, so long as execution thereof is stayed pending appeal. "

It will be seen that no sum is payable by the appellant unless the respondent has given the notice of action provided for by section 134. The only ground upon which the appellant seeks to avoid liability is that notice under the section has not been duly given. Sections 136 and 137 of the Ordinance enable the insurer to obtain a declaration of non-liability on certain grounds in legal proceedings instituted for the purpose provided that they are instituted before the expiration of a specified period and provided, in certain circumstances, notice is given of the proceedings by the insurer to the injured party within a prescribed time. Their Lordships are of the opinion that one of the objects, but not the sole object, of the notice of action required by section 134 is to enable the insurer to institute within time proceedings under sections 136 and 137.

On the 21st May, 1946, the respondent's proctors wrote the following letter to the appellant company:—

" *Re* Car No. X 4851.

" We are instructed by Mr. P. P. Thambugala of . . . to file an action for the recovery of Rs. 15,000 against Mr. Kodituwakku Aratchige Stephen Perera of . . . being damage sustained by our

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client as a result of the above car knocking down our client on the 1st September, 1945, by reason of the negligent and careless driving on the part of his driver.

"We are given to understand that the above car has been insured with your Company.

"Our client is still under treatment and unless our client's claim is settled on or before the 31st instant, we are instructed to file action against the owner of the car."

The only question for decision by their Lordships is whether this letter is a sufficient notice of action under section 134 of the Ordinance.

The Motor Car Ordinance No. 45 of 1938 follows to a large extent the English legislation on the subject of the liability of an insurer to a third party. Section 134 (*a*) bears a resemblance to section 10 (2) (*a*) of the English Road Traffic Act which reads :—

"No sum shall be payable by an insurer under the foregoing provisions of this section in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which judgment was given, the insurer had notice of the bringing of the proceedings."

In the case of *Weldrich v. Essex & Suffolk Equitable Insurance Society Ltd.*,[1] the question arose as to whether a notice in the following terms was a sufficient compliance with its provisions :—

"We understand your Society has repudiated liability, and we shall be grateful to have your confirmation thereof in writing, because you will appreciate we will have to take proceedings as against Mohamed, and also against the owner of the other vehicle and at the same time give notice to the Motor Insurers Bureau of your repudiation of liability."

It was held that it was not. But their Lordships are of the view that this decision does not help the appellant. They agree with the learned District Judge "that the main purport of this letter was to obtain confirmation of an alleged repudiation of liability" and that it was not possible to say that it was a proper notice complying with the provisions of section 10 (2) (*a*) of the Road Traffic Act. Other English cases have been cited to their Lordships which are distinguishable from the present case on a variety of grounds. They involve the interpretation of the word "notice of action" in various statutes and their Lordships would observe about them generally that the interpretation of such a set of words in a particular statute does not always greatly assist the interpretation of the same words in another. Their Lordships think it necessary to refer to only one of these cases, namely *Lewis v. Smith* [2]. In that case an act of

[1] *83 Lloyd's List Law Reports, page 91.* [2] *Holts Nisi Prius C. P. 1815, page 27.*

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Parliament incorporating the West India Dock Company was under consideration. It enacted that no action could be brought against the Company unless fourteen days' notice of such action had been given. A letter upon which the plaintiff in that case relied as giving notice bears in some respects a resemblance to the letter under consideration by their Lordships but was thought by Gibbs C.J. to leave " it open to conjecture what legal proceedings were in contemplation and against whom they were to be brought." He held that the letter under consideration in that case was not a proper notice of action under the Act. The letter sent by the respondent to the appellant however in the present case says that the proceedings were to be for the recovery of damages and that they were to be brought against Perera the owner of the car. It was consequently free from the defects referred to by Gibbs C.J.

It has been argued that the letter which is challenged should have contained the name of the Court in which it was proposed to file action. An action cannot be specified with precision without reference to its number and to the name of the Court in which it is filed. It is to be noticed however that section 134 contemplates the possibility of giving notice before the action is filed. In that event no number could be given. It follows that the section contemplates something containing less than a precise specification of the action. The name of the Court could no doubt be given but their Lordships do not think that the section requires that this should be done. It does not do so expressly and there is nothing from which it can be said to do so by implication. Then it was said that the words " unless our client's claim is settled " reduced the notice to one which was conditional and insufficient for the purposes of section 134. Their Lordships agree with the view of the Supreme Court that the words must be taken to mean " settled by you ", namely by the appellant company. But they are of opinion that even if they meant " settled by you or someone else " the words do not vitiate the notice. A notice of action without such words necessarily carries with it the implication that action will be filed only if the claim is not settled, and the addition of the express statement does not alter its meaning or its effect.

The notice which has been sent in this case sets out the name and address of the proposed plaintiff, the name of the owner and number of the car which caused injuries, the date of the accident and the sum which was being claimed from the owner as damages. Their Lordships are of the opinion that these elements taken together constitute a sufficient notice of action under section 134 and that there are no elements in it which in any way reduce it to something less than a sufficient notice.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant will pay the respondent's costs of appeal.

Appeal dismissed.

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1952 *Present :* **Gratiaen J. and Pulle J.**

S. D. A. GUNAWARDENE, Appellant, *and* M. MUTTIAH PILLAI *et al.*, Respondents

S. C. 73—D. C. Colombo, 804/X

Arbitration without intervention of Court—Ex-parte *award—Delay in making award—Validity of award—Effect of regular action filed subsequent to reference to arbitration—Bribery of arbitrator—Strict proof necessary—Arbitration Ordinance (Cap. 83), s. 7—Civil Procedure Code, ss. 386, 691 (2), 696.*

Where parties, without the intervention of Court, voluntarily submitted a matter in dispute to arbitration and the award of the arbitrator was attacked on various grounds under section 691 (2) of the Civil Procedure Code—

Held, (i) that the neglect or refusal of one of the parties to avail himself of the opportunity of presenting his case before the arbitrator did not invalidate the subsequent proceedings or disqualify the arbitrator from exercising his jurisdiction in the matter.

(ii) that delay of the arbitrator in making his award did not constitute "misconduct" on his part because no time limit was fixed in the terms of reference and the delay was largely occasioned by the dilatory and non-co-operative methods employed by the party objecting to the award.

(iii) that a reference to arbitration is not superseded by the institution of a subsequent regular action, unless the subject matter of the arbitration and the subject matter of the regular action are clearly identical.

(iv) that there was nothing improper in an arbitrator accepting from one of the parties, before the date of the award, the fee payable by that party in accordance with an agreement which bound all the parties.

(v) that the Court should not, by reference to affidavits alone, have arrived at a finding of corruption or misconduct against the arbitrator. Before reaching such a conclusion on a disputed allegation the Court should have framed issues of fact and heard oral evidence.

APPEAL from a judgment of the District Court, Colombo.

S. J. V. Chelvanayakam, Q.C., with *P. Colin-Thome*, for the petitioner appellant.

C. Thiagalingam, Q.C., with *C. Manohara*, for the respondents.

Cur. adv. vult.

July 17, 1952. GRATIAEN J.—

It is convenient at the outset to recite the facts regarding which there is no controversy between the parties. The petitioner and the respondents had formed a business association in or about November, 1947, whereby they carried on a commercial venture under the name, style and firm of "Muttiah Pillai and Co." with a view to their mutual financial advantage. On 4th September, 1948, they agreed to terminate their so-called "partnership" and to submit the disputes which had arisen in connection therewith to the arbitration of a man named

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H. E. Weerasinghe. The reference to arbitration, which also incorporates the agreement to dissolve the business, is contained in a document dated 4th September 1948 signed by all the parties in the following terms :—

"We the undersigned M. Muthiah Pillai, K. Selvadurai and S. D. A. Gunawardene being the three partners of the firm of Muthiah Pillai & Company do hereby give notice to each other of the final dissolution of the abovenamed Partnership and agree unconditionally to the following procedure with regard to the winding up of the said firm :—

(1) That we appoint Mr. Hettiaratchige Edwin Weerasinghe to act as the sole arbitrator in the dissolution of the partnership.

(2) That we submit to him within the fortnight hereof all account or accounts connected with the affairs of the said Muthiah Pillai & Co.

(3) That our individual statements of accounts showing the actual capital outlay contributed and the profits or payments received from the funds of the firm to be submitted to the said Mr. Weerasinghe before the specified date.

(4) That we agree unconditionally to accept as full and final settlement any settlement or decision that the said Mr. Weerasinghe as Arbitrator may bring about after due examination of the accounts and affairs of the said firm."

The arbitrator duly entered upon his reference but, for reasons which are controversial, he did not make his award for some considerable time. Pending that event the 1st respondent, who had admittedly used the business name of "Muttiah Pillai and Co." in his own right prior to November 1947, sued the petitioner in action No. 22215 in the District Court of Colombo on 12th December, 1949, praying (*a*) for a permanent injunction restraining the petitioner from carrying on the business name in connection with his own business, (*b*) for damages in the sum of Rs. 25,000 for the fraudulent and improper use of the business name since 4th September, 1948. The plaint in that action alleges that the parties had, during the period November, 1947, to 4th September, 1948, carried on business in partnership under the name of Muttiah Pillai & Co. on the express understanding *inter alia* that after the dissolution of the partnership, which had in fact occurred on 4th September, 1948, the goodwill of the business name was to revert exclusively to the 1st respondent. It was on this ground that the 1st respondent formulated his cause of action based on the alleged improper use by the petitioner of the business name after the partnership had been dissolved. The plaint also recites that the arbitrator had been appointed "to take an account of the partnership assets and liabilities and divide the nett assets (excluding, of course, in the 1st respondent's submission, the business name of Muttiah Pillai & Co.) among the partners". It also attributed the delay in bringing the arbitration proceedings to a conclusion up to that date to "the failure of the (petitioner) to attend the sittings fixed by the arbitrator".

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On 23rd March, 1950, the arbitrator addressed a letter to the respondents in the following terms :—

"Dear Sirs,

MUTTIAH PILLAI & CO.

With reference to the above arbitration it is regretted that so far you have neither given me any assistance nor furnished the accounts and statements which you undertook to do in spite of numerous reminders by me.

This is to give you notice that unless these documents are submitted to me before the 26th instant I shall give an ex-parte award to the remaining partner.

I would ask you to remit to me Rs. 250 from each of you to cover my arbitration fee."

No reply was sent to this letter nor was any request contained therein complied with. Thereupon, the arbitrator purported to proceed with the arbitration *ex parte* and on 31st March, 1950 he made an award declaring that the petitioner was entitled to receive from the respondents an aggregate sum of Rs. 23,233·59 on account of (*a*) the petitioner's share of the nett profits of the partnership business during the relevant period November, 1947 to 4th September, 1948, and (*b*) the proportionate share payable by the respondents out of the expenses incurred in carrying on the business during that period. These figures were admittedly computed on statements prepared and relied on by the petitioner in the course of the *ex parte* proceedings in which the respondents had, on their own version, declined to co-operate. This circumstance, however, is not sufficient to vitiate an award, because the bare neglect or refusal of a party to avail himself of the opportunity of presenting his case before the arbitrator does not invalidate the subsequent proceedings or disqualify the arbitrator from exercising his jurisdiction in the matter. *Aitken Spence and Co. v. Fernando* [1]. The *ex parte* award is enforceable against all the parties to the dispute unless it is vitiated for one or other of the reasons specified in section 691 of the Civil Procedure Code or unless some supervening circumstance has occurred which the law regards as having divested the arbitrator of the jurisdiction which he had previously assumed. Mr. Thiagalingam has made no submissions to the contrary.

On 1st June, 1950, the petitioner, in an application under Section 696 of the Code, moved the District Court by way of summary procedure to have the award in his favour filed of record, and he asked for a decree in terms thereof against the respondents. An interlocutory decree as prayed for was entered on 19th June, 1950, and on 29th June, 1950, the respondents filed a joint affidavit setting out their objections to the petitioner's application. The matter was then fixed for inquiry under section 384 of the Code.

The affidavit of the respondents is an unsatisfactory document because it contains many allegations and argumentative submissions which clearly offend the imperative requirements of section 181 of the Civil Procedure

[1] (*1903*) *A. C. 200.*

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Code. Be that as it may, the main grounds on which the arbitrator's award was attacked in the lower Court may be summarised as follows :—

(1) that the arbitrator's delay in making an award was such as to constitute " misconduct " on his part within the meaning of section 691 (2) (*a*) of the Code ;

(2) that the petitioner, by submitting certain false and fabricated documents in support of his case at the *ex parte* arbitration proceedings, had " wilfully misled or deceived the arbitrator " within the meaning of section 691(2) (*b*) ;

(3) that the institution of the regular action by the 1st respondent on 12th December, 1949, operated automatically to supersede the arbitration proceedings and to divest the arbitrator of jurisdiction to make an award thereafter ;

(4) that the arbitrator had been guilty of " corruption " and/or " misconduct " within the meaning of section 691 (2) (*a*) by accepting from the petitioner a sum of Rs. 250 during the pendency of the arbitration proceedings.

The inquiry held by the learned Judge into these grounds of objection proceeded entirely upon a consideration of the respondent's affidavit the petitioner's contra-affidavit dated 18th November, 1950, certain statements of fact (unauthenticated even by affidavit) contained in the arbitrator's award, and the arguments of counsel. The learned Judge rejected the 1st and the 3rd grounds of objections which I have enumerated above and ignored the 2nd ground on the assumption, presumably, that it was not very seriously pressed before him. He, however, upheld the fourth ground of objection and refused the petitioner's application to have the award made a rule of Court. The present appeal is from this decision.

Mr. Thiagalingam has urged that the learned Judge should have upheld each of his clients' grounds of objection, and it is convenient therefore to consider them in the order in which I previously have set them out.

I find it impossible to differ from the learned Judge's view that the delay in making the award could not, in the circumstances of this case, be attributed to " misconduct " on the part of the arbitrator. No time limit had been fixed in the terms of reference, but he was nevertheless under a duty to discharge his functions with reasonable diligence. In the present case, however, there was ample material upon which the learned Judge could accept, as he did, the explanation that the delay was largely, if not entirely, occasioned by the dilatory and non-co-operative methods employed by the respondents themselves. The present case is therefore clearly distinguishable from *Purshottam v. Amrittal* [1] where an arbitrator's " unconscionable and unexplained delay " in making an award was held to constitute legal misconduct and indeed a virtual abandonment of the judicial functions which he had undertaken to exercise.

The only evidence on which the respondents relied in support of the second ground of objection is contained in certain vague averments in their affidavit. These allegations were denied by the petitioner in

[1] *A. I. R. (1928) Bom. 49.*

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his counter-affidavit, and were, in the absence of more precise proof, insufficient by themselves to substantiate grave charges of fraud and deceit. Mr. Thiagalingam argued that the petitioner had misled the arbitrator into the belief that the partnership agreement had been reduced to writing and was therefore enforceable. It seems to me that, as far as the arbitration proceedings were concerned, the respondents must be deemed to have waived any defence which they had the opportunity of basing on the provisions of section 18 (*c*) of the Prevention of Frauds Ordinance. Besides, they do not deny even now that the basis of the *de facto* partnership was that the profits, if any, should be distributed in equal shares between the three partners. The award gives effect to this basis of computation, and no fraud or deceit is alleged against the petitioner in that respect.

The third ground of objection raises an interesting question of law, and was strenuously pressed before us by Mr. Thiagalingam. In my opinion the learned Judge came to a correct conclusion on this point. The principle to be applied is clear enough, and has been authoritatively laid down in the majority judgments of Fletcher Moulton L.J. and Farwell L.J. in *Doleman and Sons v. Ossett Corporated* [1]. Once a regular action has been instituted by a party to a dispute in a Court of Law, the Court has sole seisin of that particular dispute. If, prior to the institution of the action, the parties had mutually agreed to refer the same dispute to the arbitration of a private tribunal—or, *a fortiori*, if such arbitration proceedings had already commenced and were still pending—the defendant may invite the Court, in the exercise of its discretion, to stay the action and to compel the dispute to be decided by the private tribunal previously selected by the parties. *Section 7 of the Arbitration Ordinance* (*Cap. 83*). But unless such order be obtained within the period fixed by the Ordinance, the reference to arbitration is superseded by the regular action, and any award made thereafter by the arbitrator would be invalid for want of jurisdiction.

The validity of the present award which was made after the proceedings in D. C. Colombo No. 22215 were instituted necessarily depends on the question whether the arbitrator's award or any part of it purports to adjudicate on any right which is identifiable with the subject matter of the 1st respondent's claim over which the District Court of Colombo was vested with exclusive jurisdiction in the pending action. Applying this test, I would say that the subject matter of the award and the subject matter of the action are demonstrably distinguishable. The award, on the one hand, declares the petitioner entitled to receive from both respondents a sum of money representing his share of the net profits of the business up to the admitted date of the dissolution of a *de facto* partnership between the parties; the subsequent regular action, on the other hand, is concerned only with a claim which is based on an alleged infringement by the petitioner of the 1st respondent's rights *after* the dissolution of the partnership had occurred. It follows that there was no usurpation by the arbitrator of the jurisdiction vested in the Court, and that the learned District Judge was perfectly correct in rejecting

[1] (*1912*) *3 K. B. 257.*

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the third ground of objection. With respect, I would adopt the *ratio decidendi* of the High Court of Lahore in *Jai Narain v. Nain Das* [1] on this issue.

There remains for consideration the final ground of objection which relates to the alleged impropriety on the part of the arbitrator in receiving from the petitioner a sum of Rs. 250 pending the proceedings. The arbitrator's award expressly states that the three partners had agreed that he should receive a fee of Rs. 750, payable by them in equal shares, and the terms of his letter R6 dated 23rd March, 1950 (to which no reply was apparently received), are consistent with that position. Admittedly, the petitioner paid a sum of Rs. 250 to the arbitrator before the date of the award, but paragraphs 15, 16 and 17 of the respondent's affidavit of objection unambiguously allege that this payment represented a bribe. If that allegation could be established, the award would clearly be vitiated on the grounds of corruption and misconduct; but if the version of the arbitrator and the petitioner be substantially correct, there would certainly be nothing improper in an arbitrator receiving from one of the parties the fee payable by that party in accordance with an agreement which bound them all; indeed, Mr. Thiagalingam concedes that the subsequent failure of the other parties to implement their part of the agreement could not taint such a payment with illegality. The facts which arose for consideration in *Shepherd v. Brand* [2] and in *Fernando v. Migel Appu* [3] are distinguishable, and we are not called upon to deal with Mr. Chelvanayagam's argument that the rulings in those decisions should, in the light of modern conditions, no longer be regarded as good law.

The learned District Judge upheld the fourth ground of objection and, by reference only to the affidavits and to certain documents which were read in evidence at the inquiry he decided that the arbitrator's award was vitiated by "misconduct". With great respect, I do not see how any Court of law, either in a regular action or in summary proceedings under Chapter 24 of the Code, could without hearing oral evidence arrive at such a definite conclusion upon issues involving disputed charges of corruption and dishonesty. This was essentially a case in which the learned Judge, after consideration of the allegations in the respondent's affidavit and the denials in the petitioner's counter-affidavit, should have framed issues of fact, to be tried by oral testimony, upon the allegations of "corruption" and "misconduct" in relation to the acceptance by the arbitrator of a sum of Rs. 250 from the petitioner. Section 386 expressly provides for such a procedure, and in my opinion the case should now be sent back for a fresh inquiry before another District Judge upon this ground of objection. If, after framing appropriate issues upon the specific allegations in the respondent's affidavit with reference to the payment and receipt of this sum of Rs. 250 the learned Judge decides that the arbitrator, in accepting this sum, was guilty of corruption or misconduct within the meaning of section 691 (2) (*a*) of the Civil Procedure Code, he must make order refusing the petitioner's application to have the award made a rule of Court. If, however, the

[1] *A. I. R. (1922) Lah. 369.*

[2] *(1734) 94 E. R. 620.*

[3] *(1913) 16 N. L. R. 357.*

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issues on this ground of objection are answered against the respondents, the petitioner's application must be allowed in terms of paragraphs (*a*) and (*b*) of the prayer of the petitioner dated 1st June, 1950. The parties will, of course, be entitled to appeal against the order made by the learned Judge in the fresh proceedings, but I desire to make it clear that the respondents should not be permitted at this late stage to attack the award on any fresh grounds.

For the reasons given by me, I would set aside the judgment under appeal and send the case back for fresh proceedings to be held for the limited purpose indicated in my judgment. The petitioner is entitled to his costs of appeal, but all other costs will be costs in the cause.

PULLE J.—I agree.

Sent back for further inquiry.

[COURT OF CRIMINAL APPEAL]

1952 *Present:* **Gunasekara J. (President), Pulle J.** *and* **L. M. D. de Silva J.**

ANTHONY *et al.*, Appellants, *and* THE QUEEN, Respondent

APPEALS 56–58 WITH APPLICATIONS 84–86

S. C. 2—M. C. Badulla, 11,086

Common intention—Deprivation of self-control by grave and sudden provocation—Co-existence—Penal Code, ss. 32 ; 294, Exception 1.

A finding that several accused acted in furtherance of a common intention is not necessarily inconsistent with the finding that they were at the same time deprived of the power of self-control by grave and sudden provocation within the meaning of Exception 1 to Section 294 of the Penal Code.

"A common intention does not necessarily and in all cases imply an express agreement and a plan arranged long before the assault. The agreement may be tacit and the common design conceived immediately before it is executed."

APPEALS, with applications for leave to appeal, against three convictions in a trial before the Supreme Court.

M. M. Kumarakulasingham, for the accused appellants.

Boyd Jayasuriya, Crown Counsel, for the Crown.

Cur. adv. vult.

October 31, 1952. GUNASEKARA J.—

These appeals arise out of a prosecution of the three appellants and another man, who was the fourth accused, in respect of an incident that occurred on the 10th June, 1950, on a tea plantation in Passara known as the Dynawatta Division of El Teb Estate. All the accused, except the third, were resident labourers on this division. The third too had been a resident labourer until about the end of May, when he was discharged,

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and after that the first accused occasionally put him up in his room. The second accused is a son of the first, and the third and fourth are close relatives of theirs. The four accused were tried on an indictment containing three counts, of which the first charged all of them with the attempted murder of T. E. Mack, an assistant superintendent in charge of Dynawatta, and the other two charged the second accused alone with voluntarily causing hurt with a cutting instrument to a watcher named Sinniah and a tea-plucker named Maradamuttu, who too were employed on the same estate. On the first count the jury found the first, second and third accused guilty of attempted culpable homicide punishable under section 301 of the Penal Code and the fourth accused not guilty of any offence. On the second and third counts they found the second accused guilty as charged. It appears from an answer given by the foreman to a question from the presiding judge that the jury found on the first count that the appellants had acted with a common intention that would have rendered their offence one of attempted murder but that the offence was reduced by reason of their having received grave and sudden provocation from Mack.

One of the grounds set out in the notice of appeal, which the appellants have signed jointly, is that the presiding judge in his summing-up " did not put the petitioners' defence of private defence adequately, nor adequately explain the law relating to private defence, nor its application to the facts of this case." The appeals were pressed upon this ground and also upon one that was not taken in the notice, namely, that the finding that the appellants acted in furtherance of a common criminal intention was inconsistent with the finding that they were at the same time deprived of the power of self-control by grave and sudden provocation. The latter ground may conveniently be considered first.

According to the prosecution the three appellants jointly set upon Mack and wounded him with lethal weapons—a club, a pruning knife, and a long-handled hatchet or *keteriya*. The incident occurred at midday, and Mack was admitted to the Badulla hospital on the same afternoon. He was unconscious and bleeding at the time of admission and his life was in danger. The doctor who examined him observed the following injuries :—

(1) an incised wound 2″ long and scalp deep on the right eye-brow ;
(2) an incised wound ¾″ long and scalp deep over the right parietal region with a compound fracture of the skull ;
(3) an incised wound ¾″ long and scalp deep over the right occipital region with a compound fracture of the skull ;
(4) a contusion of the right eye with sub-conjunctival haemorrhage (which was a result of injuries (1) and (2)) ;
(5) an incised wound 3″ long and 1″ deep on the back of the chest ;
(6) a bite mark on the left upper arm ;
(7) abrasions over the left knee.

He was suffering from shock and there were signs of injury to the brain.

The effect of the evidence for the prosecution, so far as is material to the present question, was as follows. Mack was near the weighing-shed on Dynawatta at about noon, giving the kanakkapulle Ramiah some

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instructions, when a watcher named Ambrose reported to him that the third accused had returned to the estate and was in the first accused's room. He sent the third accused a message by Ambrose asking him to leave the estate. The third accused declined to comply with this request, and Mack sent Ambrose to him again asking him to come and see Mack. He refused to comply with this request either, and Mack himself went up to the lines to speak to him. Mack was accompanied by Ramiah and Ambrose and three or four others, including Maradamuttu. As he approached, the third accused came from the first accused's room to the verandah outside. At that time the second accused too was on the verandah and the first was inside the room. Standing outside the verandah Mack asked the third accused why he remained on the estate. The third accused thereupon asked Mack if he thought it was his estate and began to abuse and threaten him, gesticulating and moving about the verandah. After some attempt at argument with him Mack pulled him by an arm, and he thereupon seized Mack by an arm and pulled him in the opposite direction. When they were pulling each other the second accused gave Mack a push from behind that propelled him on to the verandah. The first accused immediately struck him with a club on the nape of his neck. At this blow Mack fell on his knees, and the second accused then slashed his back with a pruning knife. All three accused next dragged him on his knees into the first accused's room, where they assaulted him further. Mack's impression was that the weapons used by the first and third accused were clubs ; but the police found in the room, soon afterwards, a long-handled hatchet stained with human blood on both sides of the blade, which could have been used to cause the two incised wounds on the head and compound fractures of the skull, and Mack may well have mistaken this weapon for a club. According to Mack it was the fourth accused who bit him, and he had also joined in dragging him into the room. But, unlike in the case of the appellants, there was no other evidence implicating this accused ; and Ambrose, who too gave evidence about the dragging and said that at that stage he himself struck the first accused with his watcher's baton, stated that though the fourth accused was present he did not see him take part in the dragging. Ambrose fled immediately after he had struck the first accused in his vain attempt to rescue Mack, and Rasiah had run away as soon as Mack was cut by the second accused. After Mack had been dragged into the room, the second accused cut Maradamuttu who was outside, and later cut Sinniah who came to Mack's help after the assault.

The presiding judge in his summing-up dealt with the exception of grave and sudden provocation in relation to the first count of the indictment and directed the jury to the effect that upon the evidence for the prosecution it was open to them to hold that Mack's conduct in pulling the third accused by his arm constituted such provocation. Considered in the light of the summing-up the verdict clearly means that by this conduct Mack gave the appellants provocation that was grave and sudden and they attacked him with lethal weapons while they were deprived of the power of self-control by that provocation. It is also clear that the jury held that this assault was committed by the appellants in furtherance of a common intention to commit such an assault and

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therefore an intention to inflict on Mack such wounds as would be the natural and probable consequence of such an assault. The criticism that these are inconsistent findings is based on a view that it was not possible for the appellants to conceive a common intention before they had regained their power of self-control. We do not agree. The deprivation of the power of self-control that is referred to in the exception of grave and sudden provocation (Exception 1 to section 294 of the Penal Code) does not imply an incapacity to form an intention. On the contrary, the case contemplated by the exception is that of an offender who, while deprived of the power of self-control, conceives the specific intention of killing or wounding the person whose act so enraged him. Indeed, in a case falling within the exception frequently what leads to the formation of a murderous intention by the offender is the deprivation of the power of self-control, which results in a breaking down of the inhibitions that restrain him from personal violence. We can see nothing contrary to reason in a view that several persons affected in that way by rage may, while still deprived of the power of self-control, form a common intention to kill or to cause bodily injury to the person who gave them provocation. A common intention does not necessarily and in all cases imply an express agreement and a plan arranged long before the assault. The agreement may be tacit and the common design conceived immediately before it is executed. In the present case the jury may well have been satisfied that at the time of the provocation the appellants were already so united by a common bond of relationship to each other and hostility to Mack on the score of his attitude to the third accused, that as soon as he laid hands on the third accused they readily came to a tacit agreement to inflict grievous injuries on him. In our opinion there is no inconsistency in the verdict.

The evidence upon which the plea of private defence was based consisted of that of the first accused and the evidence of a doctor regarding injuries found on the appellants on the morning of the day after the incident.

The first accused gave evidence to the following effect. He and the third accused were reclining on two beds in his room when Mack came there accompanied by about 14 others. One of them, Ramiah, was armed with a knife, and the rest with clubs and sticks. The dimensions of the floor of the room were 9′ by 7′, but all of them came inside. As soon as Mack entered the room he assaulted the third accused with a stick, saying "You son of a whore, can't you come when I call you ?". The first accused protested at this conduct and thereupon was himself struck on the head with a stick by Ambrose. He then picked up a stick and struck Ambrose a blow. There was a "big fight" inside the room and the first accused received 7 or 8 blows on his head and he fell down. After that he heard "the sounds of fighting" as he lay on the floor but he saw nothing of what went on. Presently he found Mack too lying fallen and he saw the third accused hiding behind a door and the others all running away. The second and fourth accused were not present at the time of the incident. There were only the third accused and himself to oppose Mack and those who came with him. He did not see the third accused strike a single blow. He himself struck only one blow, and that was a blow dealt at Ambrose.

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According to the medical evidence the first accused had a lacerated wound 1″ long and scalp deep over the right frontal area of the scalp and another lacerated wound ¾″ long over the left parietal region. The second accused had two abrasions, ¼″ by ¼″ each, over the right parietal region of the scalp and the left side of the forehead respectively. (Though the defence elicited this evidence they adduced no evidence as to how these injuries were caused.) The third accused had a contusion 1″ by 1″ over the frontal area of the scalp.

The presiding judge directed the jury on the law relating to private defence of the body and drew their attention to the evidence that was relied on to establish the plea of private defence. It was contended that the learned judge misdirected the jury in that he failed to direct them to consider whether the appellants had also acted in the exercise of a right of private defence against house-trespass. We are quite satisfied that, having rejected the plea of private defence of the body, the jury would not have accepted that of private defence of property, which was based on the same evidence. It is clear that they disbelieved the evidence that Mack entered the room voluntarily and was not pushed and pulled into the verandah and the room by the appellants. Moreover, in view of the provisions of sections 96 and 97 of the Penal Code, in the exercise of a right of private defence against house-trespass the appellants were not entitled to take the risk of killing Mack unless the house-trespass was committed under such circumstances as reasonably caused apprehension that death or grievous hurt would be the consequence if such right was not exercised. If they had satisfied the jury that they reasonably entertained such an apprehension, then in view of the learned judge's directions regarding the right of private defence of the body the jury would have acquitted them.

The appeals are dismissed.

Appeals dismissed.

1953 *Present :* **Nagalingam A.C.J.**

R. B. KADRAMER, Applicant, *and* M. L. M. CASSIM, Respondent

Election Petition 7, Batticaloa—Application by the Agent for the Respondent to draw the sum of Rs. 5,000 deposited as security.

Election Petition—Security for respondent's costs—Proper time for withdrawing it—Parliamentary Elections (Amendment) Act, No. 19 of 1948, s. 82 (c).

Neither party to an election petition is entitled to draw during the appealable period, or during the pendency of an appeal, the money deposited by the petitioner as security for the respondent's costs.

APPLICATION by the respondent to draw the sum of Rs. 5,000 deposited as security in Election Petition 7, Batticaloa.

A. S. Vanigasooriyar, for the respondent-petitioner.

A. H. C. de Silva, with *G. T. Samarawickreme*, for the petitioner-respondent.

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August 26, 1953. NAGALINGAM A.C.J.—

This is an application by the respondent for an order of payment in his favour for the sum of Rs. 5,000 deposited by the petitioner as security for the respondent's costs. The petition itself was dismissed, the respondent's costs having been fixed at Rs. 20,000. The petition was dismissed by the Election Judge on the 17th of July, the last appealable date being the 16th of August, but in the meantime, namely, on the 30th of July, the respondent made this application. For one thing, I think it is the usual practice to wait till the expiry of the appealable period before an order of payment is allowed in circumstances such as these and that is based upon sound principle. Under the Parliamentary Elections (Amendment) Act, No. 19 of 1948, no report of the Election Judge can be transmitted to the Governor-General until the expiry of the period provided for appeal—vide Section 82 (*c*). So the Legislature recognizes the fact that no finality can be said to attach to the decision of the Election Judge till the appealable period is over and no appeal has been filed or where an appeal has been filed till the decision of the matter in appeal. If this principle be once accepted, it must extend to an application by one of the parties to withdraw the money deposited as security whether he be petitioner or respondent, and I think it is a principle which has been acted upon in this Court that no order of payment is allowed before the expiry of the period of appeal and, where an appeal has been filed, I think it is just and proper and every principle of natural justice demands that the order should await the decision in appeal.

I therefore refuse the present application. As this is the first case of its kind, I make no order as to costs.

Application refused.

1953 *Present :* **Nagalingam A.C.J.**

P. A. G. THOMAS, Appellant, *and* COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, Respondent

S. C. 56—Appeal under section 15 (1) of the Indian and Pakistani Residents (Citizenship) Act

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949—Section 3—Application for registration as citizen of Ceylon— Quantum of evidence—Costs.

In an application for registration as a citizen of Ceylon under the Indian and Pakistani Residents (Citizenship) Act—

Held, (i) that the single circumstance that the applicant had made declarations of temporary residence in " B Forms " for the purpose of remitting two sums of money should not be permitted to have an over-riding effect over all other considerations.

(ii) that the descendant of a person who has been registered as a citizen of Ceylon on the ground of permanent settlement is entitled to a certificate of registration without proof that he himself has permanently settled in Ceylon.

Costs to be taxed as in an action in Class V in the District Court.

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APPEAL under section 15 (1) of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949.

N. K. Choksy, Q.C., with *E. R. S. R. Coomaraswamy*, for the appellant.

M. Tiruchelvam, Crown Counsel, for the respondent.

Cur. adv. vult.

August 26, 1953. NAGALINGAM A.C.J.—

This is an appeal from an order of the Commissioner for the Registration of Indian and Pakistani Residents refusing the application of the appellant for registration as a citizen of Ceylon under Act No. 3 of 1949.

The Commissioner has accepted the evidence adduced by the appellant in regard to the continuity of his residence in Ceylon within the meaning of and as required by section 3 of the Act, but the ground on which the refusal was based by the learned Commissioner is that he is not satisfied "that the applicant had permanently settled in Ceylon". Learned counsel for the appellant has urged that the decision of the learned Commissioner is erroneous not only in regard to the question of permanent settlement but also in regard to the question of law that arises in the case, independently of any question of permanent settlement of the appellant.

In so far as the facts are concerned, there can be little doubt that a very strong prima facie case has been made out by the appellant. He was born in Ceylon; he was educated in Ceylon, excepting for a period of two years in India; his parents are in Ceylon; he was married in Ceylon; his wife has continued to live in Ceylon; his child was born in Ceylon, and the child has also continued to live up to the date of application in Ceylon; furthermore, he has been employed continuously in Ceylon ever since he became employable. He has no interest in India in the sense of being possessed of any property there, and it is equally true to say that he has no interest in Ceylon in the same sense. So far as acquisition of any property in Ceylon is concerned, he has referred to the fact that he is a young man twenty-six years of age and has not reached that stage in life when as a result of his own exertions he could be expected to have accumulated sufficient wealth to make investments of any kind. What is yet a still stronger factor is that his father has been granted a certificate of registration and so has one of his brothers, while the application of another brother is yet pending.

As against all these facts and circumstances, what has been regarded as sufficient to turn the balance against the appellant has been the statement by the appellant that he is a temporary resident in two application forms, referred to as "B Forms" for the purpose of remitting two sums of money, of Rs. 60 and Rs. 25 in February and December of the year 1949. He has made no other remittances even subsequently. The appellant when called for an explanation in regard to the description of himself as a temporary resident in Ceylon, stated that he had not made that statement with a view to "give up his Ceylon citizenship" but as far as he knew "the only course left at that time was to remit through B Form where the necessary declaration had to be made",

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meaning thereby that that was an integral part of the form and that that was the only form available to him to be used, especially in circumstances which were rather urgent, in regard to the first sum remitted by him, which was in the nature of an assistance to his sister who was very ill; the other sum, it is said, was in the nature of a Christmas gift.

It has been urged on behalf of the appellant, and it has not been controverted by learned Crown Counsel, that the appellant could not describe himself as a citizen of Ceylon before he was registered, and till that registration was effected the only course open to him was to apply in Form B which contains the statement that the applicant is a temporary resident in Ceylon. The learned Commissioner has, however, taken the view that this statement was not only a false statement but a false statement to the knowledge of the appellant, so much so that his conduct indicated that " he could hardly have had much regard for the laws of this country ", and as the appellant had also failed to establish that he had been " associated with any local social service organization or any local public life ", whatever these may mean in relation to the appellant, he made order refusing the application.

Be that as it may, one of the Deputy Commissioners seems to have taken a slightly different view in regard to the explanation offered by the appellant, for on 10th June he made a minute which runs as follows :

> "2. Re permanent settlement I think his explanation in para. 2 overleaf merits favourable consideration. He has made only two remittances. *For this purpose he had no other alternative except to sign the B. Forms.* "—

which to my mind is a realistic view of the situation.

While there cannot be the slightest doubt but that a statement of an applicant that he is only a temporary resident, though made it be for the sake of acquiring any benefit, however small, should be carefully weighed and weighted as heavily as all the surrounding circumstances would permit to the fullest allowable extent, it must not, however, be deemed to be the sole factor or criterion having such an over-riding effect over every other circumstance and fact so as to outweigh the cumulative effect of all other considerations—see the case of *Doucet v. Geoghegan*[1].

It seems to me, therefore, that the learned Commissioner should not have allowed the single circumstance of declarations of temporary residence made in the circumstances in which they were made to be the deciding factor in refusing the appellant's application.

I do not, however, wish to rest my judgment on this ground alone. There is the point of law that has been raised and which has not been adequately met by counsel for the respondent. Under the Act as first enacted, an Indian resident meant a person who fell under one of two different categories : (1) an Indian who had emigrated from India and permanently settled in Ceylon ; (2) a descendant of such a person. An amendment widening the class of persons, by introducing a third category, who would be entitled to claim the benefit of the Act was introduced by the amending Act No. 37 of 1950, but as it has little or no impact on the question before me, I shall not advert to that amendment.

[1] *(1878) L. R. Ch. D 441.*

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Mr. Choksy contends that in view of the fact that the father of the applicant has been registered as a citizen of Ceylon as a person falling under category (*a*), the applicant is a person therefore who falls under category (*b*), and as such entitled to be regarded as an Indian resident within the meaning of the Act without his having to establish that he had himself permanently settled in Ceylon. The facts upon which the contention is based are not in dispute. That the applicant's father was born in India, that he emigrated from there to Ceylon and that he has permanently settled in Ceylon is established by the certificate of registration issued to him. The appellant, therefore, being a descendant of a person who falls under category (*a*) is himself entitled to be regarded as an Indian resident to whom the privileges conferred by the Act extend.

Mr. Tiruchelvam sought to meet this argument by putting forward in indignant tones the hypothetical case of an applicant who, he said, may be the son of a person registered as a citizen of Ceylon under category (*a*) but who has made his home in Bombay, and postulated the question whether such an applicant should be granted a certificate of registration as a citizen of Ceylon without proof of permanent settlement; and he proceeded to posit that such a person may claim the dual benefits of Indian and Ceylon citizenship.

If everything that counsel implies by his deductions be correct, such a case may present a difficulty, but it does not establish that the simple words " a descendant of any such person " have therefore to be given a meaning other than what the words plainly and literally connote. He himself did not venture to suggest what other meaning he was prepared to give them, but he however thought that in order to prevent such a calamity as the one he had visualised the words should be qualified by some such phrase as " who has permanently settled in Ceylon ".

I find it difficult to limit the scope of these words in this manner. Mr. Tiruchelvam has given no adequate reason for so qualifying them, in particular when it is borne in mind that the necessity for permanent settlement has been emphasized in regard to the first category of persons and the third category introduced by the amending Act, but no such requirement has been added to the second category which appears both in the principal and the amending Ordinances. To my mind, there is good reason for the legislature making such a differentiation. Where a person under category (*a*) obtains a certificate of registration, he can and is entitled to exercise the privileges conferred by the Ordinance on behalf of his minor children who would then be entitled to be registered as citizens of Ceylon. In the case of children who are majors, the parent is not entitled to make an application on their behalf for the obvious reason that, the children being majors, they are entitled to make their own decision with regard to an application for registration, and if they decided to have themselves registered the legislature apparently did not intend that they should have to surmount any obstacles which their minor brothers or sisters would themselves not have to negotiate.

If one looks at the problem from this point of view, one can quite appreciate why a descendant of a person who is registered under category (*a*) should be given the right to claim registration without being compelled

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to establish the fact of permanent settlement. In the illustration given by Mr. Tiruchelvam, assuming that a son of a person who has been registered under category (*a*) and who has made his home in Bombay makes application for a certificate of registration, then by virtue of the provisions of the Ordinance he would on registration in Ceylon as a citizen lose whatever rights of citizenship he may have had in any other country, so that even the difficulty which Mr. Tiruchelvam envisaged cannot arise.

I am therefore of opinion that the true construction is that where an applicant is a descendant of a person who has been registered under category (*a*) it is not necessary for him to establish that he himself has permanently settled in Ceylon. The fact that he is a descendant of such a person is all that need be established before applying for registration, subject to the other requirements of the Act for effecting registration.

I therefore set aside the order of the learned Commissioner and substitute for it an order that a prima facie case has been made out by appellant for allowing his application, and direct the Commissioner to take the further steps necessary under the Act. The petitioner will also be entitled to the costs of his application, which will be taxed by the Registrar as if it were an action in Class V in the District Court.

Order set aside.

1953 *Present :* **Gratiaen J.**

SUFFRAGAM RUBBER AND TEA CO., LTD., Petitioner, *and* M. J. M. MUHSIN (A. G. A., Ratnapura), Respondent

S. C. 169—In the matter of an Application for a Mandate in the nature of a Writ of Prohibition under section 42 of the Courts Ordinance (Cap. 6).

Writ of Prohibition—Land Acquisition Act, No. 9 of 1950 — Order for taking immediate possession of a land—Effect of—Claim for compensation—Scope of acquiring officer's inquiry—Sections 4, 5, 9, 10, 16, 36, 37, 41—Construction of statute—Power of Court to fill in gaps.

Where, by virtue of the special powers vested in him under proviso(*a*) to section 36 of the Land Acquisition Act, the Minister of Agriculture and Lands makes order directing an " acquiring officer " to take immediate possession of a land on the ground of urgency, the property vests absolutely in the Crown from the date of the publication of the order in the *Gazette*, and the " acquiring officer " has no jurisdiction thereafter to commence or continue (once commenced) an inquiry into claims for compensation under section 9 or to make an award under section 16. In such cases, the common law jurisdiction of the regular Courts of Justice to determine disputes between the private individual (whose property has been compulsorily acquired) and the Crown has not been superseded by the Act either expressly or by necessary implication.

"In the construction of a statute 'the duty of the Court'—and *a fortiori* the duty of a tribunal created by the statute—'is limited to interpreting the words used by the Legislature, and it has no power to fill in any gaps disclosed. To do so would be to usurp the function of the Legislature.'"

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APPLICATION for a Writ of Prohibition.

H. V. Perera, Q.C., with *D. S. Jayawickreme*, for the petitioner.

Walter Jayawardene, Crown Counsel, with *G. F. Sethukavaler*, Crown Counsel, for the respondent.

July 17, 1953. GRATIAEN J.—

The petitioner is a company with limited liability and was the owner in the Ratnapura District of an estate a portion of which was known as Galkaduwa Division. The respondent is the Assistant Government Agent of the District and, by virtue of his office, is an " acquiring officer " within the meaning of the Land Acquisition Act No. 9 of 1950.

On 28th May, 1951, the Minister of Agriculture and Lands, exercising the special powers vested in him under proviso (*a*) to sec. 36 of the Act, had made an order directing the respondent to take possession of Galkaduwa Division on behalf of the Crown. This order was duly published in the *Gazette* on 30th May, 1951, and the property accordingly vested absolutely in the Crown with effect from that date (sec. 37). In the result the Company was automatically and by operation of law divested of its former title to this extent of land (hereinafter referred to for convenience as " the property ".)

It is necessary to record in this connection that, prior to 28th May 1951, the respondent had, on the Minister's direction, already initiated steps with a view to the acquisition of the property in accordance with the more normal procedure commencing with sec. 4 of the Act. Had that procedure been continued to its logical conclusion, the company would have enjoyed the opportunity, if so advised, of making representations against the proposed compulsory acquisition of its property for a public purpose. This valuable right was however lost when the Minister later decided, on the ground of urgency, that it had become necessary to vest the property forthwith in the Crown, thereby depriving the Company of the opportunity of showing cause why the proposed acquisition should not take place.

Notwithstanding the effect of the Minister's statutory order to which I have previously referred, the respondent purported to proceed, in respect of the property, with the various steps prescribed in the Act for the ultimate vesting of private land in the Crown under sec. 37 on the basis that it " should be " (*vide* sec. 5) and was " to be acquired " (*vide* secs. 9,10 and 16)—whereas in truth and by operation of law the acquisition of this particular property had already been complete on 30th May, 1951. On this fictitious hypothesis he fixed a date for the holding of an inquiry under sec. 9 at which he proposed *inter alia* to make a purported award for compensation under sec. 16 (1) (*c*) in accordance with the statutory basis of computation laid down by sec. 41 of the Act.

The Company's contention is that an " acquiring officer " has no jurisdiction to hold an inquiry under sec. 9 or to make an award under sec. 16 in cases where property has already been vested in the Crown under sec. 37 by virtue of the publication of an emergency order made by the

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Minister under sec. 36 proviso (*a*). It accordingly asked for a mandate in the nature of a writ of prohibition prohibiting the respondent from holding an inquiry under sec. 9 of the Act or from resuming the inquiry which he had purported to commence to hold under that section. The application came up *ex parte* in the first instance before my brother Pulle who entered a rule *nisi* in favour of the Company. On 8th July, 1953, I made the rule absolute with costs after hearing Counsel for both sides. I now proceed to pronounce the reasons for my decision.

Before the passing of the Land Acquisition Act No. 9 of 1950, the regular Courts of Justice were alone vested with jurisdiction to fix the amount payable to private parties as compensation for the compulsory acquisition of their property by the Crown. This jurisdiction has now been substantially, but only to the extent laid down by the relevant legislation, been transferred to statutory tribunals. It is apparent that the scope of the jurisdiction of these new tribunals must be found within the four corners of the Act itself. If one examines the limits of the respondent's jurisdiction upon this footing, one finds that, as conditions precedent to the commencement or the continuation (once commenced) of an inquiry under sec. 9, the following steps are essential :

(*a*) The appropriate Minister must have issued a direction under sec. 4 (1) and must, after the prescribed procedure has been followed, have decided under sec. 4 (5) that the property " should be . . . . acquired under (the) Act ". (The words of futurity are important).

(*b*) The Minister must, following upon his decision under sec. 4 (5), have issued a further direction to the acquiring officer under sec. 5 (1).

(*c*) The Minister's direction under sec. 5 (1) must have been carried out.

(*d*) The provisions of sec. 7 must have been complied with.

It is quite evident from this analysis that whenever, before the conclusion of an inquiry under sec. 9, the publication of a Minister's order under sec. 36 proviso (*a*) has had the automatic effect of vesting the property in the Crown, the acquiring officer's jurisdiction under sec. 9 is forthwith terminated. The Act does not confer upon him any statutory jurisdiction to determine issues of fact or law arising after the property previously belonging to a private individual has vested in the Crown. Once that has occurred, the Minister himself is powerless to confer any further jurisdiction on the acquiring officer by purporting to give him further directions (under sec. 5) which have no relation to reality. Indeed, it is implicit in the provisions of secs. 5, 7, and 9 that the property concerned has not yet vested in the Crown.

The Act is silent upon the question as to who should determine the amount, if any, of compensation payable to a person whose property has compulsorily been acquired by virtue of the publication of the Minister's order under sec. 36 proviso (*a*). It follows that an acquiring officer who purports to exercise judicial functions in respect of any dispute arising in that context would be usurping a jurisdiction which the Legislature has not conferred upon him.

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In the construction of a statute " the duty of the court "—and *a fortiori* the duty of a tribunal created by the statute—" is limited to interpreting the words used by the Legislature, and it has no power to fill in any gaps disclosed. To do so would be to usurp the function of the Legislature "—*Magor and St. Mellons Rural District Council v. Newport Corp.* [1] Applying this principle, I am satisfied that the clear and unambiguous words by the Legislature which passed the Act do not extend an acquiring officer's jurisdiction under sec. 9 to cases where the Minister's special powers under sec. 36 proviso (*a*) have been exercised and have already resulted in a vesting of the property under sec. 37. In such cases the common law jurisdiction of the regular Courts of Justice to determine disputes between the private individual (whose property has been compulsorily acquired) has not been superseded either expressly or by necessary implication. To take any other view would be to " twist the words and phrases (of the Act) into a sense that they cannot fairly and reasonably bear "—*Mohindar Singh v. The King* [2]. It is quite improper to assume that this residual jurisdiction of the Courts has survived the impact of the statute only through some inadvertence on the part of Parliament. Indeed, even if that could be assumed, it is not for this Court to indulge in " guesswork with what material the legislature would, if it had discovered the (alleged) gap, have filled it in. If a gap is disclosed the remedy lies in an amending Act "—*per* Lord Simonds in *Magor's case* (*supra*).

Rule made absolute.

1952 *Present :* **Pulle J. and L. M. D. de Silva J.**

K. VYRAMUTTU, Appellant, *and* R. MYLVAGANAM, Respondent

S. C. 107—D.C. Trincomalee, 3,859

Civil Procedure Code—Non-appearance of plaintiff—Decree nisi—Application to set it aside—Time limit of 14 days—Computation—Section 84 (1).

The period of fourteen days referred to in section 84 (1) of the Civil Procedure Code must be reckoned as from the date of the formal decree in form No. 21 and not from the date of the order directing that the decree nisi be entered.

APPEAL from an order of the District Court, Trincomalee.

N. C. J. Rustomjee, for the plaintiff appellant.

No appearance for the respondent.

Cur. adv. vult.

[1] (*1952*) *A. C. 189.* [2] (*1950*) *A. C. 345 at 356.*

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November 5, 1952. PULLE J.—

The appellant in this case is the plaintiff. He prayed for a declaration of title to an undivided three acres from and out of a land called " Puliyadi Vayal ", ejectment and damages. On the date of trial, namely, the 18th March, 1952, the appellant was absent. His Proctor was present but he stated that he had no instructions and that he was not appearing for the appellant. The learned District Judge then made an order in the following terms :—

" Enter decree nisi dismissing plaintiff's action with costs. "

On the 24th March the appellant's Proctor filed a petition and an affidavit and moved for a notice on the defendant to shew cause why the " decree nisi entered should not be vacated ". In point of fact no decree nisi in form 21 as required by section 84 of the Civil Procedure Code has been entered at all. This fact has since been fully verified.

The case was called on the Bench on the 1st April and a notice was issued on the defendant returnable on the 5th April. On the latter date the parties and their respective Proctors appeared and the order now under appeal was made. It reads—

" Cause has not been shown within 14 days. Application refused. "

The short point that arises for determination is whether the learned Judge was right in refusing the application on the ground that 14 days had elapsed since the order which he made on the 18th March. It was laid down in the case of *Austin de Mel v. Kodagoda* [1] that the period of fourteen days referred to in section 84 must be reckoned as from the date of the formal decree in form 21 and not from the date of the order directing that the decree nisi be entered. The learned District Judge was, therefore, in error in refusing the appellant's application that the order of the 18th March be vacated solely on the ground that when the application was taken up for hearing on the 5th April a period of 14 days had elapsed. We, therefore, set aside the order of the 5th April and remit the case with the direction that the motion dated 24th March be heard and disposed of on its own merits. The appellant will be entitled to the costs of the appeal. The costs below will be in the discretion of the learned District Judge.

L. M. D. DE SILVA J.—I agree.

Order set aside.

[1] *(1945) 46 N. L. R. 150.*

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1952 *Present :* **Gratiaen J. and L. M. D. de Silva J.**

L. T. F. RODRIGO, Appellant, *and* THE QUEEN, Respondent

S. C. 23—D. C. (Criminal) Colombo, N 1,639

Conspiracy—Accomplishment of the offence agreed upon—Proper indictment to bring in such circumstances—Penal Code, s. 113A.

Indictment—Amendment of it by Court—Proper procedure.

Criminal Procedure Code, s. 347 (b) (ii)—Alteration of verdict on appeal—Scope of—Abetment—Different types of abetment—Penal Code, ss. 100–103.

It is undesirable to include a charge of conspiracy in an indictment which alleges the actual commission of the offence in respect of which the conspiracy was formed.

The primary responsibility for the accuracy and suitability of an indictment rests with counsel for the prosecution, and not on the court. The court may, however, decide to amend the indictment on its own responsibility, but before such a decision in made, both the prosecution and the defence should be given an opportunity of making their submissions on the point.

The power vested in the Supreme Court under section 347 (*b*) (ii) of the Criminal Procedure Code to alter a verdict to a conviction on an amended charge which the appellant had not specifically been called upon to meet at any stage of the trial must be used with discretion, and only if the accused was not misled by the form of the charge and there is not any chance of injustice being done. The conviction for abetment under section 103 of the Penal Code could not therefore, in the circumstances of the present case, be altered to a conviction for abetment under section 102 read with section 101, Explanation 3, without injustice to the appellant.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy*, for the 2nd accused appellant.

Boyd Jayasuriya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 21, 1952. GRATIAEN J.—

The appellant, who was the Assistant Storekeeper of the firm of Brown & Co., Ltd., and another accused named McHeyzer were jointly tried before the Additional District Judge of Colombo in connection with a serious fraud which is alleged to have been practised on the Company. The indictment contains three counts which may be summarised as follows :—

(1) In the first count both accused are charged with having between 26th January, 1950, and 8th February, 1950, conspired to cheat the Chief Engineer of the Company by falsely representing to him that a large quantity of copper scrap had been delivered to the Company's Stores by a trader named Shanmugarajah, so as to induce the Chief Engineer to issue a cheque for Rs. 4,005 in favour of Shanmugarajah as consideration for what was in truth a fictitious sale ;

2——J. N. B 28724–1,592 (8/53)

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(2) In the second count McHeyzer alone was charged, as the principal offender, with having " at the time and place aforesaid and in the course of the same transaction " cheated the Chief Engineer in the manner alleged in the first count of the indictment ;

(3) In the third count, the appellant was charged with having " at the time and place aforesaid and in the course of the same transaction " *abetted McHeyzer " in the commission of the said offence, which offence was committed in consequence of such abetment* ".

McHeyzer and the appellant severally pleaded not guilty to these charges. The case for the Crown which these two accused persons were called upon to meet had been specified in the indictment with commendable particularity—namely, that they had combined to abuse their trust as employees by practising a fraud on the Company ; that their common plan had been successfully carried into execution by McHeyzer ; and that the appellant had himself abetted the planned commission of McHeyzer's offence by active participation so as to facilitate its execution. In effect, the Crown had rejected the position which McHeyzer even before the commencement of the non-summary proceedings had taken up to the effect that if there was a fraud, he had merely acted as an innocent agent in the transaction.

The evidence on which the Crown relied in support of the charge of conspiracy was none other than the evidence intended to be submitted as proof of the commission of the actual offences of cheating and abetment. In such a situation it has been considered undesirable and improper by the English Courts to charge the accused persons only with conspiracy or to include a charge of conspiracy in an indictment alleging the commission of the offences themselves—*R. v. Cooper and Compton* [1] and *R. v. West and others* [2]. The practice " renders admissible evidence of what one prisoner says in the absence of the other "—*R. v. Luberg* [3], and such a course is " manifestly calculated to operate unfairly and unjustly against the persons accused "—*R. v. Boulton* [4]. I have not been able to discover why the prosecuting authorities in this country have not discontinued this practice locally. In the present case, for instance, " there was no necessity from any point of view for the insertion of any charge of conspiracy "—per Humphreys J. in *Cooper's case* (supra).

The trial took an unexpected turn during its closing stages. After the defences of both McHeyzer and the appellant had been closed, the learned Judge decided, " entirely on (his) own responsibility ", to amend (by substitution) the third count in the indictment to read as follows :—

" That at the time and place aforesaid and in the course of the same transaction, you, L. T. F. Rodrigo the 2nd accused abovenamed, in the commission of the offence set out in count 2 above and which act was committed in consequence of such abetment but with a different knowledge or intention from that of the abettor, to wit : with knowledge on the part of the first accused that the 2 tons 5 cwt. of copper had

[1] *(1947) 32 Cr. App. Rep. 102.*
[2] *(1948) 1 K.B. 709.*
[3] *(1926) 19 Cr. App. Rep. 133.*
[4] *(1871) 12 Cox C. C. 87 at 93.*

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not been purchased for and on behalf of Brown & Co., Ltd., and that it had not been delivered at the Stores of the said Brown & Co., Ltd., and that you thereby committed an offence punishable under Section 103 read with Section 403 of the Penal Code."

This decision appears to have been made by the learned District Judge because he had by this time formed the impression upon the evidence that McHeyzer was in truth only an innocent agent in the perpetration of the fraud on the Company. Even if that be the explanation, the language of the amendment is clearly inappropriate. It is indeed unfortunate that the desirability of amending the indictment at this stage, and, if so, the form which it should take, were not considered after giving both the prosecution and the defence an opportunity of making their submissions on the point. Had this been done, some of the difficulties which have now presented themselves might certainly have been avoided. It is sufficient in this context to quote the observations of the Court of Criminal Appeal in *R. v. West* (supra) at page 717. " No application for leave to amend had been made by either side. The learned Judge was . . . . entitled to exercise his discretion in directing the amendment, but he clearly should have invited the parties, and in particular the defence, to express their views on the matter before deciding to do so. That opportunity was not given. In fact, the Crown did not desire any amendment and the defence would have strongly objected to the amendment if they had been given the opportunity of doing so." It is important to note in this connection that the primary responsibility for the accuracy and suitability of an indictment rests with counsel for the prosecution, and not on the Court—*R. v. Pople* [1]. Humphreys J. remarked in that case that " there may well be amendments which could properly be made at the beginning of the trial which would be oppressive and embarrassing to the accused if made at the close of the case for the prosecution ". How much more pertinent would this observation be to an amendment directed by the presiding Judge, and not even at the instance of the Crown, after the defence has also been concluded !

The appellant pleaded not guilty to the amended charge, and his counsel declined the opportunity of having the witnesses (including, presumably, the appellant's co-accused McHeyzer) tendered for further cross-examination. Indeed, learned Counsel protested that his client's defence had been gravely prejudiced by his being called upon at the end of the trial to meet a case which was substantially different from that which the Crown had earlier presented against him and from which the Crown had never retracted.

The learned Judge then proceeded to pronounce his judgment. He held that the complicity of McHeyzer in a conspiracy or in the perpetration of the fraud had not been established beyond reasonable doubt, and McHeyzer was accordingly acquitted on both the counts which affected him. The acquittal of the appellant on the count of conspiracy followed as a necessary consequence, but he was convicted on the third

[1] *(1951) 1 K.B. 53.*

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count (as amended) on the basis of the learned Judge's finding that he had abetted McHeyzer in the sense that he had *instigated* that gentleman, who was his innocent agent, to deceive the Chief Engineer in the manner specified in the earlier counts of the indictment. In other words, McHeyzer had not committed any offence but had nevertheless committed acts which, if accompanied by the requisite criminal intention, would have constituted the offence of cheating; and the appellant, by dishonestly *instigating* those acts, was guilty of abetment. The present appeal is from this conviction.

Learned Crown Counsel concedes, and I am satisfied, that the third count of the indictment (as amended) is entirely inappropriate to a set of circumstances such as, in the learned Judge's opinion, had actually taken place. Section 103 of the Penal Code relates only to a situation where the principal offender, though guilty, has committed the act abetted with a different criminal intention to that which actuated the abettor. In that event the abettor's criminal intention, and not that of the person abetted, must be the measure of his own guilt. If, however, the true position is that the person abetted had not, for one reason or another, committed an offence at all, Section 101 of the Code applies and Section 102 prescribes the punishment. As Explanation 3 to Section 101 lays down, " it is not necessary that the person abetted should have . . . . *any* guilty intention or knowledge." This is precisely what happened in the present case if the learned Judge's findings of fact be regarded as correct.

It is common ground that the conviction in its present form cannot stand, but Mr. Jayasuriya contends that this is an appropriate case for the exercise of this Court's jurisdiction under Section 347 (*b*) (ii) of the Criminal Procedure Code to " alter the verdict " by finding the appellant guilty of an offence of abetment materially different to that which had been set out in the indictment even in its amended form.

That this Court has the power to alter a verdict in the manner suggested by Mr. Jayasuriya is beyond question. But, as Lord Porter pointed out in *Thakur Shah v. The Emperor*[1], " the power must be used with discretion. If there is any chance of injustice being done or of the accused having been prevented from giving or of his having failed to give evidence material to his defence by reason of the amendment of the charge, the Court should at least make him the offer of a new trial on the charge as amended. But it is not always necessary to do so . . . . More particularly it is not necessary where it does not appear that any fresh evidence could be given on behalf of the person convicted." Lord Porter proceeded to cite with approval the ruling of the High Court of Patna that an appropriate amendment of the charge by the Appellate Court was justified in that particular case because " it cannot be said that the accused was misled by the form of the charge ".

There are three alternatives available to us, sitting as an Appellate Court, where the language of the indictment on which an accused person has been convicted at the trial below is inappropriate to the actual findings of the presiding Judge. One alternative is to direct a fresh trial

[1] *A. I. R. (1943) P.C. 193 at 195.*

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upon an altered indictment—*Section 177 (1) of the Criminal Procedure Code*. Another alternative is, without directing a fresh trial, to alter the verdict under the provisions of *Section 347* (*b*) (ii). If both these alternatives be inappropriate, the proper course is to quash the conviction and acquit the accused.

It has not been suggested by the Crown that the appellant should be re-tried on an altered count charging him with abetment. If the offence was committed at all, it was committed very nearly three years ago, and it would offend one's sense of justice to expose a person at this stage to the anxiety and expense of meeting a fresh charge alleging facts which differ so widely from the case which the Crown had chosen to present against him and his co-accused at the earlier trial.

There remains for consideration the proposed alternative of altering the verdict to a conviction on an amended charge which the appellant had not specifically been called upon to meet at any stage of the trial.

Section 100 of the Penal Code contemplates that abetment can take the form *either* of instigation *or* of prior conspiracy *or* of " intentionally aiding " the commission of the act abetted. In the first and second of these cases, the " abetment " would necessarily precede the contemplated action of the person abetted. The third case, on the other hand, seems to involve some contemporaneous activity on the part of the abettor. I do not doubt that there may well be situations in which the prosecution is not in a position to particularise in advance the form which the alleged abetment had taken, nor do I dispute the proposition that, in an appropriate case, a Court may without causing any prejudice convict an appellant, on the basis of the proved facts, of abetment of the appropriate kind falling within the definition of that offence.

We are here concerned, however, with a very different situation. The language of the original as well as of the amended count of abetment, coupled as they are with the preceding counts of conspiracy and of cheating (alleged to have been committed by McHeyzer in pursuance of that conspiracy) clearly indicated that the appellant had not been called upon to defend himself at the trial against an allegation of abetment involving prior instigation of any acts which would, if committed by McHeyzer, have formed an ingredient of a criminal offence. The distinction becomes apparent if one realises that a man who first instigates and later " intentionally aids " the doing of an act does in truth commit not one but two abetments.

The appellant and the lawyers who defended him must necessarily have shaped the defence (I do not use this phrase in any sinister form) so as to concentrate upon the particular case which he and McHeyzer had been called upon to meet. Can it then be said that there is not " any chance of injustice being done " if this Court were now to find him guilty of a different species of abetment, namely, the instigation of an innocent man to commit an act (not an offence) which would result in the deception of the Chief Engineer to the latter's prejudice ? Can it be asserted with confidence that he was not " misled by the form of the charge " ? I do not think so.

*——J. N. B 28724 (8/53)

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Decisions to the effect that, in a given set of circumstances, a particular accused person had not been prejudiced by an alteration of the charge against him can only offer us limited assistance in deciding the present problem. Putting this case at the very lowest, I am content to say that if the accused had been tried alone to meet a charge of abetment alleging facts which are in conformity with the view which the learned trial Judge had ultimately taken of his conduct, I am not convinced that the same adverse conclusion would without doubt have been justified. Nor am I satisfied that, had the appellant received proper notice of the fresh charge, he could not, to use the words of Lord Porter, have set up any further defence " without stultifying himself ". I would therefore hold that an alteration of the charge at this stage should not be ordered by this Court.

I would quash the conviction of the appellant and make order acquitting him. It is but fair to him to state that the appeal was argued on the hypothetical assumption that the findings of the learned Judge were justified upon the evidence led at the trial. In the view which I have taken, it is unnecessary to decide whether that assumption is justified.

L. M. D. DE SILVA J.—I agree.

Appeal allowed.

1953 *Present :* **Nagalingam A.C.J.**

I. F. ABEYAWARDENE, Petitioner, *and* C. E. JAYANAYAKE *et al.*, Respondents

S. C. 190—Application for a Writ of Habeas Corpus

Habeas corpus—*Surrender and abandonment of a child by its parents—Custodian's duty of registration—Adoption of Children Ordinance, No. 24 of 1941, ss. 19, 26.*

Where the custody of a child is transferred by its natural parent to a third party in circumstances not amounting to adoption, it is generally the duty of the third party, under section 19 of the Adoption of Children Ordinance, to have himself registered as the custodian of the child. Failure to register renders him liable to restore the child's custody to the natural parent, even if the restoration is prejudicial to the best interests of the child.

APPLICATION for a writ of *habeas corpus*.

D. S. Jayawickreme, for the petitioner.

N. E. Weerasooria, Q.C., with *J. A. P. Cherubim* and *A. W. W. Goonewardena*, for the respondents.

Cur. adv. vult.

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September 11, 1953. NAGALINGAM A.C.J.—

The petitioner who is mother of a child by the name of Nirmalie applies to have its custody delivered to her after removing it from the custody of the respondents with whom it is at present.

The learned Magistrate to whom the matter was referred for inquiry has in a very careful and lucid report given reasons for the view he has taken that the child should be restored to its mother. I do not think I need traverse the same ground, for counsel for the respondents did not himself seek to question the soundness of the view expressed by the learned Magistrate on questions of fact. He, however, attempted to show that the child should not be removed from the custody of who might be termed its foster parents, and based his argument upon the English case of *Mathieson v. Napier* [1] where the right of the natural parent was not permitted to hold sway as against the claim of a third party who had received the child in circumstances amounting to what has been referred to under the English Law as surrender and abandonment of the child by its natural parents.

It is true that the English notion of surrender and abandonment of a child has been recognized in more than one case in our courts—see *Gunaratnayake v. Clayton* [2] and *Samarasinghe v. Simon* [3], but no attempt has been made to show what are the legal consequences of surrender and abandonment, excepting that in such a case a court would bestow its consideration as to what is best for the child in the circumstances.

Under the Roman Dutch Law, the natural parent has a right to the custody of his or her child and that custody can only be terminated under that law under circumstances which are well recognized and clearly defined [4]. The mere delivery of a child by its natural parent to a third party does not invest the transaction with any legal consequences. If the parent had a right to hand over the custody of a child then that parent would also have the undoubted right to resume the custody himself, as the authority of the parent must prevail in the latter instance as much as in the former. We are quite used to the principles of adoption, though it does not apply to persons who are governed by the Roman Dutch Law. Adoption results in definite legal consequences, so far as the child, the adoptive parent and the natural parent are concerned.

It is, however, unnecessary to pursue the question as to the effect of surrender and abandonment, for the legislature has now stepped in and given legal recognition to the basic idea underlying the English notion of surrender. By the Adoption of Children Ordinance, No. 24 of 1941, adoption has been made legal even among persons governed by the Roman Dutch Law. The Ordinance goes on to give legal recognition to the transference of the custody of a child in circumstances where the transaction may not amount to adoption, and defines the circumstances and the consequences of such transference of custody. It uses a term for the person who receives the child in these circumstances as the custodian

[1] *(1918) 119 L.T.R. 18.*
[2] *(1929) 31 N. L. R. 132.*
[3] *(1941) 43 N. L. R. 129.*
[4] *Lee : An Introduction to Roman Dutch Law, page 42.*

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of the child. The Ordinance came into operation on 1st February, 1944 [1]. The delivery of the child in question was in 1947, at a date when the Ordinance was in operation, and section 19 of the Ordinance prohibits any person, subject to certain exceptions which have no application to the facts of the present case, from taking or receiving into his custody subsequent to the coming into operation of the Ordinance a child of which he is not a natural parent unless he has been registered as the custodian of the child. It is not suggested in this case that any certificate of registration has been obtained, and in any event no such certificate has been produced. In fact the attention of neither counsel nor Magistrate seems to have been given to the existence of the Ordinance.

The position in law, therefore, would appear to be that the respondents' custody of the child is illegal as such custody is in contravention of the provisions of the Ordinance, and furthermore they are guilty of the offence prescribed by section 26 of the Ordinance. Their custody cannot, therefore, be continued even if one were constrained to look at the problem from the point of view of what is good for and in the best interests of the child.

In view of the foregoing I grant the application of the petitioner and direct that the child Jehanara Nirmalie Abeyawardene *alias* Jayanthie Jayanayake be restored to the custody of the petitioner, and remit the record to the learned Magistrate for the order to be given effect to by him. The learned Magistrate will report to this court after the order has been executed.

Application allowed.

1953 *Present :* **Gratiaen J.**

S. DEERASOORIYA, Appellant, *and* C. L. MASILAMANY, Respondent

S. C. 93—C. R. Colombo, 31,117

Rent Restriction Act, No. 29 of 1948—Alternative accommodation—Can it be provided by altering substantially the structural identity of the protected premises ?—Section 13, sub-sections 1, proviso (c), and 3.

A landlord sued his tenant for ejectment on the ground that he "reasonably required" the leased premises for the purposes of his petroleum agency business. The trial Court passed a decree in favour of the landlord whereby (*a*) the landlord was to be restored to possession of a substantial portion of the premises which would suffice for the purpose of the landlord's business, and (*b*) the tenant should be allowed to remain in possession, at a reduced monthly rental to be subsequently determined, of the rest of the premises which, in the opinion of the Court, would (but only after certain necessary structural alterations had been effected) meet the requirements of the tenant's business as a timber merchant which was being carried on in the premises.

[1] *Government Gazette 9,228 of 21.1.44.*

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Held, that the decree was quite inappropriate for the reasons (*a*) that it would admittedly be impossible to provide the tenant with the suggested alternative accommodation until certain substantial alterations were first completed, (*b*) that it was demonstrably impracticable to afford the necessary protection to the tenant's business interests during the interval of time.

Held further, that a landlord who is restored to possession of his premises on the ground that he reasonably requires them is not entitled substantially to alter the structural identity of the protected premises before the period of time fixed by section 13 (3) of the Rent Restriction Act has elapsed.

APPEAL from a judgment of the Court of Requests, Colombo.

H. V. Perera, Q.C., with *H. W. Jayewardene*, *M. I. M. Haniffa* and *D. R. P. Goonetilleke*, for the defendant appellant.

E. B. Wikramanayake, Q.C., with *J. N. Fernandopulle* and *E. B. Vannitamby*, for the plaintiff respondent.

Cur. adv. vult.

July 13, 1953. GRATIAEN J.—

This action relates to certain premises in Colombo to which the provisions of the Rent Restriction Act No. 29 of 1948 are applicable. The tenant is a timber merchant and contractor who has during the past ten years established and progressively improved a lucrative business on the premises. The landlord is a petroleum agent associated with the Shell Company of Ceylon, and carries on his activities in another part of the city. He has sued the defendant for a decree of ejectment on the ground that the premises are " reasonably required for the purposes of his business " within the meaning of the third proviso to sec. 13 (1) of the Act.

The landlord's claim, in effect, is that he could improve his agency business considerably by transferring it to the premises now occupied by his tenant. In that event, he says, he would arrange to lease the premises to the Shell Company for a term of years ; and the Company would, *qua* lessee, after demolishing the existing buildings of the timber business and setting up in their place a modern petrol installation at its own expense, continue to employ him on the new premises as its selling agent on far more favourable terms. He points out that, by way of contrast, his profits under existing conditions remain stationary at about Rs. 700 per mensem.

The learned Commissioner was satisfied upon the evidence that the landlord would in fact gain material pecuniary advantage if this project could be carried out. It is implicit, however, in other parts of the judgment under appeal that a decree for ejectment would nevertheless lack the essential element of " reasonableness " unless the tenant were at the same time provided with suitable alternative accommodation from which he could conveniently carry on his long established timber business. After an examination of the problem from this angle, the learned Commissioner passed a decree in favour of the landlord whereby (*a*) the landlord was to be restored to possession of a substantial portion of the premises which would suffice for the erection of a modern petrol installation, and

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(*b*) the tenant should be allowed to remain in possession, at a reduced monthly rental to be subsequently determined, of the rest of the premises which, in the Commissioner's opinion, would (but only after certain necessary structural alterations had been effected) meet the requirements of the timber business. I shall assume, although I am not at all convinced, that this new arrangement would ultimately prove satisfactory.

It is sought to justify this form of decree on the analogy of the decision of the Court of Appeal in England in *Parmee v. Mitchell* [1]. If a decree for ejectment is to be passed at all in favour of a landlord, the order for possession must, as a matter of form, extend to the entire premises, "*for that is the only way in which the tenant's interest can be effectively determined*". In *Parmee's case* the tenant actually occupied only a portion of the premises which was sufficient for his own requirements, and had accordingly sub-let the remaining portion to someone else. The Court of Appeal held that the tenant was reasonably entitled only to be protected in his continued occupation of the portion which he in fact occupied, and therefore approved of a decree whereby the landlord was to be restored to possession of the *entire* property, " but subject to a proviso that the tenant was to remain in occupation of the part of the premises actually occupied by him at an agreed rental ".

I do not doubt that, notwithstanding the differences which exist between the English Act and the local Act, a decree in the form approved in *Parmee's case* may be justified in appropriate cases in Ceylon. But such a decree is quite inappropriate to the facts of the present case, because :

(*a*) it would admittedly be impossible to provide the tenant with the suggested alternative accommodation until certain substantial structural alterations have first been completed ;

(*b*) it is demonstrably impracticable to afford the necessary protection to the tenant's business interests during this interval of time.

I therefore do not see how in the present case the decree passed by the learned Commissioner can be modified so as to take the form of the decree in *Parmee's case*.

There is a further difficulty which is fatal to the decree under appeal. A landlord who is restored to possession of his premises on the ground specified in the third proviso to sec. 13 (1) of the Rent Restriction Act, No. 29 of 1948, is not entitled substantially to alter the structural identity of the protected premises before the period of time fixed by sec. 13 (3) has elapsed. If, for instance, a landlord, having regained possession of the premises for his own use, subsequently vacates them without reasonable cause within one year, the tenant is entitled as of right to be restored to possession. It is therefore essential that, in such an eventuality, the premises should throughout this period of extended protection continue to be suitable for the tenant's enjoyment in the same manner and for the same purposes as had obtained prior to the original decree for ejectment. It is only subject to this important qualification that I agree that there can be no objection to alterations being effected by the landlord to suit his own needs.

[1] (*1950*) *2. K. B. 199.*

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Ariyaratne v. Silva [1]. In the present case, the scheme of demolition and reconstruction contemplated by the landlord would necessarily destroy the tenant's protection should the need for resorting to sec. 13 (3) arise subsequently. Indeed, the scheme is specially designed to place the Shell Company, *qua* lessee, in immediate occupation of that part of the premises on which the petrol installation is to be established. The moment that occurs, a breach of sec. 13 (3) is automatically committed. No alterations to the premises can therefore be justified which would render the premises unsuitable for the revival of the activities of the present tenant's business as a timber merchant.

Even if one gives full effect to the considerations which weighed with the learned Commissioner, the landlord's claim to eject his tenant is unreasonable, and the decree under appeal cannot be supported either in law or upon the merits of the case. I therefore set aside the judgment and dismiss the action with costs in both Courts.

Appeal allowed.

1952 *Present :* **Gunasekara J.**

A. R. M. THASSIM, Petitioner, *and* W. T. WIJEKULASURIYA *et al.*, Respondents

S. C. 21—In the Matter of an Application for a Writ of Quo Warranto on (1) W. T. Wijekulasuriya, and (2) A. V. Chinniah, Commissioner, Municipal Council, Galle.

S. C. 24—In the Matter of an Application for a Writ of Mandamus on (1) A. V. Chinniah, Commissioner, Municipal Council, Galle, and (2) W. T. Wijekulasuriya.

Quo warranto—Local Authority—Municipal Council—Procedure for election of Mayor—Irregularity—Acquiescence—Estoppel—Municipal Councils Ordinance, No. 29 of 1947, as amended by Local Authorities (Election of Officials) Act, No. 39 of 1951—Section 14 (4)—" Candidate ".

A member of a local authority is estopped from coming forward as a relator to impeach a title conferred by an election in which he has concurred or acquiesced. Where, therefore, in the election of the Mayor of a Municipal Council, the provisions of section 14 (4) of the Municipal Councils Ordinance, No. 29 of 1947, as amended by the Local Authorities (Election of Officials) Act, No. 39 of 1951, which prescribe the procedure, have been infringed, a Councillor who participated in the irregularity is not entitled, by way of an application for a writ of *quo warranto*, to impeach the title of the person who was elected Mayor. In such a case, the Councillor cannot plead ignorance of the law as an excuse.

The word " candidate " in section 14 (4) of the Municipal Councils Ordinance means no more than a Councillor who has consented to his name being proposed and seconded for election.

[1] *(1953) 54 N. L. R. 431.*

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APPLICATIONS for mandates in the nature of a writ of *quo warranto* and a writ of *mandamus* against the Mayor of the Galle Municipal Council and the Municipal Commissioner.

H. V. Perera, Q.C., with *E. B. Wikramanayake, Q.C., Sir Ukwatte Jayasundera, Q.C., S. Nadesan, M. H. A. Azeez, H. W. Jayewardene* and *G. T. Samarawickreme*, for the petitioner.

N. E. Weerasooria, Q.C., with *S. J. V. Chelvanayakam, Q.C., C. S. B. Kumarakulasinghe, Vernon Wijetunge, Izadeen Mohamed* and *A. S. Vanigasooriyar*, for the 1st respondent in S. C. No. 21 and 2nd respondent in S. C. No. 24.

G. E. Chitty, with *P. Somatilakam, S. Sharvananda* and *Joseph St. George*, for the 2nd respondent in S. C. No. 21 and 1st respondent in S. C. No. 24.

Cur. adv. vult.

March 18, 1952. GUNASEKARA J.—

These two applications for mandates in the nature of a writ of *quo warranto* and a writ of *mandamus* respectively were heard together. I shall deal first with Application No. 21, which is the application for a writ of *quo warranto*.

The petitioner and the first respondent were candidates for election as Mayor of the Galle Municipal Council at a meeting that was held on the 15th January, and the other respondent, who is the Municipal Commissioner, was the Chairman of that meeting. All the Councillors, fifteen in number, were present, and after certain proceedings had been taken for the election of a Mayor, the Commissioner declared the first respondent elected, upon the footing that he had received eight votes and the petitioner the other seven. In due course the first respondent took the chair and the petitioner made a magnanimous speech congratulating him on his election and assuring him of his fullest co-operation in the execution of his duties as Mayor. He then consulted his lawyers and filed the present application for the purpose of having the first respondent's election declared null and void and having himself declared elected as the Mayor.

The procedure for an election is prescribed by section 14 of the Municipal Councils Ordinance, No. 29 of 1947, as amended by the Local Authorities (Election of Officials) Act, No. 39 of 1951. Sub-section (3) provides that the name of any Councillor may with his consent be proposed and seconded for election as Mayor by any other Councillor present at the meeting and the Councillors present shall thereupon elect, in accordance with the provisions of sub-section (4), a Mayor from among the Councillors proposed and seconded for election. At the meeting in question the names of three Councillors—the petitioner, the first respondent, and E. D. Nagahawatte—were proposed and seconded for election. The

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Councillors then determined, under paragraph (*b*) of sub-section (4), that the mode of election should be by open voting. Thereupon the Commissioner purported to take the votes in the manner provided by paragraph (*c*), which reads as follows :

> " Where it is determined under paragraph (*b*) that the election of a Mayor or a Deputy Mayor shall be by open voting, the Commissioner shall take the votes by calling the name of each Councillor present and asking him how he desires to vote and recording the votes accordingly. A Councillor may state that he declines to vote, and in such case the Commissioner shall record that such Councillor declined to vote.
>
> The Commissioner shall declare the result of the voting. "

The Councillor whose name was the first to be called voted for the first respondent. The next two declined to vote. At that stage, according to the " voting sheet " comprising the record made by the Commissioner at the time, E. D. Nagahawatta " withdrew ". The Commissioner recorded this " withdrawal " and continued with the taking of the votes. In the result seven of the Councillors voted for the petitioner and six for the first respondent, and two declined to vote.

It is contended for the petitioner that that was a valid voting and that having received more votes than the aggregate of the votes received by the first respondent and Nagahawatta he was duly elected Mayor in accordance with the provisions of paragraph (*e*) of sub-section (4). The terms of this paragraph are as follow :

> " Where more than two candidates are proposed and seconded for election as Mayor or Deputy Mayor and no candidate receives at the first voting more votes than the aggregate of the votes received by the remaining candidates, one candidate shall be excluded from the election as hereinafter provided and the voting shall proceed, one candidate being excluded from the election after each subsequent voting, until a candidate receives at a voting more votes than the aggregate of the votes received by the remaining candidates at that voting, or, as the case may be, until voting in respect of two candidates only is held and completed. "

Paragraph (*f*) provides for the exclusion of the candidate receiving the lowest number of votes or one such candidate selected by lot.

After the voting to which I have just referred, the Commissioner purported to hold a second voting. On this occasion all the Councillors gave their votes, including the two who declined at the first voting and also the petitioner himself. Eight voted for the first respondent and seven for the petitioner, and the Commissioner declared the former elected Mayor. It is contended for the petitioner that this second voting and the purported election of the first respondent were a nullity and that at the end of the first voting it was the Commissioner's duty to declare the petitioner elected.

In an affidavit dated the 16th February the second respondent has given his account of the circumstances in which he decided to hold the second voting. When two of the Councillors declined to vote, he says,

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Nagahawatta " stated that he did not wish to stand for election and withdrew from the election and requested the Councillors supporting him to vote for W. T. Wijekulasuriya, the first respondent ", and he thereupon " recorded in the voting sheet that E. D. Nagahawatta stated that he withdrew from the election ", and he " proceeded to register the voting of the rest of the Councillors". The result of this voting, he continues, was that the petitioner received seven votes, the first respondent six and Nagahawatta none, and he " announced the result of this voting to the Councillors ". As, however, Nagahawatta " had declared his unwillingness to stand for election after three Councillors had exercised their rights at the voting " he thought that his proceeding to take the votes of the rest of the Councillors was " unfair and irregular ", and he, therefore, " without declaring the petitioner Mayor requested the Councillors to vote between the first respondent and the petitioner who were now the only candidates". He proceeds to say that he would not have taken this step if either of these two candidates had received at least eight votes on the first occasion, because then " whichever way the two votes of those who originally declined to vote were cast it could not have affected the result".

Much the same account appears in the minutes of the meeting signed by the second respondent as Municipal Commissioner. Having stated that the result of the voting was that the petitioner received seven votes, the first respondent six, and Nagahawatta none, and that two Councillors declined to vote, the minutes continue :

> " As neither of the two candidates obtained a minimum of eight votes and as Mr. E. D. Nagahawatta had declined to stand for election after a section of the House had already voted, the Municipal Commissioner proceeded to obtain a fresh voting between Messrs. Thassim and Wijekulasuriya. "

The first respondent's affidavit adds nothing to what has been stated by the second on this point. The petitioner's account is contained in the following paragraphs of his affidavit of the 20th January :

> " 4. At the first voting I obtained seven votes, the 1st respondent six votes and E. D. Nagahawatta no votes. I having thus received more votes than the aggregate of the votes received by the remaining candidates was in terms of section 14 of the Municipal Council Ordinance, No. 29 of 1947, as amended by the Local Authorities (Election of Officials) Act, No. 39 of 1951 duly elected Mayor.
>
> 5. The second respondent without declaring the result of the voting to be as set out in the last preceding paragraph held further proceedings without any warrant or justification in law by purporting to have a second voting after excluding the said E. D. Nagahawatta from the election and thereafter purported to declare the 1st respondent duly elected Mayor for 1952. I was not then aware that the said further proceedings were void. "

This account suggests that the procedure followed was that prescribed, not for such a case as this, but for a case where more than two candidates are proposed and seconded for election and no candidate receives at the

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first voting more votes than the aggregate of the votes received by the remaining candidates. That this was the procedure which the Commissioner regarded himself as adopting is made clear by a document that he handed to the petitioner on the very next day, the 16th January, in response to a request for a copy of the minutes. This document, which purports to be a draft of the minutes, states :

" When three votes were recorded, Mr. E. D. Nagahawatta declined to stand for election. The Commissioner stated that his name may be excluded after the first voting was fully recorded.

The voting resulted as follows :—

First Voting

For Mr. A. R. M. Thassim : Messrs. B. M. Charles, D. Y. Weerasirie, A. R. M. Thassim, H. K. Edmund, A. I. H. A. Wahab, L. E. Mendis and T. D. Abeywardena.

For Mr. W. T. Wijekulasuriya : Messrs. W. Dahanayake, W. T. Wijekulasuriya, E. D. Nagahawatta, D. A. S. P. Dahanayake, A. D. H. Weeratunge and M. Thaha Cassim.

For Mr. E. D. Nagahawatta : Nil.

Declined to vote : Messrs. A. H. E. Fernando and D. S. Goonesekera.

Mr. Nagahawatta's name was excluded.

Second Voting

For Mr. A. R. M. Thassim : Messrs. B. M. Charles, D. Y. Weerasirie, A. R. M. Thassim, H. K. Edmund, A. I. H. A. Wahab, L. E. Mendis and T. D. Abeywardena.

For Mr. W. T. Wijekulasuriya : Messrs. W. Dahanayake, A. H. E. Fernando, D. S. Goonesekere, W. T. Wijekulasuriya, E. D. Nagahawatta, D. A. S. P. Dahanayake, A. D. H. Weeratunga and M. Thaha Cassim.

Mr. W. T. Wijekulasuriya was declared duly elected Mayor for 1952. "

The words " Mr Nagahawatta's name was excluded " were inserted in the draft by the second respondent in the presence of the petitioner before he handed the document to him.

I do not think that there is any material inconsistency between this version and the second respondent's affidavit, but if there is the former should be preferred for the reason that his recollection of the events would have been better at the time when he prepared or adopted the draft minutes. It seems to me that the second respondent treated the election as one in which there were three candidates until the end of the first voting, and that at that stage he excluded from the election, in supposed compliance with the provisions of paragraphs (*e*) and (*f*) of section 14 (4), the candidate who received no votes. It is apparent that Nagahawatta's

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interruption of the proceedings raised a problem for the second respondent as to how he should proceed, in view of the other's statement that he did not wish to stand for election and that he withdrew and the element of confusion that it may well have introduced. Apparently he was in doubt as to whether Nagahawatta's name should be excluded immediately, but he thought that the problem would solve itself at the end of that poll if he took the rest of the votes ; and so he seems to have " stated that his (Nagahawatta's) name may be excluded after the first voting was fully recorded ". When at the end of the voting he found that no candidate had received a majority of the possible votes, by polling at least eight votes, it appears to have occurred to him that the procedure he had adopted could result in unfairness and must therefore be " irregular ", but he seems to have thought that any irregularity would be cured and any unfairness redressed by the next step that he thought he should take of excluding Nagahawatta from the election at that stage.

It is contended for both respondents that the first voting was a nullity. One ground upon which Mr. Chitty bases that contention is that Nagahawatta's conduct showed that he did not consent to stand for election. I do not think that this is a tenable ground : Nagahawatta made no protest when his name was proposed and seconded for election and it does not appear that even at the late stage at which he did speak he denied having consented to his name being proposed. Mr. Chitty next argues that if he did so consent he withdrew his consent later and thereby ceased to be a candidate. Mr. Chelvanayakam's argument, too, is that Nagahawatta ceased to be a candidate and therefore the first voting was a nullity : he had ceased to be a candidate in fact and the law does not say that he must be deemed to be a candidate nonetheless. The view submitted by Mr. H. V. Perera in his reply is that sub-section (4) merely gives the Commissioner directions as to the steps that he must take in the election and does not, by the introduction of the word " candidate ", add a new condition upon which those steps must be taken. The only conditions, he points out, are those laid down in sub-section (3), and a " continuing consent " to stand for election is not one of them. I agree with this view. The word " candidate " in the context in which it appears means no more, I think, than a Councillor who has consented to his name being proposed and seconded for election.

It seems to me, however, that it is implicit in this view of the effect of sub-section (4) that the ground on which the first respondent's title to the office is impeached is merely a defect in the procedure by which he was elected. The Councillors who were present at the meeting were empowered by sub-section (3) to elect a Mayor from among those who were duly proposed and seconded for election, and they chose the first respondent from among such candidates by a majority of the whole number of Councillors (and not merely of those who were present), but the provisions of sub-section (4) which prescribes the mode of election were infringed. The petitioner himself participated in the irregularity, however, and is disqualified by his concurrence in the mode of election for impeaching the first respondent's title to the office. His plea that he was " not then aware that the said further proceedings were void " is only

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a plea of ignorance of the law, which is not an excuse. The gist of the decisions regarding the effect of acquiescence is stated by Jayawardene A. J. in *Inasitamby v. Government Agent, Northern Province* [1], as follows :

> " It is a general rule of corporation law that a corporator is estopped from coming forward as a relator to impeach a title conferred by an election in which he has concurred (*Rex v. Lane* [2] and *Rex v. Cobb* [3]). It is a valid objection to a relator that he was present and concurred at the time of the objectionable election even though he was then ignorant of the objection, for a corporator must be taken to be cognizant of the contents of his own charter and of the law arising therefrom (*Rex v. Trevanon* [4]). Where a corporator has attended and voted at a meeting, he will not be allowed to become a relator, unless he shows that at the time of the election he was ignorant of the objection subsequently taken (*Rex v. Slythe* [5]). A relator who has acquiesced in and himself adopted the mode of voting he now objects to is disqualified from applying for a rule (*Rex v. Lofthouse* [6]), and a rule will not be granted to a relator who has participated in the alleged irregularities on which he based his application (*Rex v. Colclough* [7])."

(The ignorance referred to in *Rex v. Slythe* is ignorance of some fact making the election invalid and not ignorance of the law.)

Application No. 21 is refused. Application No. 24, for a mandate in the nature of a writ of *mandamus* is also refused. In each case the petitioner will pay the costs of the first respondent, that is to say, the respondent W. T. Wijekulasuriya in Application No. 21 and the respondent A. V. Chinniah in Application No. 24.

Applications refused.

1952 *Present :* **Swan J.**

A. M. JOHARDEEN, Appellant, *and* T. J. AHMATH (S. I. Police), Respondent

S. C. 631—M. C. Matale, 1,931

Joinder of Charges—" In the same transaction "—Criminal Procedure Code, s. 184.

For joinder of charges in respect of offences committed in the same transaction, it is not necessary that the charges must expressly state that the offences were committed in the course of the same transaction. If the sameness of the transaction is manifest or implicit in the charges themselves there is no misjoinder.

[1] *(1932) 34 N. L. R. 33, at 36.*
[2] *(1827) 9 Dow. Ry. K. B. 183.*
[3] *4 Dow. & Ry. M. C. 293.*
[4] *2 B. & Ald. 339 & 479, 106 E. R. 391.*
[5] *6 B. & C. 240, 108 E. R. 441.*
[6] *(1866) L. R. 1 Q. B. 433.*
[7] *(1882) 1 N. Z. L. R. 129, 16 Emp. Dig. 364 (note).*

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APPEAL from a judgment of the Magistrate's Court, Matale.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy*, for the 2nd accused appellant.

Boyd Jayasuriya, Crown Counsel, for the Attorney-General.

Cur adv. vult.

November 4, 1952. SWAN J.—

In this case the appellant and one S. Ponnambalam were charged as follows :—

that they did on or about 1st May, 1950, at Matale within the jurisdiction of this Court dishonestly misappropriate a sum of Rs. 117·50 the property of the Matale Co-operative Transport Society, Ltd. and thereby committed an offence punishable under Section 386 of the Ceylon Penal Code

In the alternative

at the time and place aforesaid the 2nd accused being employed as a Cashier-Clerk did wilfully and with intent to defraud falsify an account which belongs to his employer to wit the Honorary Secretary of the Matale Co-operative Transport Society, Ltd. by making the following entry :—

" a sum of Rs. 117·50 was paid to Messrs. Costa's Motor Works, Matale, on 1.5.1950 " whereas in truth and in fact no such sum was paid to Messrs. Costa's Motor Works and thereby committed an offence punishable under Section 467 of the Ceylon Penal Code.

Mr. Perera maintains that there is a misjoinder of charges and that the convictions must be quashed. Section 184 of the Criminal Procedure Code permits a joinder of accused in respect of charges committed *in the same transaction*. There can be no question that violation of this rule would make the trial an illegality. It was so held in the case of *Subramania Iyer v. King-Emperor* [1] where the Privy Council was dealing with the construction of Section 239 (*d*) of the Indian Criminal Procedure Code which corresponds to Section 184 of our Code. This case was referred to in *Choukhani v. King-Emperor* [2] and Lord Wright who delivered the judgment of the Privy Council said :—

" It has been taken as settled law on all sides throughout these proceedings that the infringement of Section 239 (*d*) would, if made out, constitute an illegality, as distinguished from an irregularity, so that the conviction would require to be quashed under the rule stated in *Subramania v. King-Emperor* [1] as contrasted with the result of an irregularity as to which *Abdul Rahaman v. King-Emperor* [3] is an authority.

[1] *(1901) L. R. 28 Ind. Appeals 251.* [2] *(1398) L. J. R. (P. C.) 38.*
[3] *(1926) L. R. 53 Ind. Appeals 96.*

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Their Lordships will assume that this is so without thinking it here ne essary to discuss the precise scope of what was decided in *Subramania's* case, because in their understanding of Section 239 (*d*) that question does not arise. "

Mr. Perera contends that the charges must clearly state that the offences were committed in the course of the same transaction. He even contended that the omission of the words " *in the course of the same transaction* " were sufficient to indicate that they were not so committed. In this connection he drew my attention to the dictum in *Choukhani v. King-Emperor* [2] that the correctness of the joinder, which depends on the sameness of the transaction, is to be determined by looking at the accusation and not by looking at the result of the trial. But as learned Crown Counsel submitted, there is no special magic in the use of the words " in the course of the same transaction ". If the sameness of the transaction is manifest or implicit in the charges themselves there is no misjoinder. In this case the charges themselves reveal that the offences were committed in the course of the same transaction.

I shall now deal with the appeal of the 2nd accused on the merits.

[His Lordship then considered the merits and reached the conclusion that the conviction of the appellant should be set aside.]

Appeal allowed.

1953 *Present :* **Weerasooriya J.**

VADIVEL CHETTY, Appellant, *and* ABDU, Respondent

S. C. 254—C. R. Colombo, 37,171

Landlord and tenant—Enhancement of rent—Not effective until there is agreement—Refusal of landlord to accept rent due—Resulting position—Rent Restriction Act, No. 29 of 1948, s. 13 (1) (a).

Where a tender of payment of the rent due was made by the tenant and was refused by the landlord on the ground that, as the monthly rent had been enhanced by him, a larger amount was due—

Held : (i) A landlord's unilateral act in demanding payment of a higher rent than that agreed upon does not render the tenant liable to pay the higher rent demanded.

(ii) Where a landlord refuses to accept the rent due when it is tendered to him, and has by his conduct made it clear that he will not, in the future, accept rent at the rate agreed upon, the tenant is not obliged to tender the rents for the subsequent months as and when they fall due. The tenant must, however, pay all the unpaid rent within a reasonable time if the landlord subsequently demands it or signifies his readiness to accept it.

(iii) Where the tenant has been given reasonable time to pay all unpaid rent, he cannot be said to be in arrear within the meaning of section 13 (*a*) of the Rent Restriction Act until one month elapses after the expiry of such reasonable time.

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APPEAL from a judgment of the Court of Requests, Colombo.

S. J. V. Chelvanayakam, Q.C., with *S. Canagarayar* and *A. Sivagurunathan*, for the plaintiff appellant.

H. W. Jayewardene, with *D. R. P. Goonatilleke*, for the defendant respondent.

Cur. adv. vult.

August 3, 1953. WEERASOORIYA J.—

The defendant in this case, who is the respondent to the present appeal, became the monthly tenant of premises bearing No. 90, Silversmith Lane, Colombo, belonging to the plaintiff, who is the appellant. The tenancy commenced on the 1st January, 1951, and the rent as agreed between the parties was Rs. 18 per month payable on or before the 10th of the month immediately following.

On the 7th March, 1951, before the rent for February had fallen due, the appellant through his proctor wrote the letter P4 to the respondent in which certain facts (which for the purpose of this judgment it is not necessary to set out) were alleged as entitling the appellant to demand from the respondent, as from the 1st February, 1951, a sum of Rs. 29·18 as the monthly rent in lieu of the Rs. 18 agreed upon.

On the 10th March, 1951, the respondent's proctor wrote to the appellant's proctor the letter P5 calling for proof of the facts on the basis of which the demand for enhanced rent had been made, and on the same day the respondent wrote the letter P6 by which he forwarded a money order for Rs. 37·90, of which Rs. 18 represented the rent for the month of February in respect of No. 90, Silversmith Lane, and the balance was rent in respect of certain other premises of which also the respondent was the appellant's tenant.

The sum of Rs. 18 forwarded by the respondent as the February rent for premises No. 90, Silversmith Lane, was returned to the respondent by the appellant's proctor by his letter P7 dated the 14th March, 1951, with a further request that rent should be paid as from February at the rate of Rs. 29·18 per month. On the 9th April, 1951, the respondent wrote the letter P9 to the appellant forwarding a money order for Rs. 55·90 which included a sum of Rs. 36 as the February and March rents for premises No. 90, Silversmith Lane. The letter also set out the views of the respondent as to why the rent of these premises should continue to be Rs. 18 per month, and not Rs. 29·18 as claimed by the appellant. A reply to P9 was sent by the appellant's proctor by his letter P10 dated the 23rd April, 1951. That letter intimated to the respondent that the appellant was not prepared to accept rent at Rs. 18 per month for the premises, and the sum of Rs. 36 paid as rent for February and March was returned to the respondent and he was again called upon to pay rent at

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the rate of Rs. 29·18. This letter was followed up by letter P11 dated the 26th April, 1951, from the appellant's proctor in which the respondent was informed that as he had failed to pay rent at the rate of Rs. 29·18 from February onwards he should quit and deliver vacant possession of the premises on the 31st May, 1951, and that on his failure to do so an action would be instituted against him. A specific issue was raised at the trial whether this letter had the effect of terminating the contract of tenancy between the parties, and this issue was answered in the affirmative by the learned Commissioner. No argument was addressed to me at the hearing of the appeal that this finding of the learned Commissioner was erroneous, and I shall therefore proceed on the footing that when this action was filed the contract of tenancy between the parties had already been determined by P11.

On the 3rd April, 1951, the respondent had made an application to the Rent Control Board praying, *inter alia*, for an order on the appellant to accept rent for premises No. 90, Silversmith Lane, at the rate of Rs. 18 per month. On the 7th June, 1951, the appellant also made an application to the Board, the object of which was to obtain an order on the respondent to pay on or before a date to be specified all arrears of rent from the 1st February, 1951, at the rate of Rs. 29·18 per month and, in default of such payment, the authority of the Board to institute an action for ejectment against the respondent.

Pending the determination of his application to the Board the respondent made no tender of payment of rent, even at Rs. 18 per mensem, for the months following March, 1951. On the 5th February, 1952, the appellant's proctor wrote to the respondent the letter P12. At the date of that letter no final determination had been given by the Board on either of the applications made by the appellant and the respondent. In P12 the respondent was informed that as any order made by the Board would not have retrospective effect he should remit to the appellant within 7 days all arrears of rent at the rate of Rs. 18 per month. The rent then outstanding was the rent for the period February, 1951, to January, 1952. The respondent's proctor replied to P12 by letter P14 dated the 12th February, 1952. In that letter particulars were called for as regards the aggregate amount of the appellant's claim and the period in respect of which it was made, and the appellant was informed that a remittance would be sent on receipt of these particulars.

On the 14th February, 1952, the appellant filed action against the respondent praying for his ejectment from premises No. 90, Silversmith Lane, and for the recovery from him of arrears of rent at Rs. 18 per month for the period February, 1951–January, 1952, and damages at the same rate from February, 1952, until the date of ejectment.

For the institution of this action no authority was obtained from the Rent Control Board. Paragraph 6 of the plaint averred that the respondent was in arrears of rent for more than one month after it had become due " within the meaning of section 13 (1) (*a*) of the Rent Restriction Act, No. 29 of 1948 " (hereinafter referred to as " the Act ") and the question that arises for decision in this appeal is whether in the

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circumstances stated that averment has been made out, and the appellant's action is maintainable. The decision of that question involves a consideration of the legal position when a tender of payment of the rent is made by the tenant and is refused by the landlord on the ground that a larger amount is due.

It might be stated here that the agreed rate of rent when the tenancy commenced being Rs. 18 per month, even assuming that anything subsequently happened as a result of which the view could be taken that the sum of Rs. 29·18 per month represented no more than the authorised rent recoverable under the Act, the appellant could not, in my opinion, by his unilateral act in demanding payment of rent at that rate change an essential term of the contract of tenancy. It was held in the case of *De Silva et al. v. Perera* [1] that a mere demand made by a landlord for the payment of a higher rent than that agreed upon did not render the tenant liable to pay the higher rent demanded. The decision in that case would apply to the present case notwithstanding that the tenancy under consideration is governed by the provisions of the Act. This appeal must, therefore, be decided on the basis that at all material times the rent of the premises was Rs. 18 per month.

It was conceded by Mr. Chelvanayagam, who appeared for the appellant, that there was a valid tender by the respondent of the rents that fell due for February and March, 1951. Where a tenant has made a valid tender of the rent due, while the non-acceptance of it by the landlord would not place the tenant in default or *in mora* in the payment of that rent, the tenant is not thereafter entirely discharged from the obligation to pay the amount tendered if the landlord subsequently demands it or signifies his readiness to accept it. Wessels in his treatise on the Law of Contract in South Africa [2], in dealing with a tender of money in the attempted performance of a contract, states as follows :—

Para 2339 (3) : " It is submitted that in the case of a money debt, the tender of the money does not liberate the debtor, and he does not hold the money after tender at the risk of the creditor . . . . "

Para 2340 : " The debtor must always continue ready and willing to pay the money due, and if sued upon the debt, can plead his tender and payment of the money into Court . . . . If this plea is proved the plaintiff will be entitled to the money paid into Court, but the defendant will be entitled to the costs of the action ".

The position in English Law is similar, as appears from the following passage in Anson on the Law of Contract [3] :—

" If the creditor will not take payment when tendered, the debtor must nevertheless continue always ready and willing to pay the debt. Then, when he is sued upon it, he can plead that he tendered it, but he must also pay the money into Court.

[1] *(1928) 29 N. L. R. 506.*

[2] *Wessels on the Law of Contract in South Africa (1937 edition), Vol. I, pp. 703–4.*

[3] *Anson on the Law of Contract (1937 edition), p. 329.*

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If he proves his plea, the plaintiff gets nothing but the money that was originally tendered to him, while the defendant gets judgment for his costs of defence, and so is placed in as good a position as he held at the time of the tender ".

It will be seen that while the respondent tendered to the appellant the rents for February and March, 1951, as they fell due, no tender was made of the rents for April–December, 1951, and January, 1952. Mr. Chelvanayagam did not, however, contend that despite the refusal of the appellant to accept the rents for February and March, 1951, and his having returned to the respondent the sums tendered, the respondent was under an obligation to tender the rents for the subsequent months as and when they fell due. Up to the time when the letter P12 was written to the respondent by the appellant's proctor, the appellant by his conduct had made it clear that he would not accept rent at Rs. 18 per month, and applying the maxim *lex non cogit ad inutilia* I would hold on the admitted facts that the respondent was not obliged to tender the rents for the subsequent months as and when they fell due. The position is analogous to the case where although a land has been transferred subject to the condition that if the transferor pays a certain sum within a specified period he would be entitled to a re-transfer of it, the transferee subsequently, at a point of time prior to the expiry of the period of the option, repudiates the agreement to re-transfer. It was held in *Muthuvel et al. v. Markandu* [1] that in those circumstances it was unnecessary for the party entitled to ask for the re-transfer to allege or prove tender of the purchase price within the specified period in an action subsequently instituted for specific performance of the agreement.

S. 13 (1) of the Act provides that no action for the ejectment of a tenant shall be instituted in or entertained by any Court except with the written authorisation of the Rent Control Board. Under the proviso to that sub-section an action for ejectment may, however, be instituted without the authorisation of the Board on the grounds set out in paragraphs (*a*)–(*d*) of the proviso, of which paragraph (*a*) requires as a condition precedent that the rent has been in arrear for one month after it has become due. The words " in arrear " in that paragraph are not used in any special sense and their ordinary meaning is that the payment of the rent has been in default. Now 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 that rent ; nor can it be said that the tenant has been in default in paying the rent where as a result of the landlord's conduct in refusing acceptance of the rent for a previous month he did not tender the rent for a subsequent month on the ground that the tender would have been useless. It is only of the rent outstanding from a tenant who is behind in the discharge of his liability to pay rent punctually that it may be said that the rent is in arrear. Whether in a given case the rent has been in arrear would largely be a question of fact.

Mr. Chelvanayagam while conceding that the respondent cannot be said to have been in default in the payment of the rent up to the time of

[1] *(1952) 54 N. L. R. 462.*

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the receipt by him of P12, submitted that on the respondent failing to remit to the appellant, within the period specified in P12, all the rent that was then outstanding at the rate of Rs. 18 per month, he was in default in the payment of that rent. Mr. Chelvanayagam also conceded that where a creditor makes a subsequent demand for payment of money previously tendered, but refused by him, the debtor must be allowed a reasonable time for the payment of the money, but he contended that the period of seven days specified in P12 was a reasonable time. What a reasonable time is is, however, a question of fact. In this case there is a finding by the learned Commissioner that the time limit imposed by the appellant in P12 was neither adequate nor reasonable, and that the respondent was not in arrear in the payment of the rent, and I see no reason to disturb that finding ; but even assuming that such time limit was reasonable the respondent would have commenced to be in default (or in arrear) only on the expiry of that period. This action was instituted on the 14th February, 1951 ; that is to say one day, or at the most two days, after the expiry of the specified period, and even if the respondent was in arrear for one day, or two days, at the time of the institution of the action, that fact alone would not have entitled the appellant to dispense with the authority of the Rent Control Board, as, in terms of s. 13 (1) (*a*) of the Act, such authority is unnecessary only when the rent has been in arrear *for one month* after it has become due, and in my opinion on no view of the matter could it be said that when the action was instituted the rent was in arrear for one month after it had become due.

In the result the order of the learned Commissioner dismissing so much of the appellant's action as relates to the ejectment of the respondent is correct and the appeal from that order is dismissed. With regard to that part of the action which relates to the recovery of the rent outstanding at the date of action, the respondent in his answer admitted that it was due, and pleaded tender of the rent for February and March, 1951, and his readiness at all times to pay that rent as well as the other rents which were outstanding, and although he did not, as required by s. 414 of the Civil Procedure Code, at the time that the answer was filed pay the money into Court or take the requisite steps for the purpose of such payment, the money was in fact paid into Court on or about the 15th September, 1952, and before the actual trial of the case, along with the rent for the months of February–May, 1952.

The order of the learned Commissioner dismissing that part of the appellant's action for the recovery of the sum of Rs. 216 as representing the rent outstanding for the months of February–December, 1951, and January, 1952, is set aside, and judgment will be entered for the appellant for that amount. The appellant will be entitled to withdraw that amount from the sum deposited in Court. The respondent will, however, be entitled to his costs of the trial which will have to be paid by the appellant. Each party will bear his own costs of appeal.

Order varied.

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1953 *Present :* **Nagalingam A.C.J., Gratiaen J. and Weerasooriya J.**

T. A. K. DE SILVA, Petitioner, *and* HIRDARMANI LTD., Respondent

S. C. 175—Application for conditional leave to appeal to the Privy Council in S. C. 94, D. C. Colombo 21772

Privy Council—Application for conditional leave to appeal—Valuation of "matter in dispute on the appeal"—Notice to opposite party—Grounds of appeal need not be specified—Rules 1 and 2 of Schedule to Appeals (Privy Council) Ordinance.

Plaintiff sought to recover from defendant a sum of Rs. 2,250 as arrears of payments due to him under an agreement whereby the defendant was allegedly obliged to pay the plaintiff a monthly allowance of Rs. 150 for the rest of plaintiff's life. He further claimed the additional sum that would become due, under the agreement, from date of action till date of decree and for legal interest. The trial Court entered judgment in favour of plaintiff for a total sum of less than Rs. 5,000. The defendant appealed, and his appeal was allowed. The plaintiff, thereupon applied for conditional leave to appeal to the Queen in Council.

Held, that, for the purpose of determining the value of the matter in dispute on the appeal to the Queen in Council, (1) the amounts that became payable to the plaintiff under the alleged agreement subsequent to the date of the decree of the trial Court and up to the date when the Supreme Court pronounced judgment should not be taken into consideration, (2) although the amount at stake in the action was less than Rs. 5,000, representing only part of the instalments that had fallen due up to the date of decree of the trial Court, the action itself raised the entire question of the existence and validity of the contract between the parties, and a settlement of that question one way or the other affected the rights and liabilities of parties beyond the sum of Rs. 5,000 ; the plaintiff was therefore entitled, under the second part of Rule 1 (*a*) of the Schedule to the Appeals (Privy Council) Ordinance, to appeal as of right to the Queen in Council.

Held further, that the notice given by an appellant to the opposite party in accordance with Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance need not specify the particular grounds upon which it is intended to make the application for conditional leave.

Kasipillai v. Nagalinga Kurukkal (1952) 54 N. L. R. 183, overruled.

APPLICATION for conditional leave to appeal to the Privy Council. It was referred to a Bench of three Judges for determination.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the defendant respondent.—There are two objections to the present application. Firstly, the matter in dispute on the appeal is not of the value of Rs. 5,000 and, secondly, the notice given of the intended application is bad in law.

The plaintiff-petitioner has valued the action at Rs. 2,250. He must place a value on his action when he comes into Court. Once he has so valued it he cannot subsequently change it to bring him within Rule 1 (*a*) of the Schedule to the Appeals (Privy Council) Ordinance.

4——LV
2——J. N. B 28742—1,592 (8/53)

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The petitioner had to place evidence necessary for assessing the value of the right. Up to date he has made no attempt to place before Court any material to value his right. See *Appuhamy v. Victor Corea* [1], *Babapulle v. Rajaratnam* [2], *Pemaratne Thero v. Indasara Thero* [3]. The value of the right is the market value—of which there is no evidence. The Court of Appeal cannot set out on its own to place any value—*Ahamadu Lebbe v. Abdul Cader* [4]; *Sokkalal Ram Sait v. Nadar* [5]; *Subbiah Pillai v. Fernando* [6]. The proper test has been laid in the English cases of *Allan v. Pratt* [7] and *Macfarlane Leclaire* [8]. These principles of valuation have been consistently followed here. See *Bandara v. Bandara* [9], *De Alwis v. Appuhamy* [10], *Joseph v. Sockalingam Chetty* [11], *Gooneratne v. Bishop of Colombo* [12] and *Fradd v. Fernando* [13].

In India the position is somewhat different under section 110 of the Indian Civil Procedure Code. The important distinction in the corresponding Indian provision is that it is not only necessary that the subject matter in dispute on the appeal should be of the value of Rs. 10,000 but also that the subject matter of the action in the court of first instance must be of the same value. It is very clear therefore that accruing interest and mesne profits cannot be tacked on to get the sum total over the Rs. 10,000 mark. Vide *Mangamma v. Mahalakshmamma* [14]. The petitioner in the present case has come to Court asking for a decree as set out in paragraph 4 of the petition. Therefore his case comes under the first part of Rule 1 (*a*) and he cannot rely on the second part. Vide *Mangamma v. Mahalakshmamma* [14] and *Subramania Aiyar v. Sellammal* [15].

On the question of notice, the judgment in *Kasipillai v. Nagalinga Kurukkal* [16] is only the logical conclusion of the ruling in *Vanderpooten v. Vanderpooten* [17]. What is required under Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance is notice of the intended application, and the application must be by petitioner. Therefore, what should be served on the respondent is notice of the petition. The word " intended " is important. The effect of that word is that notice should be given before application is made. Vide *Wijesekera v. Corea* [18]; *Pathmanathan v. Imperial Bank of India* [19]; *Balasubramaniam Pillai v. Valliappa Chettiar* [20]. The practice apparently has been always to serve a copy of the application along with the notice. Vide *Wijesekera v. Corea* [18].

L. G. Weeramantry, with *J. R. M. Perera*, for the plaintiff petitioner, was called upon to address only on the question of the value of the matter in dispute on the appeal.—Petitioner comes under the second part of Rule 1 (*a*) of the Schedule to the Appeals (Privy Council) Ordinance, namely, " some civil right amounting to or of the value of Rs. 5,000 or upwards ". Rule 1 (*a*) emphasises particularly the fact that the decisive value is that of the matter in dispute on the date on which appeal to

[1] (*1900*) *1 Browne 165.*
[2] (*1900*) *1 Browne 304.*
[3] (*1938*) *16 Times 43.*
[4] (*1931*) *33 N. L. R. 337.*
[5] (*1939*) *40 N. L. R. 553.*
[6] (*1950*) *52 N. L. R. 217.*
[7] (*1888*) *13 A. C. 780.*
[8] (*1862*) *15 E. R. 462.*
[9] (*1909*) *1 Current L. R. 52.*
[10] (*1929*) *30 N. L. R. 421.*
[11] (*1930*) *32 N. L. R. 59.*
[12] (*1931*) *33 N. L. R. 63.*
[13] (*1934*) *36 N. L. R. 132.*
[14] *A. I. R. 1930 P. C. 44.*
[15] *A. I. R. 1916 Madras 985 at 988.*
[16] (*1952*) *54 N. L. R. 183.*
[17] (*1949*) *51 N. L. R. 145.*
[18] (*1931*) *33 N. L. R. 349.*
[19] (*1937*) *39 N. L. R. 103.*
[20] (*1938*) *40 N. L. R. 89.*

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Privy Council lies. If that is the test, the amount involved is well over Rs. 5,000. See *Mussumat Ameena Khatoor v. Radhabenad Misser*[1].

In regard to the Indian case of *Mangamma v. Mahalakshmamma* (supra), accruing damages can be added. Our Rules are different from the corresponding Indian Rules after amendment. Our Rules are to be interpreted in the light of local decisions and Indian cases before amendment.

The amount of the stamps affixed is not conclusive of the value of the subject-matter—*Mussumat Ameena Khatoor v. Radhabenod Misser* (supra) ; *De Alwis v. Appuhamy*[2] ; *Alles v. Alles*[3].

Cur adv. vult.

September 14, 1953. NAGALINGAM A.C.J.—

Two grounds of objection have been taken by the defendant-respondent to the application for conditional leave made by the plaintiff-petitioner to appeal to the Queen in Council. They are, firstly that the minimum monetary limit prescribed by Rule 1 of the Schedule to the Appeals (Privy Council) Ordinance (Chapter 85) has not been reached, and secondly that the notice given of the intended application is bad in law.

The action was instituted by the plaintiff to recover a sum of Rs. 2,250 alleged to be arrears of payments due to him under an agreement at the rate of Rs. 150 a month and for the recovery of the additional sum that would become due at the same rate from date of action till date of decree and for legal interest. The lower court entered judgment on 3rd November, 1950, and at that date the total amount due to the plaintiff under the decree was under Rs. 5,000. The defendant appealed and this court allowed his appeal and dismissed the plaintiff's action on 3rd March, 1953.

The contention on behalf of the defendant is that in these circumstances the matter in dispute on the appeal to the Queen in Council does not amount to the value of Rs. 5,000 or upwards. On behalf of the plaintiff, however, it has been urged that for the purpose of determining the value in dispute on the appeal to the Queen in Council, the amounts that became payable to the plaintiff subsequent to the date of the decree of the lower court and up to the date when this court pronounced judgment should be taken into consideration.

I do not think that the contention of the plaintiff is sound. The plaintiff did not apply, and in fact he could not have asked, for a decree indefinitely *in futuro* for payments to be continued to be made to him at the rate of Rs. 150 without specifying some time limit. In fact in the plaint he has not asked for payment to be made to him during an indefinite period of time. He has definitely, and I think quite properly, fixed the period up to which the court should assess the amount payable to him as the date of entering the decree, and the lower court has entered decree in accordance with the prayer contained in the plaint.

It was also sought by the plaintiff to support his argument by reference to what was termed the reciprocity test. It was put forward in this way.

[1] *(1859) 7 Moore's I. A. 261.* [2] *(1929) 30 N. L. R. 421.*
[3] *(1945) 46 N. L. R. 445.*

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It was said that had this court affirmed the judgment of the lower court the defendant would have been entitled to a right of appeal to the Queen in Council because the liability which the plaintiff would thereby seek to get rid of would have been over Rs. 5,000. I do not think this proposition is sound either, for had this court affirmed the judgment of the lower court at the date it did set it aside, even so the amount recoverable by the plaintiff under the decree would not be anything greater than what had been fixed under the decree of the lower court ; it would be obvious that under the decree so entered the plaintiff could not have issued execution for a sum which may have become due subsequent to the date thereof, though it is easy to see that he would have a right to institute an action in order to recover any such sum. The test of reciprocity, too, therefore fails.

The plaintiff, however, submits in the alternative that the appeal involves indirectly "some civil right amounting to or of the value of Rs. 5,000 or upwards". It is said on his behalf that the effect of the judgment of the lower court was to affirm the validity of the agreement under which he claims, and it would have operated as *res judicata* in regard to the existence and validity of the contract, and the liability of the defendant to pay him the sum of Rs. 150 a month so long as the other conditions contained in that behalf continued to be fulfilled would have been conclusively and finally determined thereby. But it is urged that as a result of the judgment of the lower court being set aside by a finding of this court that there is no binding contract between the plaintiff and the defendant, the principle of *res judicata* now operates adversely against the plaintiff to the extent that he can at no future time claim any payment under the agreement for the judgment of this court is conclusive on the non-existence of a valid agreement between the parties.

It is pointed out further that having regard to the events that have occurred since the date of the judgment of the lower court up to at least the date of application for conditional leave, the reversal of the judgment of this court by the Judicial Committee of the Privy Council would have the effect of restoring to the plaintiff not only the amount decreed under the judgment of the lower court but also indirectly confer on him the right to recover such sums as have accrued subsequent to the date of the judgment of the District Court and up to now, involving, as it then would, the determination of a right which certainly would be over Rs. 5,000 in value.

Mr. Jayawardene for the respondent strongly relied upon the case of *Mangamma v. Mahalakshmamma* [1]. That case, if at all, would have a bearing on the earlier question I have discussed. In that case the question was whether interest should be permitted to be added to the amount claimed, in order to reach the requisite monetary limit, and it was held that it could not be so added, because under the corresponding Indian provision it was not only necessary that the subject-matter in dispute on appeal should be of the value of Rs. 10,000 but that the subject-matter of the action also in the court of first instance must be of the same value. Apart from authority, it is manifest that one cannot tack on the interest that has accrued between the date of institution of action and the date of decree for the purpose of ascertaining that the amount in dispute at the date of action is the total of those two sums.

[1] *A. I. R. (1930) P. C. 44.*

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The precise point that arises in this part of the argument is, however, covered by another case which is also one delivered by the Privy Council and that is the case of *Ratha Krishna Ayyar v. Sunderswamy Iyer*[1]. As was observed by Lord Shaw in that case,

> " the sum of money actually at stake may not represent the true value. The proceeding may, in many cases, such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that question may, settled one way or the other, affect a much greater value, and its determination may govern rights and liabilities of a value beyond the limit. "

That is the exact position in this case. While it is true that the amount at stake in the action is under Rs. 5,000, representing only part of the instalments that had fallen due up to the date of decree of the lower court, the action itself raises the entire question of the existence and validity of the contract between the parties, and a settlement of that question one way or the other affects the rights and liabilities of parties beyond the sum of Rs. 5,000.

I therefore hold that the appeal involves a civil right of the value of over Rs. 5,000 and that the plaintiff is entitled as a matter of right to appeal to the Queen in Council.

I now turn to the next objection raised, namely that relating to the sufficiency of the notice. The requirement as to the notice to be given to the opposite party is to be found in Rule 2 of the Schedule to the Appeals (Privy Council) Ordinance (hereinafter referred to as Ordinance), and it runs as follows :—

> " Application to the court for leave to appeal shall be made by petition within thirty days from the date of the judgment to be appealed from, and the applicant shall, within fourteen days from the date of such judgment, give the opposite party notice of such intended application. "

The notice served on the defendant Company has been produced by its managing director, and it runs as follows :—

> " Take notice that I, T. A. K. de Silva, the plaintiff respondent in the above styled action will in accordance with the Appeals (Privy Council) Ordinance apply to the Honourable the Supreme Court of the Island of Ceylon for leave to appeal to Her Majesty the Queen in Council against the judgment and decree of the Supreme Court pronounced on March 3, 1953. The application for conditional leave will be filed in the Supreme Court within 30 days of the said judgment.
>
> (Sgd.) T. A. K. DE SILVA,
> 11/3/53
> Plaintiff-Respondent. "

It is urged that as the notice does not set out the grounds upon which it is intended to make the application for conditional leave the notice is bad. The law in this sense was interpreted in the case of *Kasipillai et al. v.*

[1] *A. I. R. (1922) P. C. 257.*

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Nagalinga Kurukkal [1], and my brother Gunasekara J. who delivered the judgment in that case came to that conclusion largely influenced by a dictum of Wijeyewardene C.J. in the case of *Vander Poorten v. Vander Poorten et al.* [2] (in which case he himself had taken part) where the learned Chief Justice suggested that the

> " object of giving notice is to enable the opposite party to be prepared to show, if possible, that the plaintiff is not entitled to appeal. The opposite party should, therefore, know in time whether the applicant claims a right to appeal and in that case, on what grounds, or whether he pleads that the Court should exercise its discretion in his favour and permit him to appeal ".

With all respect to the learned Chief Justice other reasons can be suggested for the necessity to give notice to the opposite side of an intended application for leave to appeal. An appeal to the Queen in Council would have the effect of staying execution proceedings. Rule 7 of the Schedule to the Appeals (Privy Council) Ordinance expressly provides that this Court shall have power, in granting leave to appeal to the Queen in Council, to direct the judgment appealed from to be carried into execution, subject to conditions, if any. In the absence of such a direction any application for execution made to the District Court even though it be made before the filing of the application for conditional leave would be futile and abortive. See the case of *de Silva v. Hulme King* [3].

I do not think that one should speculate upon the reasons for the requirements as to notice of the intended application beyond drawing the obvious inference to be drawn from such a requirement, which in the language of Hearne J. in the case of *Balasubramaniam Pillai v. Valliappa Chettiar* [4] is

> " merely to apprise him (the opposite party) within a reasonable time of the fact that the litigation is not at an end, and that the unsuccessful party has the intention of applying to the Court for leave to take the subject-matter in dispute between the parties to the Privy Council ".

In any event, the opposite party would have ample time and opportunity after the application is filed in court to get ready to challenge the ground or grounds upon which the right of appeal may be based by an applicant for leave to appeal. The application is required by the Rules framed by this Court to contain a statement of the particular ground upon which the appeal is sought to be rested, whether under the first or second part of sub-rule (*a*) or under sub-rule (*b*) of Rule 1 of the Schedule to the Ordinance—vide the form in Schedule II to the Appellate Procedure (Privy Council) Order, 1921 [5].

It is to be observed that there is no express provision either in the Ordinance or in the Rules that on the filing of the application for conditional leave notice of such application should be given to the respondent. According to the Registrar, no application to Court is made now for

[1] *(1952) 54 N. L. R. 183.*
[2] *(1949) 51 N. L. R. 145.*
[3] *(1935) 14 C. L. Rec. 235.*
[4] *(1938) 40 N. L. R. 89.*
[5] *Subsidiary Legislation, Vol. I, page 472.*

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such a notice, nor is there a uniformity of practice from which one could say that the applicant himself serves a copy of the application on the opposite party. In fact in this case there is nothing on record to indicate that the respondent was given any intimation of the filing of the application for conditional leave or that a copy of that petition was served upon him. According to the Registrar, the parties make inquiries at the Registry, and apprise themselves of the contents of whatever papers may have been filed in the Registry.

In contrast to this statement of the Registrar, Poyser S.P.J. in the case of *Pathmanathan v. The Imperial Bank of India*[1] makes the significant observation :—

> " Further in my experience the practice in this Court has been for the applicant to apply in the first place ' ex parte ' for a notice of his application to be served on the respondent and that would appear to be the most convenient practice. "

The notice of application the learned Judge refers to is the notice of the fact that application for conditional leave has been filed in Court. But whether notice is effected by a formal instrument issued at the instance of Court, or without the intervention of Court by the applicant, or whether even without any such instrument being served the respondent secures knowledge of the filing of the application by his own exertions, it would be correct to say that the application for leave 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 thirty 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 without it being necessary at all to be apprised, within the fortnight allowed to an applicant to give notice of the intended application, of the ground on which the right of appeal is based.

It is not without interest to refer to a remark of Wijeyewardene C.J., then Wijeyewardene A.J., in the case of *Balasubramaniam Pillai v. Valliappa Chettiar* (supra)—(he was associated with Hearne J. in that case)—which is as follows :—

> " An applicant who sends notice and then files his application before the notice reaches the opposite party is an applicant who gives notice of his intended application, for at the time he sent the notice he had not made the application but had only formed the intention of making such application. "

I would emphasize the words, " but had only formed the intention of making such an application ". And that may be said to be precisely the object of giving notice of the intended application, that is to say, that the applicant had formed an intention of making the application

[1] (1937) 39 N. L. R. 193.

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but at that stage he may not have made up his mind as regards the grounds upon which he bases his application for the appeal.

Mr. Jayawardene for the respondent also called attention to the practice of a copy of the application for leave being served along with the notice of the intended application, referred to by Drieberg J. in his judgment in the case of *Wijeyesekere v. Corea* [1]. But that was a practice that was in vogue under a provision somewhat different from the one which governs the question now. The present Rule 2 of the Schedule to the Ordinance was introduced by an amendment of 1918 of the previously existing Rule, which ran as follows :—

> " Application to the Court for leave to appeal shall be made by petition within thirty days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application. " [2]

It will be observed that under the earlier Rule both the notice of the intended application and the application to Court had to be made within thirty days of the date of the judgment appealed from. It was therefore convenient to combine the service of both the application and the notice, and effect at one time the service of both these documents. I think Poyser S.P.J.'s reference in *Pathmanathan v. The Imperial Bank of India* (supra)[3] is very probably to the practice under the earlier provision. It will also be seen that the practice of alleging in the petition that notice had been served referred to by Drieberg J. in *Wijeyesekere v. Corea* (supra)[4] has been altered by the Rules framed—vide the form of petition in Schedule II to the Rules. It does not therefore appear to have been necessary under the earlier provision for the notice of the intended application to contain the ground on which the right of appeal is based, which would properly have been embodied in the copy of the petition itself which, as indicated, would be served on the respondent at the same time as the notice.

Mr. Jayawardene, however, says that as a result of the alteration in the law by the requirement that the notice of the intended application should be given within fourteen days, while the application to Court could be made within thirty days, of the date of the judgment, it became necessary for the notice itself to set out the grounds of appeal. I do not think this follows. The notice continued to perform the same function as earlier, merely a notice of an intention to appeal and nothing more, the grounds of the right of appeal being relegated to the petition for leave, and this is all that in my view is required under this new provision.

Though it be a small point, it is of some significance that Rule 2 of the Schedule to the Ordinance refers in the first part of it to the application that has to be made to Court for leave to appeal, but in the latter part of it it refers not to notice of such application but to notice of such *intended* application, which clearly emphasizes the view that at that stage the reference is only to an intention to make an application, not to the application itself.

[1] *(1931) 33 N. L. R. 349.*
[2] *Legislative Enactment 1923, Vol. IV, page 422.*
[3] *(1937) 39 N. L. R. 103.*
[4] *(1931) 33 N. L. R. 349.*

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I do not therefore think that the ground upon which the right of appeal is based need be stated in the notice. The notice, therefore, that has been served on the defendant-respondent is in compliance with the requirement of the law, and the objection as to its sufficiency fails.

The case of *Kasipillai et al. v. Nagalinga Kurukkal* (supra)[1] must be regarded as wrongly decided.

At the conclusion of the argument we allowed the application and stated that we would give our reasons later, which I do now.

GRATIAEN J.—

I agree with my Lord the Acting Chief Justice. I desire, however, to add a few observations of my own out of respect for the learned Judges who, in regard to the second objection raised by the respondent, had taken a different view in *Vanderpoorten v. Vanderpoorten* [2] and *Kasipillai v. Nagalinga Kurukkal* [1].

The petitioner was entitled *as of right* to appeal to Her Majesty in Council against the final judgment pronounced by this Court dated 3rd March, 1953. The value of the "matter in dispute on the appeal", assessed in relation to the immediate relief prayed for in the plaint, admittedly falls below Rs. 5,000, but this does not conclude the argument on the respondent's first objection. In the facts of the present case, it is manifest that the appeal indirectly (and, I am inclined to think, directly) "involves" a civil right whose value, if that right be established in the litigation, exceeded Rs. 5,000 on 3rd March, 1953, and has appreciated since that date. The second part of Rule 1 (*a*) of the Schedule to the Ordinance therefore comes into operation. The basis of the petitioner's claim to recover Rs. 2,250 from the respondent Company in this action is that this sum represents arrears of payments due to him under an agreement whereby the respondent was allegedly obliged to pay him a monthly allowance of Rs. 150 subject to certain conditions. The respondent denies that such an agreement ever existed, and this Court has upheld the objection. In the result, the respondent would, so long as the judgment of this court stands, forfeit not only the arrears claimed in the present action but also any claims which, in his submission, have since accrued. It is just such a situation which the second part of Rule 1 (*a*) is intended to cover, because, as Lord Shaw points out in *Ratha Krishna Ayyar's case* [3], "the sum of value actually at stake" in the immediate litigation does not represent the entirety of the financial implications directly or indirectly arising from the *ratio decidendi* of the judgment which the petitioner seeks to challenge in his proposed appeal to Her Majesty in Council.

The second objection raised by the respondent remains to be considered. The argument is that the petitioner has forfeited his right to appeal to Her Majesty in Council because he has failed to comply with the statutory condition prescribed by Rule 2 which is in the following terms :—

"Application to the Court for leave to appeal shall be made by petition within 30 days of the judgment to be appealed from, and

[1] (*1952*) *54 N. L. R. 193.* [2] (*1949*) *51 N. L. R. 145.*
[3] *A. I. R.* (*1922*) *P. C. 257.*

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the applicant shall, within 14 days from the date of such judgment, give the opposite party notice of such intended application ".

It is not disputed that the petitioner did in fact apply to this Court within 30 days for leave to appeal to Her Majesty in Council, and that he has, within the prescribed period, given the respondent due notice of his intention to make that application, Nevertheless, the respondent contends, the notice served on him was invalid because it did not specify the particular ground on which he asserts his right to appeal to Her Majesty in Council.

Rule 2 does not expressly direct that a person should specify in advance the grounds on which he intends to base his application to appeal to Her Majesty in Council from a judgment of this Court. Nor does the Rule so direct by necessary implication. I therefore find no justification for the view that the legislature must have intended in this particular context to penalise a litigant for disobedience to an assumed statutory direction by depriving him of his accrued right to take the litigation before the highest judicial tribunal in the Commonwealth—particularly where, as here, the opposite party cannot seriously pretend that such non-obedience has caused him the slightest prejudice. I am not at all disposed to read into the procedural rules provided by the Ordinance mandatory directions which are not clearly and unambiguously expressed, or to infer that a drastic penalty should be imposed on a litigant for disobedience to an unexpressed statutory direction. Indeed, it is not always an easy matter, even where procedural requirements are expressly laid down by statute, to decide whether they are to be considered as " mere directions or instructions involving no invalidating consequences in their disregard, or as imperative, with an implied nullification for disobedience ".—*Maxwell on the Interpretation of Statutes* (10th Edn.) p. 376.

Rule 2, as far as it goes, is satisfied if an intending appellant gives notice to the opposite party, within the prescribed period of 14 days, *of his intention* to proceed further with the litigation. To that extent, the Rule lays down " an absolute enactment which must be obeyed or fulfilled absolutely "—*Woodward v. Sarsons* [1]. The underlying purpose of the rule is merely (*a*) to apprise the opposite party within 14 days that the litigation must not be assumed to be at an end—*per* Hearne J. in *Balasubramaniam Pillai's case* [2], and (*b*) as my Lord the Acting Chief Justice has pointed out, to give the opposite party, if he so desires, timely opportunity to apply for execution under Rule 7. As the petitioner in the present case has complied with Rule 2, his application for conditional leave cannot be refused.

WEERASOORIYA J.—I have seen the reasons as stated by My Lord the Acting Chief Justice for allowing conditional leave to appeal in this case. With those reasons I am in respectful agreement and I have nothing to add to them.

Application allowed.

[1] *(1875) L. R. 10 C. P. 733.* [2] *(1938) 40 N. L. R. 89.*

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1953 *Present :* **Gratiaen J. and Gunasekara J.**

M. SANTIA PILLAI, Appellant, *and* THE ATTORNEY-GENERAL, Respondent

S. C. 258—D. C. Colombo, 19055/M

Public servant—Liability to dismissal at pleasure of Crown—Ceylon (State Council) Order in Council, 1931, Art. 86—Effect of Royal Instructions.

By Article 86 of the Ceylon (State Council) Order in Council, 1931,

"(1) The appointment, promotion, transfer, dismissal, and disciplinary control of public officers shall be vested in the Governor, subject to any Instructions given under His Majesty's Sign Manual and Signet and, in so far as concerns the Auditor-General, to the provisions of Article 83.

(2) The Governor may, subject to such Instructions and provisions as aforesaid, and with the approval of the Secretary of State, delegate to such public officers having authority in or over Government departments as he shall think fit, subject to such conditions as he may prescribe, the appointment, promotion, transfer, dismissal and disciplinary control of officers who are not in receipt of annual pensionable emoluments exceeding such sum as may be specified in such Instructions."

Held, that there is nothing in Article 86 that is inconsistent with the condition that is ordinarily implied in the terms of employment of a public servant other than the Auditor-General, that he holds office only during the pleasure of the Crown. Consequently a public servant who is aggrieved by any failure to comply with the procedure for dismissal prescribed by the Royal Instructions must seek his remedy by administrative process and has no remedy by action in a court of law.

APPEAL from a judgment of the District Court, Colombo.

S. J. V. Chelvanayakam, Q.C., with *V. A. Kandiah* and *A. Nagendra*, for the plaintiff appellant.

B. C. F. Jayaratne, Crown Counsel, for the Attorney-General, respondent.

Cur. adv. vult.

June 5, 1953. GUNASEKARA J.—

This is an appeal from a judgment of the District Court of Colombo dismissing an action brought by the appellant, Mr. Santia Pillai, against the Attorney-General for the recovery of a sum of Rs. 11,458·24 which he claims as arrears of salary and allowances due to him as a servant of the Government. He was appointed to the Government Railway Clerical Service in 1920. On the 23rd February, 1945, the Governor ordered that he should be retired for inefficiency. This order was officially communicated to him on the 4th March, 1945, and he ceased to work as a public servant from the following day. It is contended for him that the order was not made in accordance with the procedure prescribed by law and is therefore void and inoperative, and that he is entitled to a declaration that he continues to be a member of the Public Service or should be treated as continuing to be one.

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The procedure that is said to have been contravened is laid down in certain Royal Instructions to the Governor in these terms :—

> " the grounds of intended dismissal shall be definitely stated in writing and communicated to the officer in order that he may have full opportunity of exculpating himself, and the Governor shall investigate the case with the aid of the head of the department in which the officer shall then be serving."

The circumstances in which the order in question was made were these. As a result of an audit report there was a departmental investigation of alleged irregularities in the work of the Jaffna railway station staff. In December, 1943, the Governor appointed a retired member of the Ceylon Civil Service, Mr. T. W. Roberts, " to act temporarily as Investigating Officer, Jaffna Railway Station Inquiry, to complete the inquiries in connection with the irregularities discovered at the Jaffna railway station and to hold a face to face inquiry and furnish a report ". Mr. Roberts had had considerable experience as a magistrate and district judge and had been the District Judge of Galle at the time of his retirement from the Civil Service, having held that office for the preceding nine years. After a preliminary inquiry Mr. Roberts advised that certain charges should be framed against the appellant, and his recommendation was placed before the Attorney-General. In July, 1944, eight charges in writing, approved by the Attorney-General, were served on the appellant. Mr. Roberts inquired into them in September and submitted his recommendation to the General Manager of Railways, who was the head of the department. The inquiry was held in the presence of the appellant, and he cross-examined the witnesses who were called in support of the charges, and also gave evidence on his own behalf and called witnesses. On the 4th December, 1944, the General Manager of Railways forwarded Mr. Roberts's report to the Public Services Commission, whose function it was, in terms of Article 89 of the Ceylon (State Council) Order in Council, 1931, to advise the Governor in the exercise of his powers of dismissal and disciplinary control of public officers.

The Governor's order was communicated to the General Manager of Railways by a letter from the Chief Secretary dated the 28th February, 1945, which referred to the General Manager's communication to the Public Services Commission. This letter states that " His Excellency the Governor finds Mr. Santhiapillai guilty of the first five of the eight charges framed against him and has ordered that Mr. Santhiapillai should be retired for inefficiency and that a reduction of 15% should be made in his pension. "

It is contended for the Attorney-General that there was no irregularity in the procedure that was adopted ; and that even if there was, the appellant held office at the pleasure of the Crown and therefore would have no cause of action in a court of law but only a remedy by administrative process.

It is settled law that " in a contract for service under the Crown, civil as well as military, there is, except in certain cases where it is otherwise provided by law, imported into the contract a condition that the Crown

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has the power to dismiss at its pleasure" : *Gould v. Stuart* [1] ; and public servants hold their offices on this condition "not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service": *Shenton v. Smith* [2]. It is contended for the appellant that the power of the Crown to dismiss at pleasure was restricted by the terms of Article 86 of the Ceylon (State Council) Order in Council, 1931.

Article 86 is in these terms :

"(1) The appointment, promotion, transfer, dismissal, and disciplinary control of public officers shall be vested in the Governor, subject to any Instructions given under His Majesty's Sign Manual and Signet or through the Secretary of State and, in so far as concerns the Auditor-General, to the provisions of Article 83.

(2) The Governor may, subject to such Instructions and provisions as aforesaid, and with the approval of the Secretary of State, delegate to such public officers having authority in or over Government departments as he shall think fit, subject to such conditions as he may prescribe, the appointment, promotion, transfer, dismissal and disciplinary control of officers who are not in receipt of annual pensionable emoluments exceeding such sum as may be specified in such Instructions."

The Instructions that had been given to the Governor under the Royal Sign Manual and Signet at the material time included certain instructions about the appointment, promotion and dismissal of public officers. Instruction VIII laid down the conditions subject to which the Governor might delegate his powers. Instruction IX provided that all commissions to be granted by the Governor, or by any public officer acting under his authority, to any person or persons for exercising any office or employment should, unless otherwise provided by law, be granted during the pleasure of the Crown only. Instruction X prescribed the procedure for dismissal of public officers. Mr. Chelvanayakam contends that these instructions are given statutory force by Article 86 of the Order in Council and that the power of the Crown to dismiss a public servant at its pleasure is restricted by the provisions of Instruction X. He seeks in this way to draw an analogy between Article 86 of the Order and section 240 of the Government of India Act, 1935, which provides as follows :

"240—(1) Except as expressly provided by this Act every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him....."

[1] *(1896) A. C. 575, Privy Council.* [2] *(1895) A. C. 229, Privy Council.*

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It was held by the Privy Council in *The High Commissioner for India v. Lall* [1] that sub-section (3) was mandatory and constituted an express provision of the Act which qualified the provisions of sub-section (1) and provided a condition precedent to the exercise by the Crown of its power of dismissal. A provision somewhat similar to sub-section (3) had previously been contained in rules made under section 96B (2) of the Government of India Act, 1919, and sub-section (1) of that section had provided as follows :

> " Subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure,.....but no person in that service may be dismissed by any authority subordinate to that by which he was appointed,..... "

Referring to this proviso the Privy Council observed in *Rangachari v. Secretary of State* [2] that it is " manifest that the stipulation or proviso as to dismissal is itself of statutory force and stands on a footing quite other than any matters of rule which are of infinite variety and can be changed from time to time ", and held that a dismissal of a public officer by an authority subordinate to that by which he was appointed was therefore bad and inoperative. In another case, *Venkata Rao v. Secretary of State* [3], which was decided at the same time, the Privy Council held that a failure to comply with the procedure for dismissal prescribed by rules made under subsection (2) of section 96B of the Act of 1919 did not give any right of action to a dismissed officer, although there had been " a serious and complete failure to adhere to important and indeed fundamental rules ". Contrasting the provisions of section 96B of the Act of 1919 with those of section 240 of the Act of 1935 the Privy Council held in *Lall's Case* [1] " that the provision as to a reasonable opportunity of showing cause against the action proposed is now put on the same footing as the provision now in subsection (2) of S. 240, which was the subject of decision in *64 I. A. 40* [2] and that it is no longer resting on rules alterable from time to time, but is mandatory and necessarily qualifies the right of the Crown recognised in S. 240 of 1953 ". Mr. Chelvanayakam's contention is that in Ceylon, Instruction X of the Royal Instructions to the Governor similarly qualifies Instruction IX and that both are incorporated in Article 86 of the Order in Council and therefore have statutory force. He also contends that, alternatively, if the Royal Instructions cannot be read as a part of Article 86, the appointments which the Governor is empowered by that Article to make would not be subject to the condition referred to in Instruction X, that the offices are to be held only during the pleasure of the Crown.

I am unable to accept either of these contentions. The instructions to which the Governor's powers are made subject, whether given under the Royal Sign Manual and Signet or issued through a Secretary of State, are no more a part of the Order in Council than the rules referred to in section 96B of the Government of India Act, 1919, are a part of that section. Nor is there anything in Article 86 that is inconsistent with

[1] *A. I. R. 1948 P. C. 121.* [2] *A. I. R. 1937 P. C. 27 ; 64 I. A. 40.*
[3] *(1937) A. C. 248 ; 64 I. A. 55.*

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the condition that is ordinarily implied in the terms of a public servant's employment, that he holds office only during the pleasure of the Crown. On the contrary, the provision that, except in the case of the Auditor-General, the powers given to the Governor are vested in him " subject to any Instructions given under His Majesty's Sign Manual and Signet or through the Secretary of State " indicates that all public officers other than the Auditor-General hold office subject to the pleasure of the Crown. A contrast is furnished by the provisions of Article 83 about the Auditor-General's tenure of office, which clearly negative the implication of such a condition in the terms of his employment; for that Article enacts that the Auditor-General " shall hold office during good behaviour, provided that he shall be removed from office by the Governor upon an address praying for his removal presented to the Governor by the Council, provided also that he may be required by the Governor to retire from the public service on the ground of age or infirmity..... " There is nothing in the Order in Council that restricts the power of the Crown to dismiss at pleasure any other public officer.

As was pointed out by my brother in the case of *Vallipuram v. Postmaster-General*[1], "The Royal Instructions regulating the procedure for dismissal merely issued directions for the guidance of the Governor, and did not constitute a contract between the Crown and its servants ". Consequently a public officer aggrieved by any failure to comply with those instructions must seek his remedy by administrative process and has no remedy by action in a court of law. It is therefore not necessary to discuss the argument that was addressed to us on the question whether there has been a failure to comply with the Royal Instructions. If, however, it were necessary to decide that question I should hold that the procedure prescribed by the Instructions has been followed.

In my opinion the appeal must be dismissed with costs.

GRATIAEN J.—I agree.

Appeal dismissed.

1952 *Present :* **Rose C.J.**

N. SUBRAMANIAM, Petitioner, *and* PAKKIYALEDCHUMY, Respondent

S. C. 92—Application in revision in M. C. Jaffna (Addl.) 21,446

Divorce—Decree nisi *entered in favour of wife—Re-marriage before decree is made absolute—Right to claim maintenance as wife—Marriage by habit and repute—Maintenance Ordinance (Cap. 76), s. 2.*

The applicant, who had obtained a decree *nisi* in divorce proceedings against her husband K., alleged that she contracted a second marriage with S. and claimed maintenance for herself from S. before the decree *nisi* in the divorce proceedings had been made absolute.

Held, that the applicant was not entitled to claim maintenance as wife of S. under section 2 of the Maintenance Ordinance. In such a case, the presumption of marriage by habit and repute is not applicable.

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[1] *(1948) 50 N. L. R. 214.*

APPLICATION to revise an order of the Magistrate's Court, Jaffna.

T. B. Dissanayake, for the defendant petitioner.

C. Chellappah, for the applicant respondent.

Cur. adv. vult.

June 19, 1952. ROSE C.J.—

This is an application in revision by the defendant-petitioner, the respondent in a maintenance action, to have the order for maintenance made in favour of the applicant-respondent (the applicant) set aside on the ground of its illegality in that the applicant-respondent was, at the time of the order, still the lawful wife of one Appapillai Kumarasingham.

In her application for maintenance the applicant-respondent called herself the " wife " of the defendant-petitioner who, on appearing in court on the summons returnable date, admitted marriage and paternity, as shown in the relevant journal entry. On this admission the magistrate inquired into the quantum of maintenance and made order in her favour in a total sum of Rs. 50 viz. Rs. 30 for the applicant-respondent and Rs. 20 for the child. The defendant-petitioner's appeal from this order was dismissed by this court on August 31st, 1951. Thereafter on 2nd September, 1951, the defendant-petitioner on discovering that the applicant-respondent was still in law the wife of Appapilai Kumarasingham filed an affidavit with a copy of the marriage certificate and invited the learned magistrate to set aside the order for maintenance in favour of the applicant-respondent, who rightly declined to interfere because he had no jurisdiction to entertain such an application.

From this order the defendant-petitioner appealed but at the hearing of the appeal it was conceded on his behalf that his remedy, if any, would be to seek relief from this court by way of revision. Hence this application.

Section 2 of the Maintenance Ordinance No. 19 of 1889 permits a " wife " to make an application against her husband in the event of his failing or neglecting to maintain her. The duty is cast on the husband to provide only for his " wife ", and if the alleged marriage of an applicant for maintenance is invalid by reason of some legal impediment, which makes her stand in some lesser relationship to the alleged husband than his " wife ", it would seem to be plain from the wording of the section that she is not entitled to claim maintenance for herself under the Ordinance.

The applicant-respondent was married to Appapillai Kumarasingham and in divorce proceedings against him she obtained a decree nisi on November 4th, 1941. This decree was not made absolute until April 8th, 1952, which is considerably later than the decision of the application which has given rise to the present proceedings.

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That being so, there cannot, in my opinion, arise even a presumption of a marriage by habit and repute between the defendant-petitioner and the applicant-respondent at the relevant times—*Sathiyanathan v. Sathiyanathan* [1] ; *Weerapperuma v. Weerapperuma* [2].

The defendent-petitioner is, therefore, entitled in my view to succeed in the present application. The previous proceedings in so far as they make the defendant-petitioner liable to pay maintenanc to the applicant-respondent are set aside. The applicant-respondent will pay the costs of the present application.

Application allowed.

1953. *Present :* Gratiaen J.

MRS. E. D. HENSMAN, Appellant, *and* MRS. MARY STEPHEN *et al.*, Respondents

S. C. 198—C. R. Colombo, 34,496

Rent Restriction Act, No. 29 of 1948—Death of tenant—Continuance of tenancy—Scope of Section 18.

Where a monthly tenant, who has been given due notice to quit residential premises to which the Rent Restriction Act applies, dies during the pendency of an action for ejectment instituted against him by the landlord, his widow and family are no longer entitled to occupy the premises as against the landlord. Section 18 of the Rent Restriction Act, which provides for continuance of tenancy upon the death of a tenant, has no application where the original contractual tenancy had already been determined according to the common law so that all that the former " tenant " thereafter enjoyed was a statutory protection which was personal to him.

APPEAL from a judgment of the Court of Requests, Colombo.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the plaintiff appellant.

H. W. Tambiah, for the substituted defendants respondents.

Cur. adv. vult.

October 12, 1953. Gratiaen J.—

This appeal involves a consideration of the scope of section 18 of the Rent Restriction Act, No. 29 of 1948.

The appellant has let certain residential premises, to which the Act admittedly applies, on a monthly tenancy to S. M. Stephen. She filed action against him for ejectment on 8th August, 1951, having previously

[1] (1937) 39 N. L. R. 241. [2] (1938) 39 N. L. R. 433.

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given due notice terminating the contractual tenancy, and she claimed that he was not entitled to statutory protection from ejectment because, *inter alia*, the premises were reasonably required as a residence for herself and her family within the meaning of section 13 (1) (*c*).

S. M. Stephen died on 24th December, 1951, pending the action for ejectment, but his widow (who is the respondent to the present appeal) purported on 8th January, 1952, to serve a notice on the appellant under section 18 (2) (*a*) to the effect that she proposed, as " the surviving spouse of the deceased tenant ", to continue in occupation of the premises as tenant. There can be no doubt that, if the section applies to a case of this nature, the respondent would have become, by operation of the Act, a substituted tenant of the premises with effect from 1st January, 1952. In that event, the appellant would not be entitled to eject her or the other members of her household on the footing that they had ceased to enjoy rights of occupation under the previous " tenant " (S. M. Stephen).

The learned Commissioner of Requests has taken the view that the respondent was entitled to avail herself of the provisions of section 18 of the Act. The appellant contends, however, that section 18 does not apply because, in the present case, S. M. Stephen had in truth ceased to be a " tenant " long before the respondent had purported to invoke section 18.

In dealing with this issue, it is necessary to remind oneself of the extent to which the Act interferes with the common law rights of a landlord *vis a vis* his contractual tenant. The provisions of the Act " do not prevent an owner from terminating the tenancy of his tenant in the ordinary way ; what they do is to give the person *who has been tenant* a right (in certain specified circumstances) to remain in possession after the tenancy has gone "—*Baker v. Turner* [1]. It follows, therefore, that the contractual monthly tenancy between the appellant and S. M. Stephen was lawfully determined by due notice at a date long prior to his death, but that, although he ceased to be a tenant thereafter, he still enjoyed " *a purely personal right* " to remain in occupation of the premises against the wish of his landlord until an order for his ejectment was made by a Court of law. In other words, he could not be turned out of possession so long as he complied with the provisions of the Act and until the landlord could establish against him that this statutory protection had been forfeited for one or other of the reasons specified in section 13. *Keeves v. Dean* [2]. In that decision Bankes L. J. emphasised the point that such statutory protection, being of a purely personal nature, cannot be passed on to another person *unless the statute expressly authorises him to do so*, and that, subject to this qualification, " must cease the moment he parts with possession *or dies* ". That is the limit of what Evershed M. R. describes as the " statutory right of irremovability " enjoyed by a person whose contractual rights as a tenant have been previously determined under the common law. *Marcroft Wagons v. Smith* [3].

[1] (*1950*) *A. C. 401 at 436.* [2] (*1924*) *1 K. B. 685.*
[3] (*1951*) *2 K. B. 496 at 501.*

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Apart from section 18 whose scope I shall later examine, the widow of a tenant (under a subsisting contract of tenancy) or of a so-called "statutory tenant" (who still enjoys some statutory protection notwithstanding the termination of the contractual tenancy) is conceded no special privileges under the local enactment. In England, on the other hand, section 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 defines the term "tenant" so as to *include* a man's widow or, in certain circumstances, his other relations thereby conferring on her or them (as the case may be) the privileges of what *Megarry* (*Rent Acts, 7th Ed., p. 211*) calls "a transmitted statutory tenancy". In such cases, the widow or other relation enjoys, *by succession*, the right to continue *in the same tenancy* (i.e., either contractual or "statutory") with its original advantages and disadvantages unaltered. *Bolsover Colliery Co., Ltd. v. Abbot* [1]. If the deceased person was only a "statutory tenant" at the time of his death, his successor would also become a statutory tenant "under the same tenancy by virtue of which the original statutory tenant was in possession"—*American Economic Laundry, Ltd. v. Little* [2]. By this means, *either* the contractual rights of the deceased person under a tenancy which has not been determined under the common law *or* the statutory protection enjoyed by him if his contractual rights no longer exist would be transmitted to the succeeding "tenant" who steps into his shoes by virtue of the Act.

The learned Commissioner appears to have assumed that the operation of section 18 of the Rent Restriction Act, No. 29 of 1948, confers upon the respondent, as Stephen's widow, the same rights as she would have had if section 12 (1) (*g*) of the English Act had applied to the case. He accordingly decided that, as the respondent had exercised her option under section 18, she still enjoyed her deceased husband's statutory protection under section 13. In this view of the matter, he held that a decree for ejectment would cause greater hardship to the respondent than a refusal of such a decree would cause to the appellant. The appellant's case was therefore dismissed with costs.

In my view, the scope of section 18 (2) (*a*) of the Act is entirely different. It confers on the widow of a deceased "tenant" the option of compelling the landlord to recognise her as *a new tenant* as from a point of time which commences after (but not immediately after) the date of her husband's death. If the landlord protests, the jurisdiction of the Board under section 18 (3) is restricted to a consideration of whether or not the widow was in truth a person "entitled to give the notice for which provision had been made" under section 18 (2). In other words, the Board has no discretion to refuse a widow's claim to a new tenancy by reference to any other considerations (such as those of convenience or desirability). And, if that new tenancy be established, it follows that the new tenant's rights would be quite unaffected by the events which have gone before—for instance, the earlier tenant may have been in arrears of rent ; he may have caused the premises to have deteriorated by neglect, or have used them for an illegal or an immoral purpose ; all

[1] *(1946)1 K. B. 8.* [2] *(1951) 1 K. B. 400 at 406.*

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that would be beside the point—because the new tenant would nevertheless be vested with the status of a tenant enjoying *in her own right* the superadded protection of the Act.

Section 18, in my opinion, was not intended to produce any such startling results. It only permits the widow or relation of a deceased " tenant " to claim a fresh tenancy if the latter was a " tenant " in the strict sense of the term—i.e., *if there was still subsisting at the time of the death a contractual tenancy between himself and the landlord.*

I agree with Mr. Thambiah that, in section 13 of the Act, the word " tenant " is wide enough in that particular context to include a person whose contractual tenancy has already been determined. I agree also that, as a general rule, the same meaning should be implied by the use of the same expression in a statute. But this is not a rigid rule of interpretation. There are other sections, for instance, in which a " tenant " clearly refers only to a *contractual* tenant, and I am perfectly satisfied that it is in this sense that the word was used in section 18. Section 18 has no application where the original contractual tenancy had already been determined according to the common law, so that all that the former " tenant " thereafter enjoys is a statutory protection which is personal to him and dies with him. That was the position when Stephen died in the case with which this appeal is concerned. I would therefore hold that the respondent and her family were no longer entitled to occupy the premises as against the appellant.

I set aside the judgment under appeal, and direct that judgment be entered as prayed for in the petition of appeal. Having regard, however, to the difficulties in which the respondent and her children have been placed, I would direct that writ of ejectment should not issue until after 31st January, 1954.

Appeal allowed.

1953 *Present :* **Nagalingam A.C.J.**

R. A. DON ABRAHAM, Petitioner, *and* T. H. CHRISTOFFELSZ (Inspector of Police), Respondent

S. C. 171—Application in Revision in M. C., Kanadulla, 524

Autrefois acquit—*Failure of prosecutor to lead evidence—" Discharge " of accused—Right of prosecutor to institute fresh proceedings—Criminal Procedure Code, ss. 190, 330.*

On the date of trial of a summary case the chief witness for the prosecution was absent although summons had been served on him. The prosecuting officer did not apply for a warrant on the witness, but stated that he was not prepared to go on with the case. Thereupon, the Court " discharged " the accused.

Held, that the order of discharge was tantamount to an acquittal under section 190 of the Criminal Procedure Code and that the accused could not be prosecuted again in respect of the same charge.

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APPLICATION to revise a judgment of the Magistrate's Court, Kanadulla.

W. D. Gunasekera, for the accused petitioner.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

September 15, 1953. NAGALINGAM A.C.J.—

This is an application in revision by the accused who has been convicted of having committed criminal breach of trust of estate tools valued at Rs. 188·50. He was found guilty and ordered to enter into a personal bond to be of good behaviour for a period of one year in a sum of Rs. 100 and to pay Rs. 50 as Crown costs. The point taken on his behalf is that an earlier prosecution against him operates as *autrefois acquit*. In fact, there were two earlier prosecutions against the same accused person. In case No. 8889 of the Magistrate's Court of Kanadulla the accused was charged with having committed criminal breach of trust in respect of machinery, &c., valued at Rs. 3,528·50. The machinery, &c., as stated in the charge were all deposed to by the witness Sugden and included items of tools which form the subject-matter of the present case and the present application. After the principal witness had given evidence, it was discovered that a number of articles enumerated by him and which formed the subject-matter of the plaint had not in fact been entrusted to the accused. The prosecution, therefore, at that stage moved to withdraw the case and the learned Magistrate allowed the application and discharged the accused. Following on the heels of that discharge another case bearing No. 9598 of the same court was filed against the accused person in relation to the identical tools that formed the subject-matter of the present proceedings. That case was fixed for trial on the 14th of July, 1952. The accused was present in court ; the prosecuting Police Officer was present in court, but the chief witness, Sugden, was absent in spite of summons having been served on him. The prosecuting officer did not apply for a warrant on the witness who was absent but stated that " the Police are not prepared to go on without him (Sugden)." " Accused discharged ".

The question is, what is the effect of this order. Is it an order of discharge as specifically laid down in the Code, or does it amount to an order of acquittal. It has been contended on behalf of the accused that it is an order of acquittal while the contrary is contended for by learned Crown Counsel.

I do not think that where a prosecution is unable on the day fixed for trial to adduce evidence in court and states that it is not prepared to go on with the case, the order is one which must be treated as an order of discharge. I should say that it partakes of the character of an order under section 190 of the Criminal Procedure Code whereunder if a Magistrate after taking the evidence for the prosecution finds that the accused is not guilty he must enter an order of acquittal. There was no evidence before the Magistrate to show that the accused was guilty. In

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these circumstances the order of discharge was improperly made and must be regarded as an order of acquittal. In that view of the matter the present prosecution is completely barred. I, therefore, set aside the order of the learned Magistrate and the order directing the accused to enter into a bond and to pay Crown costs.

The accused would appear to have been noticed to produce the tools, the subject-matter of the prosecution, in Court. They will be returned to him in view of the order of acquittal, or even otherwise, for even if the Magistrate's order stood, under section 413 of the Criminal Procedure Code the Magistrate had no jurisdiction to make an order directing the accused to return the tools. The articles will be returned to the accused person.

Application allowed.

1953 *Present :* **Gratiaen J.**

C. L. DE SILVA WIJESUNDERA, Petitioner, *and* PUBLIC SERVICE COMMISSION, Respondent

S. C. 595—Application for a Mandate in the nature of a Writ of Certiorari *under Section 42 of the Courts Ordinance*

Public officer—Dismissal by Public Service Commission—Cannot be canvassed by Certiorari.

Certiorari does not lie against the Public Service Commission in regard to any alleged procedural irregularity in the appointment, transfer or dismissal of a public officer.

APPLICATION for a writ of *certiorari*.

Cyril E. S. Perera, Q.C., with *T. B. Dissanayake*, for the petitioner.

M. Tiruchelvam, Crown Counsel, with *J. W. Subasinghe*, Crown Counsel, for the respondent.

Cur. adv. vult.

July 14, 1953. GRATIAEN J.—

The petitioner, who was a member of the General Clerical Service, was dismissed from his office on 7th June, 1950, by order of the Public Service Commission. He complains that this order was illegal and unjust on the ground of certain procedural irregularities in the investigation which led to his dismissal, and prays for a mandate in the nature of a writ of *certiorari* quashing the order of dismissal.

The application is clearly misconceived. *Certiorari* lies only where a tribunal vested with functions of a judicial nature purports to make an order in excess of its jurisdiction. The Constitution of Ceylon provides that (subject to certain exceptions which do not apply to the present case)

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the appointment, transfer, dismissal and disciplinary control of all public officers shall be vested in the Public Service Commission. None of these functions can properly be described as functions of a judicial nature over which the Supreme Court can exercise any form of supervisory control. In *Suriyawansa v. The Local Government Service Commission* [1] Canekeratne J. held, after full argument upon the point, that *certiorari* did not lie against the Local Government Service Commission in similar circumstances. I am aware that in *Abeygunasekera's case* [2] Nagalingam J. expressed doubts as to the correctness of the earlier decision, but he disposed of the matter before him on other grounds. Having considered the matter afresh, I would respectfully follow the decision in *Suriyawansa's case.*

A most incongruous situation would arise if the petitioner's contention were to be adopted by me. On 7th June, 1950, he ceased to be a public servant holding office under the Crown by virtue of a decision of the only authority vested with power to decide whether or not he should continue to serve the Crown. Were I to accede to the present application, I would, in effect, be purporting to re-instate the petitioner in the public service, and, if that were done, I would be usurping functions which are not mine to exercise.

I refuse the application with costs which I fix at Rs. 262/50.

Application refused.

1952

Present : **Swan J.**

H. VELENIS, Appellant, *and* L. EMMIE, Respondent

S. C. 825—M. C. Kalutara, 14,060

Maintenance—Application by wife and child—Denial of paternity of child—Burden of proof.

Where a wife sued her husband for maintenance for herself and a child and the husband admitted that the applicant was his wife but denied the paternity of the child—

Held, that the burden was on the defendant to establish his defence first.

APPEAL from a judgment of the Magistrate's Court, Kalutara.

Titus Goonetilleke, for the defendant-appellant.

No appearance for the applicant-respondent.

Cur. adv. vult.

[1] *(1947) 48 N. L. R. 433.* [2] *(1949) 51 N. L. R. 8.*

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October 13, 1952. SWAN J.—

In this case the applicant-respondent sued the defendant-appellant for maintenance for herself and a child called Premawathie, aged three. In her application she stated that she was the lawful wife of the defendant and that Premawathie was their child and that the defendant, having sufficient means, had failed to maintain them in breach of section 2 of the Maintenance Ordinance. After recording the evidence of the applicant the learned Magistrate issued summons on the defendant. The defendant appeared on summons and admitted that the applicant was his wife but denied the paternity of the child. Inquiry was fixed for 19.4.52. It was postponed from time to time and ultimately taken up and concluded on 18.7.52. At the inquiry both parties were represented. Mr. Francis Silva appeared for the defendant and led evidence to prove that Premawathie was not his child. When the defendant's case was closed Mr. Weeraratne who appeared for the applicant called his client and a witness in support of his case and the learned Magistrate delivered judgment holding that Premawathie was the defendant's child. He ordered the defendant to pay the applicant Rs. 10 per mensem as maintenance for herself and Rs. 5 per mensem as maintenance for Premawathie.

Mr. Goonetilleke for the defendant-appellant contends that the procedure at the trial was entirely irregular and wants me to set aside the order and remit the case for re-trial before another Magistrate. For the alleged irregularity he relies on the judgment of Nagalingam A.J. in *Vidane v. Ukkumenika* [1]. In that case it was held that where the defendant admitted the marriage but denied the paternity of the child and alleged that the applicant was living in adultery the applicant had to prove at the trial certain necessary matters before the defendant could be called upon to "establish his defence"; *firstly* that the defendant had sufficient means, and *secondly* that he had neglected or refused to maintain his wife, and *thirdly* that the child for whom maintenance was claimed was the child of the defendant.

Mr. Goonetilleke very properly brought it to my notice that Dias J., in the case of *Selliah v. Sinnammah* [2], doubted the correctness of the judgment of Nagalingam A.J. in *Vidane v. Ukkumenika* (supra).

I am in complete agreement with the dictum of Dias J. in *Selliah v. Sinnammah* (supra) that maintenance proceedings are civil in their nature and that the rules as regards burden of proof apply.

The record does not show that the learned Magistrate ruled that the defendant should begin. But presuming that he held that the burden was on the defendant I would unhesitatingly say that he was right.

On the facts the appeal was not pressed. I have no doubt at all that the learned Magistrate was correct in holding that the defendant had failed to prove that the applicant was living in adultery and had failed to rebut the presumption of legitimacy as regards Premawathie.

The appeal is dismissed.

Appeal dismissed.

[1] *(1946) 48 N. L. R. 256.* [2] *(1947) 48 N. L. R. 261.*

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1953 *Present :* **Rose C.J., Nagalingam S.P.J. and K. D. de Silva J.**

In re C. E. DE S. SENARATNE

In the Matter of a Rule on a Proctor

Proctor—Misconduct.

The respondent, a Proctor, who had been entrusted with a sum of Rs. 4,000 by a client on February 12, 1949, for the purpose of discharging a mortgage bond executed by the client, falsely represented to the client on November 22, 1949, that he had got the bond discharged and had sent it for registration. In fact, however, he failed to return the discharged mortgage bond and title deeds until December 6, 1952, after the conclusion of an inquiry by the Disciplinary Committee of the Law Society.

Held, that by his conduct the respondent had fallen short of that standard of conduct that, in the public interest, was required of a professional man.

RULE on a Proctor.

N. E. Weerasooria, Q.C., with *M. M. Kumarakulasingham, G. T. Samerawickreme* and *O. S. M. Seneviratne*, for the respondent.

N. K. Choksy, Q.C., with *E. R. S. R. Coomaraswamy*, for the Incorporated Law Society of Ceylon.

M. Tiruchelvam, Crown Counsel, with *R. S. Wanasundera*, Crown Counsel, for the Attorney-General as *amicus curiae*.

Cur. adv. vult.

October 27, 1953. ROSE C.J.—

In this matter the Chairman and one of the other two members of the Disciplinary Committee have found that Mr. C. E. de S. Senaratne, Proctor, appropriated to his own use a sum of Rs. 4,000 entrusted to him on the night of 12th February, 1949, by a Mrs. Wanasinghe for the purpose of discharging mortgage bond No. 1757 executed by her. They also found that Mr. Senaratne practised a deceit when by his letter dated 22nd November, 1949, (P20), he informed Mr. Wanasinghe, the lady's husband, that he had got the bond discharged on or about the 13th November, 1949, and had sent it for registration.

The third member of the Committee agreed with those two findings but held in addition that Mr. Senaratne " without any justification deliberately withheld the petitioner's title deeds and bond to her loss and detriment ".

As no prosecution has been instituted or is contemplated against the respondent for misappropriation of the monies in question, the respondent was required to show cause only in respect of those representations in the letter of 22nd November, 1949, and of his failure and neglect to return the discharged mortgage bond No. 1757, until the conclusion of the inquiry by the Disciplinary Committee on the 6th of December, 1952.

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2——J. N. B 29785-1,592 (10/53

The Committee found, and it is not in dispute, that the two sums of Rs. 1,000 and 3,000 were paid to and accepted by the respondent for the purpose of redeeming the Rs. 4,000 loan on mortgage bond No. 1757. The discharged bond and title deeds not having been received by Mrs. Wanasinghe or her husband by November, 1949, the letter (P15) dated 3rd November, 1949, was written to the respondent by the husband of Mrs. Wanasinghe. This letter requested a prompt discharge of the deeds. By (P16) dated the 4th November, the respondent replied to this letter in the following terms :—

" Dear Mr. Wanasinghe,

I received your registered letter today. I have not yet got the bond signed by the man and I am writing to him to come and discharge same immediately in order to give the deeds to you. I have got his receipt for the money paid. As soon as the bond is signed by the man I'll send you the title deeds. I do not know you wanted these in a hurry. Why did you not tell me so before ?

Yours sincerely,

———— "

No explanation is given as to why the bond was not cancelled on payment of the Rs. 4,000.

Two further letters were written by Mr. Wanasinghe (P17 and P18) on the 11th and 16th November, 1949, asking for the documents to be dispatched without delay. No replies were sent by the respondent to either of these letters. On 21st November, 1949, the letter (P19) was sent by Mr. Wanasinghe in the following terms :—

" Dear Mr. Senaratne,

I haven't received replies from you to my letters. My wife is worried over this matter and I wanted to go and see Haramanis Appuhamy and bring him to you. But on my way I went to Uncle R. S. and he told me that he would talk to you and make arrangements to send the deeds on or before Thursday. In failing I will have to take the trouble to go and see the man on Friday. I hope you will be so good as to send the deeds before Friday.

(Sgd.) D. T. Wanasinghe. "

The uncle "R. S. " referred to is apparently Mr. R. S. Perera who is a Proctor who practises in partnership with the respondent. It was in reply to this letter (P19) that the respondent sent the letter of 22nd November, 1949 (P20) that is under inquiry. (P20) is in the following terms :—

" Dear Mr. Wanasinghe,

I received all your letters yesterday when I came to office. I was absent from office the whole of last week. I got your letter today. I got your bond discharged about nine days ago and sent it for registration. At no time, till you wrote to me, did you tell me that the deeds were required by you urgently. You saw me twice after you paid the money, and on both occasions you saw me about a transfer, and only casually asked me about the deeds. Your attitude now is

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very unfair to me. I paid you money to the mortgage a four days . . . gave same to me. If you were in a hurry, I would have attended to the matter immediately.

Yours sincerely,

_____"

The position taken up by the respondent before the Disciplinary Committee appears to have been that the letter of 22nd November, 1949, was written owing to some incorrect information which was supplied to him by his clerk, and that the true reason for the delay was that the mortgagee was raising difficulties about some interest which was alleged to be due on the bond.

The Committee have rejected both those explanations and we see no reason to differ from their conclusions. Moreover, the correspondence which was produced at the inquiry included some letters from Mr. R. S. Perera, which lends no support to the respondent's contention. In the letter (P26) written on 14th December, 1949, to Mr. Wanasinghe, Mr. R. S. Perera says, "Nothing concrete seems to have happened *re* your matter . . . I believe it is his (respondent's) intention now to do it immediately he is in a position to do it ; it is very difficult to say just now . . . Things can't be very different from what I told you when I met you last." In a letter (P27) dated 28th December, 1949, also written to Mr. Wanasinghe, Mr. R. S. Perera says, "I am afraid the (respondent) could have done it last week—now that it has not happened he will have to wait till January to get the money he expected early this month. However I think you need not worry just at present . . . "

At the inquiry the mortgagee, one Haramanis Appuhamy, gave evidence in favour of the respondent, and the respondent in fact produced two receipts (R1 and R2) alleged to have been given by the mortgagee in 1948 and 1949 respectively in respect of two payments for Rs. 1,000 and Rs. 3,000. The Committee seem to have disbelieved the oral evidence of Haramanis Appuhamy and to have regarded the receipts (R1 and R2) as fabricated. They point out, as is indeed the case, that no mention of these receipts was made in any of the letters written by the respondent at the relevant time either to Mr. or Mrs. Wanasinghe, and that such an omission would seem to be inexplicable if in fact these receipts were genuine and were in his possession at the time. So far, indeed, from having endeavoured to give a rational explanation on the lines of what the respondent indicated to the Committee was the true position, it appears from the correspondence that the respondent had adopted an attitude of resentment and even of truculence.

Upon a careful consideration of all these matters I see no reason to disagree with the findings of the Disciplinary Committee and consider that the respondent has failed to explain or to excuse his false representations on the 22nd of November, 1949, and his failure to return the discharged mortgage bond No. 1757 until after the conclusion of the inquiry by the Disciplinary Committee of the Law Society. I also agree with the view of the Disciplinary Committee that by his conduct in this matter the respondent has fallen short of that standard of conduct that, in the public interest, is required of a professional man.

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The question of punishment is always difficult in matters of this kind. While paying full regard to the fact that the mortgage bond and title deeds have now been returned to Mrs. Wanasinghe, and that it may therefore be the position that she and her husband have suffered nothing more than inconvenience, annoyance and anxiety, I consider that the interests of the profession and the public demand a suitable recognition of the respondent's misconduct. The respondent will therefore be suspended from the practice of the profession of proctor for three years from this date. The respondent will pay the costs of these proceedings to the Law Society in the sum of Rs. 262.50.

NAGALINGAM S.P.J.—I agree.

K. D. DE SILVA J.—I agree.

Respondent suspended from practice for 3 years.

1953 *Present :* **Nagalingam S.P.J.**

THE ATTORNEY-GENERAL, Applicant, *and*
R. DISSANAYAKE, Respondent

S. C. 263—Application for Revision in M. C. Colombo, 25,777

Appeal—Order of Supreme Court—Duty of court of first instance to execute it—Power of Supreme Court to permit conditional release of offenders—Courts Ordinance, s. 37—Criminal Procedure Code, ss. 325, 350.

When a criminal case is decided on appeal and the record of the case is returned to the court of first instance, it is the duty of the lower court, under section 350 of the Criminal Procedure Code, to carry out the order of the Supreme Court on the unquestionable basis that the order of the Supreme Court is right. The Magistrate (or District Judge) must then act as the ministerial officer of the Supreme Court and cannot question the correctness of the order of the Supreme Court.

Although a Magistrate cannot discharge an offender conditionally under section 325 of the Criminal Procedure Code if he proceeds to conviction, the Supreme Court, when it exercises its appellate or revisionary powers, may, without disturbing the order of conviction made by a Magistrate, proceed to order the accused person to be discharged conditionally on his entering into a bond in terms of that section.

Perera v. Punchi Appuhamy (1944) 45 N. L. R. 214, followed.

APPLICATION to revise an order of the Magistrate's Court, Colombo.

H. A. Wijemanne, Crown Counsel, with *A. Mahendrarajah*, Crown Counsel, for the Attorney-General.

N. E. Weerasooria, Q.C., with *M. M. Kumarakulasingham*, for the accused respondent.

Cur. adv. vult.

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October 14, 1953. NAGALINGAM S.P.J.—

In this case the learned Chief Magistrate of Colombo has crucified justice on a cross of judicial indiscretion. The Attorney-General intervenes and points out that an absurd situation has been reached in these proceedings by the learned Magistrate purporting to sit in judgment over and nullify the effect of an order made by this Court, the supreme tribunal in the Island ; and that the absurdity reaches fantastic heights when it becomes patent that the view taken by the learned Magistrate it is that is erroneous.

The facts lie within a narrow compass. The respondent was convicted by the learned Magistrate of having caused hurt to his wife and sentenced to undergo three months rigorous imprisonment. On appeal My Lord the Chief Justice while affirming the conviction set aside the order of imprisonment and directed that the respondent should be " bound over in the sum of Rs. 500 in his own recognizances to be of good behaviour for a period of twelve months". In pursuance of the order of this Court the learned Magistrate directed the respondent to " enter into the bond as ordered by the S. C." (Supreme Court). The bond was signed on 19th February, 1953, before the learned Magistrate himself. On 5th May, 1953, the prosecuting Inspector brought to the notice of the learned Magistrate that the respondent had been convicted, while the bond was still in force, of another offence, and moved that the respondent be called upon to show cause why he should not be convicted and sentenced in this case. Notice was duly served on the respondent. The respondent appeared, and was also represented by proctor. Both the respondent and his proctor stated that they had no cause to show. The learned Magistrate thereupon proceeded to make this order :—

> " I am afraid that this bond is not enforceable. The accused was convicted in this case and sentenced to three months' R.I. He appealed against that conviction. In the course of the order of the Supreme Court, it is stated that the conviction is affirmed. At the end the order says that the accused will be bound over in a sum of Rs. 500 in his own recognizances to be of good behaviour for a period of twelve months. The binding over is obviously under section 325 (1) of the Criminal Procedure Code, this being a summary charge. That section expressly states that the Court can make an order for a binding over only if it does not proceed to conviction. With very great respect, I would say that an accused cannot be bound over if the Court proceeds to conviction. Therefore, I regret, I am unable to enforce this bond. So, I discharge the accused."

There is nothing on record to indicate that the learned Magistrate before making this order afforded the prosecuting Inspector an opportunity of being heard against the order he proposed to make ; nor indeed does he even appear to have invited the assistance of the proctor for the accused to see what support he could derive from him for the view he had taken in regard to the order of this Court ; but the learned Magistrate made his order without hearing any argument.

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Assuming for a moment—and it cannot be too strongly emphasized that the assumption is altogether fallacious—that there was some defect or irregularity in the order made by this Court, the question then arises as to what course should be adopted by a Magistrate in such an event. Is it open to a Magistrate to treat an order of this Court as erroneous and therefore of no legal effect ? It is elementary to state that—

> " 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.*"

—per Lord Hobhouse in the Privy Council in the case of *Malkarujan v. Narhare and another* [1].

The order of this Court was made as early as 22nd January, 1953. That order was binding upon the parties to the proceedings. Either party dissatisfied with that order or claiming that the order was contrary to law had, if at all, a right to go before a tribunal having appellate powers over this Court in order to have the wrong set right. But where no such action was taken, the order, however erroneous, was binding on them and of full force and effect. In fact the Magistrate himself, as he was bound to do, treated the order as binding on the respondent, for he called upon him to execute a bond in terms of the order of this Court. On the other hand, it would have been ridiculous to suggest that a Magistrate to whom an order of this Court is transmitted could regard himself as an appellate tribunal possessing powers on a par with those of the Privy Council and take upon himself the misguided duty of determining whether the order of this Court is right or wrong.

This Court is empowered, on the hearing of any case in appeal before it, to pass such judgment, sentence, decree, or order, or to give such direction to the Court below as it shall think fit (section 37, Courts Ordinance), and when a case is decided on appeal by it, it certifies its order under its seal to the court of first instance, and such Court thereupon has to make such orders as are conformable to its order (section 350, Criminal Procedure Code). In view of these provisions, it would be obvious that the Magistrate to whom an order of the Supreme Court is transmitted " acts not as a Judge but as the ministerial officer of the Supreme Court, and no discretion is vested in him".—See for a discussion of this question the case of *King v. Perera* [2].

I do not therefore think it was competent to the Magistrate to assume jurisdiction as a Judge and to express any opinion on the correctness or otherwise of the order of this Court. The learned Magistrate was completely wrong in taking upon himself the self-imposed duty of determining the regularity or otherwise of the order of this Court, for all that he had to do at that stage was to carry out the order of this Court on the unquestionable basis that the order of this Court is right.

On this occasion it is not necessary to say more than to remind the learned Magistrate that no usurpation of powers will be tolerated by this Court.

[1] *(1900) I. L. R. 25 Bombay, 337 at 347.* [2] *(1926) 28 N. L. R. 151.*

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I shall now proceed to consider whether the learned Magistrate was correct in the view he took that the order made by this Court on appeal was erroneous. Had he invited assistance from the parties before him, succour may have been proferred and his attention drawn to previous decisions of this Court embodying the correct principles to be applied in circumstances such as those that confronted the learned Magistrate. There have been several previous instances where, without the propriety or otherwise of the order being discussed, this Court has affirmed the conviction entered by a Magistrate but deleted the sentence of imprisonment or fine and directed that the accused be discharged conditionally on his entering into a bond in terms of section 325 of the Criminal Procedure Code.

However, the point was specifically raised and debated and a considered judgment given by this Court in *Perera v. Punchi Appuhamy et al.*[1] That judgment was delivered by Soertsz J., and he expressly held that while, no doubt, a Magistrate cannot discharge an offender conditionally under section 325 of the Criminal Procedure Code if he proceeds to conviction (see the cases of *Marthelis v. James*[2] and *Fernando v. Inspector of Police, Panadura*[3]) it was competent to the Supreme Court in the exercise of its appellate or revisionary powers to affirm the conviction, or rather, without disturbing the order of conviction made by a Magistrate, to proceed to order the accused person to be discharged conditionally in terms of section 325 of the Criminal Procedure Code. That decision has been followed since in more than one case. The order of this Court, the correctness of which was doubted by the learned Magistrate, is therefore not only in consonance with previously decided cases of this Court, but is legally sound.

The order, therefore, made by My Lord the Chief Justice, if I may respectfully say so, is a right order and not a wrong order. The Magistrate, therefore, was clearly mistaken in saying that " an accused cannot be bound over if the Court proceeds to conviction " —a statement which can only be defended in relation to an order made by a Magistrate and not in relation to an order made by the Supreme Court. Manifestly, therefore, the order of the Magistrate whereby he expressed his inability to enforce the bond is altogether erroneous, and I therefore set it aside.

The next question is whether the respondent having shown no cause against his being convicted and sentenced in this case, he could properly be proceeded against. Learned Crown Counsel submits that it is not possible to do so in view of the terms of the bond entered into by him, as the bond that was entered into is a bond that is not in accordance with the order of this Court. That the bond directed to be taken by this Court could only have been taken in terms of section 325 of the Criminal Procedure Code there can be little doubt. That the learned Magistrate correctly construed the order of this Court in that sense, though there was no express reference to that section, is abundantly clear, for the Magistrate remarks that the " binding over is obviously

[1] *(1944) 45 N. L. R. 214.*

[2] *(1929) 10 C. L. Rec. 36.*

[3] *(1948) 49 N. L. R. 333.*

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under section 325 (1) of the Criminal Procedure Code, this being a summary charge". That the prosecuting Inspector himself understood the order in the same sense is apparent from the application he made to Court for a notice on the respondent to show cause why he should not be called up for conviction and sentence, which could only have been done if the bond had been taken under section 325. That the accused himself understood the order in the same sense is obvious from the fact that neither he nor his proctor showed cause against his being convicted and sentenced in this case in view of his subsequent conviction.

But unfortunately, due to carelessness there can be little doubt, the bond that was taken by the learned Magistrate is one which conforms more to a bond required to be furnished under section 82, rather than to one under section 325, of the Criminal Procedure Code. It is in fact a bond not in conformity with the provisions of section 325, and cannot be availed of for the purpose of convicting or sentencing the respondent in this case. Counsel for the respondent concedes that this is so. In these circumstances, the application of the Attorney-General to direct the learned Magistrate to take action in conformity with the order of this Court is entitled to succeed.

I therefore allow the application of the Attorney-General and *pro forma* cancel the bond entered into by the respondent, and remit the case to the learned Magistrate for a bond to be taken in proper form in terms of section 325 of the Criminal Procedure Code.

Application allowed.

1952 *Present :* **Gratiaen J. and Gunasekara J.**

MURUGAPPAN CHETTIAR, Appellant, *and* NADARAJAN CHETTIAR, Respondent

S. C. 42—D. C. Colombo, 20,470

Lis alibi pendens—*Stay of proceedings—Conditions precedent—Civil Procedure Code, s. 839.*

An order staying all proceedings in an action until the conclusion of a litigation which is pending between the parties in a foreign Court cannot be made except upon proper material. A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in a court in Ceylon if it is otherwise properly brought.

APPEAL from an order of the District Court, Colombo.

C. Thiagalingam, Q.C., with *S. Sharvananda* and *G. A. Thavathurai*, for the plaintiff appellant.

E. B. Wikramanayake, Q.C., with *S. Thangarajah*, for the defendant respondent.

Cur. adv. vult.

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June 5, 1952. GRATIAEN J.—

This is an appeal from an order of the District Court of Colombo, dated 22nd November, 1950, directing that all proceedings in the present action should be stayed until the conclusion of a litigation which was pending between the parties in the Sub-Court of Sivaganga in India. Section 839 of the Civil Procedure Code certainly confers upon trial Judges in this Island an inherent jurisdiction to make orders of this nature upon proper material and in accordance with the well-recognised principles of the doctrine of *lis alibi pendens*. In *Ramen Chettiar v. Vyvaven Chettiar* [1] Wijeyewardene J. (Howard C.J. concurring) laid down the following rules which should guide a Judge who is invited to order a stay on the ground that the same *lis* is already pending between the parties in a foreign Court :—

" (1) The burden is on the party asking for the interference of Court to prove that he is doubly vexed by reason of two actions being brought against him.

(2) Where the two actions are brought in the same country there is a prima facie presumption of an intent to cause vexation.

(3) Where the party is sued in one country and also in a foreign country or where a party is sued in two countries subject to the same Paramount Power a Court will not presume an intent to cause vexation—

(*a*) in the absence of evidence that the plaintiff cannot obtain an additional advantage in continuing both his actions, or

(*b*) from the mere fact of inconvenience or additional expense caused to a party, or

(*c*) from the fact that by staying one action less evidence would have to be ultimately led in the first action. "

The plaintiff asks that the learned District Judge's order under appeal should be set aside because he has misdirected himself as to the matters which should have weighed with him in exercising his discretion to stay proceedings on the ground of vexation or abuse of process—a discretion which must, without doubt, be very cautiously applied. For our Courts are " freely open to all persons, including persons foreign to this country, seeking to enforce their rights . . . . in cases in which the Courts can properly exercise jurisdiction ". *Logan v. Bank of Scotland* [2]. The rule was stated thus by Scott L.J. in *St. Pierre v. S. American Stores (Gath and Chavis) Ltd.* [3] :—

" (1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. *The right of access to the King's Court must not be lightly refused.* (2) In order to justify

[1] *(1940) 41 N. L. R. 371.*

[2] *(1906) 1 K. B. 141, 159.*

[3] *(1936) 1 K. B. 382, 398.*

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a stay, two conditions must be satisfied, one positive and the other negative ; (*a*) the defendant must satisfy the Court that the continuance of the action would work an injustice to him because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way ; and (*b*) the stay must not cause an injustice to the plaintiff. *On both the burden of proof is on the defendant.*"

These observations are in conformity with those enunciated by Wijeyewardene J. in *Ramen Chettiar's case* (supra) and, with respect, they should always be borne in mind by a Judge who is called upon, in effect, to deny to a litigant the privilege of obtaining legal redress in proceedings over which our Courts are vested with jurisdiction.

The conclusion at which I have arrived is that the defendant, on whom the burden of proof clearly lay, has not adduced any evidence which would have justified a stay of the proceedings in the present action. The elements of vexation or oppressiveness or abuse of process have not been established. Still less has the onus been discharged of proving that the plaintiff would not derive any advantage by a continuation of the proceedings in this country in the normal way.

I now proceed to set out my reasons for deciding that the learned Judge's order should be set aside.

The present action was instituted by the plaintiff on 1st December,1948, against the defendant, who is his elder brother, for the recovery of two substantial sums of money aggregating over Rs. 160,000 and for certain additional relief upon these causes of action. The jurisdiction of the Court to entertain the action is not denied, and the defendant himself seems to concede that, in respect of the second cause of action on which he has admitted partial liability, the District Court of Colombo is the most convenient forum for an adjudication of the dispute (paragraphs 18 and 20 of the document P1). On that basis, a sum of money representing the amount of his admitted liability has been brought into Court to the credit of the action.

On 15th December, 1948, the plaintiff also instituted an action against the defendant and two others in an Indian Court upon several causes of action including, but not restricted to, the causes of action which form the subject matter of the present proceedings. We have no evidence before us as to the rules of procedure governing litigation in the Sub-Court of Sivaganga, but I find that the defendant's answer in the Indian case had specifically pleaded *inter alia* that the prior institution of this action in Ceylon is an absolute bar to the maintainability of the *lis* in India. If that be a valid plea, it certainly affords a most compelling argument against the application for a stay of the proceedings in the Ceylon case.

To return to the progress of the proceedings in the District Court of Colombo. The trial was originally fixed for 18th July, 1950; and both parties, who had attended Court with their respective witnesses, were ready to proceed with the action on its merits. Unfortunately, however, the case was postponed by the Court for want of time, and the trial stood adjourned for 22nd November, 1950. On that date, without any previous

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notice to the plaintiff or his proctor, an oral application on the defendant's behalf was made for a stay of proceedings on the ground that the Indian litigation was still pending. The failure of the defendant to invoke the discretionary jurisdiction of the Court until long after the time when he could reasonably and properly have applied for a stay was itself a ground for rejecting his belated application. *Spencer Bower on Res Judicata, page 213.* But apart from that, the application was in my opinion entirely devoid of merit, and the trial should have been proceeded with on the appointed date for the following compelling reasons :—

(*a*) it was not proved or even suggested that any events had occurred *since 18th July, 1950* (*on which date the defendant had expressed his willingness to submit to the Court's jurisdiction to try the case*), which would operate to prejudice his position as a litigant in the Ceylon Court ;

(*b*) both parties had cited witnesses resident in Ceylon to support their respective cases, and these witnesses cannot be subpoenaed to attend the Sub-Court of Sivaganga in India ;

(*c*) the defendant had conceded in the document P2 that the transaction to which one at least of the causes of action relates " had arisen in Ceylon and has to be decided under the law governing in Ceylon " ;

(*d*) the defendant has also pleaded in P2 that, should the defendant obtain a money decree in India upon the second cause of action, that decree should direct payment to be made in Ceylon. If that be so, the final adjudication of the Indian Courts would not by itself conclude the litigation, and further proceedings in this Island would be necessary for the purpose of enforcing part at least of the Indian decree ;

(*e*) the trial in the present action would, but for the granting of the order applied for, have commenced on 22nd November, 1950, and been concluded, presumably, not very long afterwards ; by way of contrast, there was no evidence that the litigation in Sivaganga could reasonably have been expected to be brought to a speedy conclusion. (Indeed, 18 months have since passed, and it would appear that the Indian case has even at this date not reached a stage beyond the preliminary " framing of issues ".)

(*f*) should the plaintiff ultimately fail in his action in the Ceylon Courts, he would enjoy the advantage of preferring an appeal as of right to the Judicial Committee of the Privy Council ; that privilege is no longer enjoyed by litigants in India.

The learned District Judge does not seem to have had the advantage of being reminded of the reported decisions on the doctrine of *lis alibi pendens* —an omission for which the plaintiff's counsel, who had no previous notice of the defendant's application, was certainly not to blame. In consequence the learned Judge has not given due weight to any of the matters referred to by me, and his judgment proceeds solely upon h

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assessment of what he described as the " balance of conveniences ". In the result, the discretion which he purports to have exercised in ordering a stay of proceedings is vitiated by misdirection.

I would set aside the order under appeal and direct that the case be sent back for trial in the normal way. The appellant is entitled to his costs both here and in the Court below. The District Judge in fixing fresh dates of trial will no doubt pay due regard to the fact that this action was instituted nearly 4 years ago.

GUNASEKARA J.—I agree.

Order set aside.

1953 *Present :* **Gratiaen J. and Weerasooriya J.**

L. A. DISSANAYAKE, Appellant, *and* G. M. PUNCHI MENIKKE *et al.*, Respondents

S. C. 159—D. C. Kurunegala, 3,902

Kandyan Law—Binna *marriage—Subsequently registered as* Diga—*Effect of such registration*—Binna *married daughter who leaves* mulgedera—*Her rights of inheritance.*

Where a Kandyan marriage contracted in *binna* was registered three years later and was described in the marriage register as a *diga* marriage—

Held, that the entry in the register as to the nature of the marriage was rebuttable by other evidence.

Held further, (i) that the marriage, upon its registration, became valid as from the date of the original association of the parties as man and wife.

(ii) that a *binna* married daughter, who severs her connection with the *mulgedera* after her father's death, does not forfeit her paternal inheritance.

APPEAL from a judgment of the District Court, Kurunegala.

H. V. Perera, Q.C., with *H. W. Jayewardene* and *D. R. P. Goonetilleke*, for the plaintiff appellant.

C. E. S. Perera, Q.C., with *T. W. Rajaratnam* and *A. Nagendra*, for the 1st, 2nd and 5th defendants respondents.

Cur. adv. vult.

August 25, 1953. GRATIAEN J.—

The property which is the subject matter of this action under the Partition Ordinance had admittedly belonged to a Kandyan villager named Mudalihamy who died on 30th October, 1886. Two sons named Yahapathhamy and Ukkubanda and a daughter Dingirimenika were the legitimate children of his marriage with Lama Etana. Lama Etana subsequently gave birth to another child named Menuhamy, but, although Menuhamy was also regarded as a sister of the other children, the date of her birth excludes the possibility of Mudalihamy having been her father.

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The second son Ukkubanda died issueless after his father's death. Mudalihamy's estate therefore vested in Yahapathhamy and (provided that she had not forfeited her inheritance) in Dingirimenika in equal shares. Dingirimenika purported to sell an undivided one-third share of the property to the plaintiff by P2 of 1945. On the basis of this title her outstanding one-sixth share must be allotted to her son the 6th defendant.

The contesting defendants have succeeded to the interests of Mudalihamy's elder son Yahapathhamy. Their position is, however, that they are entitled to the entire property because Dingirimenika forfeited her share in the inheritance as a result of a *diga* marriage which she had contracted with the witness Appuhamy, the 6th defendant being a child of that union. The learned District Judge accepted this contention and dismissed the plaintiff's action on the ground that the conveyance P 2 executed in 1945 by Dingirimenika passed no title to any share in the property sought to be partitioned.

The main issue in the case was whether Dingirimenika's marriage with Appuhamy was in fact a *diga* marriage. Mr. H. V. Perera concedes that, if that be the true position, the question of any subsequent re-acquisition by her of *binna* rights does not arise upon the evidence in the case.

The 1st defendant, who is Yahapathhamy's widow, gave evidence which, if true, completely destroys the plaintiff's claim that Dingirimenika's marriage had been contracted in *binna*. She stated that, whereas the *mulgedera* was admittedly situated in the village of Welikara, Dingirimenika was " given out in *diga* " by her family to Appuhamy who, from the commencement of this association, lived with her in the neighbouring village of Kandagedera ; that their son the 6th defendant was born in Kandagedera and " did not live in the *mulgedera* a single day ".

The 1st defendant's version is, to say the least, demonstrably exaggerated. The 6th defendant's birth certificate P 3 proves that he was born *at Welikara* on 26th August, 1903, and that both his parents were residents of Welikara during that period. Moreover, the 1st defendant's witness Kusalhamy, who is a son of Yahapathhamy, admitted under cross-examination that " Appuhamy, at the beginning, came and settled down in Mudalihamy's house (i.e., the *mulgedera*). There their eldest son Gunerathhamy (the 6th defendant) was born after about two years of Appuhamy settling down there. Two or three years after the birth of Gunerathhamy, Appuhamy and Dingirimenika went to Kandagedera. *They registered their marriage and went to Kandagedera* ".

The learned Judge, for the purpose of his decision upon this vital issue, appears to have accepted Kusalhamy's evidence as substantially true. Indeed, this version is corroborated by the marriage certificate 1D7 which proves that the marriage of Appuhamy and Dingirimenika was not registered until 10th December, 1904 (i.e., nearly 16 months after the 6th defendant was born), and that Dingirimenika had at the date of registration been " living as a married woman for three years ". Upon these facts, the learned Judge accepted the submission made on behalf of the contesting defendants that after the 6th defendant was born, " the actual legal marriage took place according to law and the husband and wife left Welikara ".

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The question to be decided is whether, upon the basis of these facts, the marriage of Dingirimenike can properly be regarded as a *diga* marriage. It is certainly a point in favour of this argument that when her *de facto* marriage with Appuhamy was eventually legalised by registration it was described in the Register as a *diga* marriage. If I may respectfully adopt, with the necessary variations, the observations of Pereira J. in *Sinno v. Appuhamy*[1], " this would be almost conclusive evidence *had the marriage been contracted at the time it was registered*, but this marriage was registered (three) years after it was contracted. In the circumstances, the entry in the marriage register as to the nature of the marriage is rebuttable by other evidence ".

We are here confronted with yet another instance of the difficulties which arise when Kandyan villagers refrain from prompt compliance with the strict provision of the Kandyan Marriage Ordinance whereby formal registration is essential to the validity of " an association which a *de facto* husband and wife, as well as all their neighbours, regard as an honourable union even without registration "—Modder : Kandyan Law p. 256.

If one analyses the facts in the light of the intention of the parties to the *de facto* marriage which was originally contracted in Welikara, it is not difficult to appreciate that when Appuhamy and Dingirimenika appeared before the Registrar on 12th December, 1904, they could not have regarded themselves as contracting a fresh marriage with effect only from that date; on the contrary, they intended merely to regularise their previous *de facto* marriage which they, and everyone else, considered to have honourably commenced when Appuhamy was first received in the *mulgedera* as her husband. The eldest child was born in the *mulgedera* during this *binna* association; and though he became legitimated only upon the registration of his parents' marriage, he had already been acknowledged as a " child of the *mulgedera* ". In the result, the registration of the marriage gave validity to the uninterrupted association which had originally commenced in the *mulgedera*. Dingirimenika and her husband must therefore be regarded, notwithstanding the entry in the marriage register and notwithstanding their subsequent departure to Kandagedera, as having married in *binna*. This marriage, upon its registration, became valid as from the date of their original association as man and wife—*Ukku v. Kirihonda* [2]. Pereira J. took a similar view in *Dingirihamy v. Mudalihamy*[3], and Ennis J. adopted the same line of reasoning " with diffidence ". It seems to me a sensible way of reconciling the statutory requirements of the Ordinance with the habits of the people whom it governs.

It would be artificial in the extreme to treat the earlier unregistered *binna* association as having been converted into an unregistered *diga* association, the latter association alone being eventually validated by registration. What these two people intended to register in 1904 was the uninterrupted association which has commenced three years earlier in the *mulgedera*. There is certainly no evidence from which one could infer that, shortly before the date of registration, Dingirimenika was, with due ceremony, " given out in *diga* " by her brothers to the

[1] *(1913) 1 Bal. N. C. 80.* [2] *(1901) 6 N. L. R. 104.*
[3] *(1912) 16 N. L. R. 61.*

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same man whom everyone concerned already regarded as her husband. In these circumstances, the description which Appuhamy gave to the marriage as a "*diga*" marriage was at best a layman's expression of his opinion upon a mixed question of law and fact which even lawyers might well have difficulty in solving.

The view which I have taken gains support from the conduct of Dingirimenika's elder brother Yahapathhamy even after she had taken up residence with her husband in Kandagedera. In 1917 a Crown grant P4 was obtained by all the members of Mudalihamy's family (including his assumed child Menuhamy) in respect of another property which he had possessed during his lifetime, and a share was allotted to Dingirimenika on a basis which is consistent only with a continued recognition by her brothers of her status as a married sister who had not forfeited her paternal inheritance. Similarly, although Yahapathhamy had purported in 1922 to convey the entire property in dispute to his wife and children as if he were the sole heir of Mudalihamy, he later purchased in 1923 an undivided one-third share in the same property from Menuhamy (whose illegitimacy was at that time not appreciated) for the benefit of Kusalhamy and the 4th and 5th defendants. One may legitimately infer from this transaction that Dingirimenika was still recognised as being also entitled to the outstanding one-third share inherited from her father and her brother Ukkubanda (then deceased). To my mind, the evidentiary value of these circumstances outweighs that of the unilateral acts of Yahapathhamy's heirs who, on isolated occasions, subsequently acted as if Dingirimenika had forfeited her inheritance.

It remains to be considered whether Dingirimenika's subsequent departure to her husband's village operated so as to forfeit her inheritance. As Dr. Hayley points out (Kandyan Law p. 373-6) it is important to distinguish between the position of a *binna* married daughter who severs her connection with the *mulgedera after her father's death* from that of a daughter who is "given out in *diga*" during her father's lifetime. In the former case, the *binna* married daughter's title to a share in the paternal inheritance had already, before she left the *mulgedera*, become "crystallised", and no forfeiture can thereafter take place if she takes up residence elsewhere with the same husband—*Siripaly v. Kirihamy* [1]. *Vide* also Wood Renton J.'s observations regarding the position of the *binna* married daughter Ran Etana who had left her *mulgedera* with her husband after her father's death—*Ran Etana v. Nekappu* [2]. In such circumstances, the vested rights of a *binna* married sister cannot be extinguished except by prescription unless, apparently, they are forfeited by her contracting a second marriage in *diga with another man*. Neither of these events has occurred in the present case.

Dingirimenika, while still unmarried, merely enjoyed "a temporary interest" in her father's estate—*Hayley's Kandyan Law* p. 370-1. Thereafter, when her *binna* association with Appuhamy was validated by registration, her rights in the inheritance became indefeasible subject only to the limitations to which I have previously referred. Her subse-

[1] (*1917*) *4 C. W. R. 157.* [2] (*1911*) *14 N. L. R. 289.*

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quent change of residence, even if it could be construed as an unequivocal severance of her connection with the *mulgedera*, left her vested interests unimpaired.

For the reasons which I have given, the learned Judge was wrong in taking the view that Dingirimenika forfeited her paternal inheritance. The true position is that her conveyance P2 in favour of the plaintiff vested in him an undivided one-third share in the property, and that her outstanding one-sixth share passed to her son the 6th defendant by maternal inheritance. Only a half-share in the property belonged to Yahapathhamy, whose interests subsequently devolved on the contesting defendants.

I would set aside the judgment under appeal and order the record to be sent back to the lower Court with a direction that an interlocutory decree be entered for the partition of the land in dispute, allotting

(*a*) a one-third share to the plaintiff ;
(*b*) a one-sixth share to the 6th defendant ;
(*c*) shares to the contesting defendants on the basis that Yahapathhamy, by his deed 1D1, conveyed only an undivided half share, and not the entirety, of the property to his wife and children.

The appellant is entitled to the costs of this appeal and to the costs of the contest in the Court below. The costs of partition will be borne *pro rata*.

WEERASOORIYA J.—I agree.

Appeal allowed.

1952 *Present :* **Nagalingam A.C.J.**

S. KATCHIMOHAMADU, Appellant, *and*
P. K. MOOYAN (S. I. Police), Respondent

S. C. 1,309—M. C. Batticaloa, 13,048

Penal Code, s. 394—Receiving stolen property—Several articles in accused's possession —Different owners—Presumption of one offence only—Autrefois acquit—*Criminal Procedure Code, s. 330.*

Where a person, who is found in possession of several articles belonging to different owners, is tried and acquitted of the offence of receiving stolen property in respect of some of the articles, he cannot be prosecuted again for the same offence in respect of any of the remaining articles. In that event, he is entitled to take the plea of *autrefois acquit* unless there is evidence to show that the articles were received by him on different occasions or that he came into possession of them at different times.

APPEAL from a judgment of the Magistrate's Court, Batticaloa.

M. A. M. Hussein, for the accused appellant.

Cecil Gunawardene, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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May 15, 1952. NAGALINGAM A.C.J.—

A plea of *autrefois acquit* is taken on this appeal on behalf of the appellant. The appellant, the 3rd accused in the proceedings, and two others were charged in case No. M. C. Batticaloa 11,666 with having committed theft of six goats belonging to one Katchimomahadu Shahul Hameed and in the alternative with having retained possession of the said animals knowing or having reason to believe that the animals were stolen property. After trial, the 1st accused in the case was convicted of having retained stolen property and duly sentenced, while the 2nd and 3rd accused were acquitted.

In the present case bearing No. M. C. Batticaloa 13,048 the same three accused were charged with having committed theft of three goats belonging to one Ismail Lebbe Seeni Mohamadu and in the alternative with having retained possession of the said animals, knowing or having reason to believe the animals to be stolen property. After trial, the learned Magistrate acquitted all the accused of the offence of theft but convicted them of having retained the animals, which they knew to be stolen property.

There was no evidence in the case as to the person or persons by whom the thefts were committed, though there was evidence that the thefts as well as certain other thefts relating to certain other animals had taken place on the night of the 6th January. The evidence, however, against the accused persons, both in the earlier trial and the present one, was that they were found driving a flock of fifteen goats, all said to have been stolen on the night of the 6th, and they were detected driving the animals in the early hours of the morning of the 7th January.

Mr. Hussein on behalf of the appellant who is the 3rd accused in the present case contends that the present trial is barred by reason of the provisions of section 330 of the Criminal Procedure Code in that the appellant had previously been tried and acquitted of the offence of having retained stolen property and that in the present case the offence is the same offence which was the subject matter of the earlier proceedings. It is unnecessary to consider the effect of the charges in the two cases in respect of the offence of theft because in respect of these offences the accused were acquitted in the respective cases.

The question thus raised leads to a consideration as to whether the offence in the present case is identically the same as the one which was the subject of the prosecution in the former. As remarked earlier, the evidence against the accused persons was that they were found driving the flock of fifteen animals. The offence of retaining stolen property was therefore in respect of the accused having been found in control of all the fifteen animals. Mr. Hussein contends that there was only one offence and that in the absence of any evidence to shew that the several animals were received by the accused persons on different occasions or that they came into possession at different times there was only one offence which they could be said to have committed and that it cannot be said that there were as many offences as the number of thefts that had taken place in respect of the several animals.

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Mr. Hussein supported his argument by reference to three cases, the first of which is that of *Ganeshi Sahu v. Emperor* [1] where on almost identical facts the Court held that there was no more than one offence disclosed and that a subsequent conviction was illegal in view of the provisions of section 403 of the Indian Criminal Procedure Code. To much the same effect are the other two cases of *Hayat v. Emperor* [2] and *Jalal v. Emperor* [3].

The contention of Mr. Hussein is sound and the conviction of the appellants after he had been acquitted of the identical offence in the earlier proceedings is contrary to the provisions of section 330 of the Criminal Procedure Code.

I therefore set aside the conviction and acquit the accused and acting in revision and for the same reasons set aside the convictions of the 1st and 2nd accused as well. The prison authorities will be communicated with immediately if the 1st and 2nd accused are yet in prison under the conviction and sentence entered in this case.

Appeal allowed.

1952 *Present :* **Swan J.**

PIRAGASAM, Appellant, *and* MARIAMMA, Respondent

S. C. 154—C. R. Jaffna, 2,164

Maintenance Ordinance—Arrears of maintenance—Deposited in Court—Liability to attachment—Civil Procedure Code, s. 218 (l).

Action—Thesavalamai—Action instituted by married woman—Subsequent grant of dispensation to sue alone—Date of action.

Arrears of maintenance and costs paid into a Magistrate's Court to the credit of an applicant in proceedings instituted under the Maintenance Ordinance are liable to be seized in execution of a decree obtained against her.

Where a married woman governed by Thesavalamai instituted an action and her application for sanction of Court to sue alone, unassisted by her husband, was made with the presentation of the plaint—

Held, that the date of the institution of the action was the date on which the plaint was filed and not the date when the dispensation to sue alone was granted.

APPEAL from a judgment of the Court of Requests, Jaffna.

C. Chellappah, for the 2nd defendant appellant.

J. St. George, for the plaintiff respondent.

Cur. adv. vult.

[1] *A. I. R. 1923 Cal. 557.* [2] *A. I. R. 1928 Lah. 637.*
[3] *A. I. R. 1932 Lah. 615.*

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December 9, 1952. SWAN J.—

The appellant had sued the respondent in case No. 4,149 of the District Court of Jaffna and her action had been dismissed with costs. In execution of the decree for costs the respondent seized certain monies deposited to the credit of case No. 15,643 M. C. Jaffna. This was a maintenance case and the defendant who was the husband of the appellant and the sister of the respondent had deposited in Court two sums of Rs 63·65 and Rs. 60 which were due from him as costs and as arrears of maintenance for two months respectively. Whether the husband paid the money into Court and not directly to the appellant in order to help his sister as against his wife does not affect the main question that arises for consideration in this appeal. The appellant preferred a claim to the said sums of Rs. 63·65 and Rs. 60 and her claim was upheld. The respondent then brought this action under Section 247 of the Civil Procedure Code for a declaration that the monies seized were liable to seizure under her decree. The learned Commissioner of Requests held in her favour, and the present appeal is against that finding.

The same two objections that were taken in the lower Court have been pressed in appeal, namely,

(1) that the action was not instituted within fourteen days as required by Section 247.

(2) that the monies paid to the credit of the appellant in the maintenance case were not liable to seizure.

As regards the first point it is conceded that this action was filed within fourteen days but the contention is that it was not properly constituted when the plaint was submitted to Court in that the respondent, who was governed by the law of Thesawalamai, was not assisted by her husband and had not previously obtained the permission of Court to institute the action without such assistance.

It is common ground that a married woman governed by Thesawalamai cannot sue alone. She must either be assisted by her husband or obtain the sanction of Court to sue alone. In this case the application for such dispensation was made with the presentation of the plaint but it was not granted till 10.4.1951, i.e., very much more than fourteen days after the claim was upheld. Mr. Chellappah contends that 10.4.1951 ought to be taken to be the date of institution. The learned Commissioner held that the order had retrospective effect and I have no hesitation in saying that he was correct. The institution and maintainability of an action are two different things. When the action was instituted the wife had no legal right to sue alone but once the Court dispensed with the presence of the husband her act in suing alone was validated as from the date the plaint was filed.

As regards the second point, namely, that the amounts deposited to the credit of the appellant in the maintenance case were not liable to seizure the exemption is claimed under Section 218 (L) of the Civil Procedure Code which protects from seizure and sale in execution of a money decree "a right to future maintenance". Neither costs paid in a maintenance case nor arrears of maintenance already accrued and

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actually paid into Court can by any stretch of the imagination come under the category of " a right to future maintenance " ; and as there is nothing in the Maintenance Ordinance to prevent such money from being seized in execution on a writ against the person to whose credit it has been deposited I fail to see how exemption from attachment can be claimed. Learned Counsel for the respondent cited two Indian cases in support of his contention that arrears of maintenance were not exempt from seizure and sale in execution, namely, the cases of *Venkat Rao Ganpat Rao Harne v. Zunkari Marwadi* [1] and *Orissa Province v. Rangamma* [2]. But those are cases where the decree for maintenance was ordered in a civil suit and not in proceedings like the Maintenance Ordinance, and may therefore be distinguished on that ground. However, the matter seems quite simple. So long as the Maintenance Ordinance affords no protection with regard to money paid into a Magistrate's Court to the credit of an applicant on account of costs or of arrears of maintenance, such money is, in my opinion, liable to be attached on a decree against her.

The appeal is dismissed with costs.

Appeal dismissed.

1953 *Present :* **Nagalingam A.C.J.**

M. A. PONNIAH, Appellant, *and* R. SELLAN, Respondent

S. C. 20—C. R. Anuradhapura, 4,792

Jurisdiction—Trespass by licensee—Action in ejectment—Valuation thereof—Test to be applied—Evidence Ordinance, s. 116—Courts Ordinance, s. 75.

The value which should be placed on an action in ejectment instituted by an employer against an overstaying servant or licensee in respect of premises which the latter had been permitted to occupy free of rent is only a nominal value, and not the value of the premises ; if, however, the servant was given a month's notice to quit the premises, the value would be a reasonable amount payable for the use and occupation of the premises.

" The principle that a tenant cannot deny his landlord's title extends to the case of a person coming in by permission as a mere lodger, a servant or other licensee."

APPEAL from a judgment of the Court of Requests, Anuradhapura.

S. J. V. Chelvanayakam, Q.C., with *J. C. Thurairatnam*, for the plaintiff appellant.

E. R. S. R. Coomaraswamy, for the defendant respondent.

Cur. adv. vult.

[1] *(1934) A. I. R. Nagpur 83.* [2] *(1950) A. I. R. Orissa 220.*

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October 2, 1953. NAGALINGAM A.C.J.—

What is the proper test to be applied for the valuation of an action instituted by an employer to eject his caretaker or watcher of property from a building permitted to be occupied by the latter during the period of his employment, free of rent, is the problem that arises for determination in this case.

The facts are not in dispute. The plaintiff-appellant employed the defendant-respondent as his caretaker of certain lands on a monthly salary of Rs. 50. On these lands stood a house, a room in which was made available for the occupation of the defendant. The defendant's employment was terminated in early April but the defendant refused to vacate the room. The plaintiff thereupon caused his Proctors to send the defendant a formal letter on 23rd April noticing him to quit and deliver possession of the room on or before 31st May, 1952. The defendant failed to quit the premises and the plaintiff instituted this action in August, 1952. In the plaint, after setting out the relevant facts as stated above, the plaintiff averred not only that he continued to suffer damages at the rate of Rs. 5 a month from the date on which the defendant was asked to quit but also proceeded to value the house. The value he set on the house was Rs. 250.

The plaintiff has brought all the trouble on himself by valuing the house. The defendant denied that the house was worth only Rs. 250 and alleged that it was worth more than Rs. 4,000, and that the Court therefore had no jurisdiction to entertain the action.

Although all the issues that arose between the parties were raised in the case and evidence given by the plaintiff, no evidence was led on behalf of the defendant, but the action was dismissed on the ground that the Court had no jurisdiction inasmuch as the value of the house was over Rs. 300.

A servant is neither a monthly tenant nor a tenant at will. A monthly tenant, as is well known, is one whose tenancy runs from month to month unless previously determined. A tenant at will is a person whose tenancy could be determined at the will of the landlord without any previous notice being given to him ; but both in the case of a monthly tenant and a tenant at will it is important to bear in mind that the foundation of the relationship is based upon an agreement as to the amount of rent payable. It is therefore manifest that a servant who is permitted to occupy a room or house during the period of his employment by his employer free of rent is not entitled to regard himself either as a monthly tenant or as a tenant at will. It is to be noted that the notice given by the plaintiff was one which was appropriate to a case of a monthly tenancy.

The point that arises is, if a servant is neither a monthly tenant nor a tenant at will, then does he on termination of his services become a trespasser of the apartment in his occupation ? Learned Counsel for the respondent contended that he was in the fullest sense of the term a trespasser and that the action against such a person to eject would have to be valued on the basis of the capital value of the premises occupied.

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Neither legal precedent nor even the view of any text-book writer was cited in support of the contention. I do not think the proposition is sound.

A servant cannot deny the title of the employer to the apartment of which he was placed in possession by the employer. From the earliest times the view has prevailed that in such circumstances the servant is estopped from questioning the title of the employer.

In *Doe v. Baytup* [1] the principle was laid down that where a person had entered property by leave of the party in possession, such person could not defend an action in ejectment by putting in issue the title, but was bound to deliver up possession of the premises before he could be permitted to contest the title. I have, however, not been able to find any Roman Dutch Law proposition in regard to the position of a servant or licensee nor has counsel been able to assist me in this respect, although a very similar principle underlies the doctrine of *exceptio domini* in the Roman Dutch Law relating to Landlord and Tenant. But it is unnecessary to investigate the position of the Roman Dutch Law, for section 116 of the Evidence Ordinance expressly enacts the law in the sense in which *Doe v. Baytup* (supra) has been decided. The section not only creates an estoppel as between landlord and tenant but goes further and provides :

> "And no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had the title to such possession at the time when such licence was given."

The defendant therefore cannot be permitted to deny the plaintiff's title to the land. In fact the defendant does not in his answer set up title to the room occupied by him, nor did he place any oral evidence from which even an inference could be drawn that he claimed title to or that he disputed the title of the plaintiff ; but on a false issue arising upon the pleadings as to what is the value of the house the case has been decided. In an unreported judgment of this Court [2] E. W. Jayawardene A.J. said :

> "A watcher is usually a monthly paid servant employed by the owner to protect the land and its produce. He can be in no better position than a monthly tenant or a tenant-at-will. He is a mere licensee. The principle that a tenant cannot deny his landlord's title extends to the case of a person coming in by permission as a mere lodger, a servant or other licensee."

Obviously the value of the house is not the test for determining the jurisdiction of the Court. What, then, is the test to be applied ? In the case of a monthly tenant the test is the monthly rent, in the case of an yearly tenant the yearly rent, and in the case of a weekly tenant the weekly rent. But here there is no rent as such and the duration of the occupation is not for any definite term but for an indeterminate period which could be terminated without previous notice, as stated earlier.

[1] *(1835) 3 Ad. & El. 188.*
[2] *S. C. 18/C. R. Colombo 49968, S. C. Min. 1.7.30.*

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Could it then be said that no value should be placed on the right claimed by the employer to eject the servant from the premises occupied by him because there is no agreement as to rent or even because the period of occupation is indeterminate? I should say only a nominal value should be placed on such right. But it is unnecessary to decide that question for the purposes of this case, for the plaintiff has signified by his conduct his willingness to treat the defendant as one who is entitled to occupy the premises at least for a month. In such a case although there was no rent fixed, the value of the right would be a reasonable amount payable for the use and occupation of the premises. The plaintiff fixes the amount at Rs. 5 per mensem and claims it by way of damages for the period the defendant has remained in possession of the premises after termination of his occupation.

The test of valuation of the action would therefore be the value of such right, namely Rs. 5 plus the damages claimed up to the date of the institution of action, all of which amount to less than Rs. 300. The Court of Requests, therefore, has jurisdiction. Issue 5 is irrelevant and need not be answered, but issues 1, 2 and 3 must be answered in favour of the plaintiff, and issue 4 in regard to damages at Rs. 5 per mensem.

I would therefore set aside the judgment of the learned Commissioner and enter judgment for plaintiff as prayed for with costs both of appeal and of the lower Court.

Appeal allowed.

1953 *Present :* **Pulle J. and L. M. D. de Silva J.**

W. STEPHEN FERNANDO, Appellant, *and* W. JAMES FERNANDO, Respondent

S. C. 244—D. C. Colombo, 23,443

Postponement—Grant or refusal—Discretion of Court.

An order refusing or granting a postponement is a typical exercise of discretionary power with which an appellate court would be slow to interfere.

APPEAL from a judgment of the District Court, Colombo.

S. W. Walpita, for the defendant appellant.

A. W. Gooneratne, with *B. E. de Silva*, for the plaintiff respondent.

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Cur. adv. vult.

January 9, 1953. PULLE J.—

The appellant in this case is the defendant against whom judgment has been entered for the payment of Rs. 6,775, legal interest and costs.

The trial of the case was taken up on the 15th February, 1951, when the Proctor for the appellant tendered a medical certificate and applied for a postponement. The certificate which was dated the 15th February, 1951, merely stated that the appellant was under " treatment for acute gastritis ". The certificate which was intended to be used as evidence in a court of law did not state specifically that the condition of the appellant was such as to render him unfit to attend court. The learned District Judge declined to grant a postponement and having heard the evidence adduced he entered judgment for the plaintiff as prayed for but reserved to the defendant, with the consent of the plaintiff, the right to bring a separate action upon the claim in reconvention.

It is argued in appeal that the Judge erred in refusing to grant a postponement. Now an order refusing or granting a postponement is a typical exercise of a discretionary power with which an appellate court would be slow to interfere. In the case of *Maxwell v. Keun* [1] Atkin L.J. said at page 653,

" The other point that was made by the defendants was that this was a discretionary order, and that the Court of Appeal ought not to interfere with the discretion of the learned Judge. I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned Judge on such a question as an adjournment of a trial, and it very seldom does do so ; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so." Other cases on this subject are reviewed by the Court of Appeal in *Dick v. Piller* [2].

In his order the learned Judge stated his reasons as follows :—

> " It (the certificate) does not even say that the defendant is at present suffering from acute gastritis, but only says he is under treatment for gastritis. It may be that he is now not so bad as he was when he first started treatment. I refuse the application for a date. "

We are unable to say that the Judge exercised his discretion wrongly in refusing to grant a postponement. It is a matter of common knowledge in this country that medical certificates are procured with the object of delaying creditors especially in cases where the party applying for a postponement is remiss in getting ready for trial or feels that his defence has little chance of success. In these circumstances the Judge was perfectly right in subjecting the certificate to a strict scrutiny.

The appeal is dismissed with costs.

L. M. D. DE SILVA J.—I agree.

Appeal dismissed.

[1] *(1928) 1 K. B. 645.*

[2] *(1943) 1 All E. R. 627.*

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1953 *Present:* **Gratiaen J. and Gunasekara J.**

NELSON DE SILVA, Appellant, *and* S. CASINATHAN (Acting Rubber Commissioner), Respondent

S. C. 20—D. C. Colombo, 17,622

Action—Plaintiff described as public officer—Right to sue in personal capacity.

A plantiff, merely because he describes himself by reference to his public office in the caption to the plaint, is not precluded from obtaining, with the consent of the defendant, a decree in his favour in his personal capacity.

Proctor—Proxy not filed—Circumstances when failure may be excused.

An application for the execution of a decree was signed by a proctor in whose favour no proxy had been granted by the plaintiff. It was, however, established that he was an assistant to the proctor on record and that he had signed the application on behalf of the latter, and not as a proctor purporting to act independently on his own responsibility. Further, there was evidence of acquiescence on the part of the defendant and of ratification by the plaintiff.

Held, that in the circumstances the irregularity occasioned by the absence of a proxy in favour of the proctor was cured.

APPEAL from a judgment of the District Court, Colombo.

C. Renganathan, for the defendant appellant.

H. W. Jayewardene, with *D. R. P. Goonetilleke* and *M. L. de Silva*, for the plaintiff respondent.

Cur. adv. vult.

February 9, 1953. GRATIAEN J.—

This action was instituted on 6th February, 1947, in the District Court of Colombo by S. Casinathan, who was described in the caption to the plaint as " the Acting Rubber Commissioner of Ceylon ", to recover from the defendant a sum of Rs. 5,976·75 in connection with certain rubber transactions which had taken place between the parties. The defendant denied liability, and pleaded *inter alia* that it was " not competent to the plaintiff either in his personal capacity or as Acting Rubber Commissioner to maintain the action ". He counter claimed a sum of Rs. 11,839·73 from the plaintiff, which, he alleged, would be found due to him in respect of the transactions referred to in the plaint.

In March, 1949, before the action had been concluded, the parties agreed to submit their disputes to the arbitration of an Advocate of the Supreme Court, and the memorandum embodying their agreement expressly provided, *inter alia*, that " in the event of any sum being found due from the defendant *to the Rubber Commissioner* on the cause of action pleaded in the plaint, then and in such case the defendant should pay the sum *to the plaintiff* ".

The arbitrator made an order awarding to the plaintiff a sum of Rs. 5,979·75 and costs, and rejected the defendant's counter claim,

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2——J. N. B 29786–1,592 (10/53)

In due course a decree of Court was entered in terms of the award, and on 30th January, 1950, the learned District Judge allowed an application made on the plaintiff 's behalf for execution of the decree against the defendant. The Fiscal thereupon seized certain properties belonging to the defendant, who later intervened and applied for a recall of the writ on the ground that it had, for a variety of reasons, been irregularly issued. On 14th March, 1951, the learned Judge, after due inquiry, refused the application with costs, and declared that the execution proceedings were valid. The present appeal is from this order.

The only grounds upon which learned Counsel for the defendant challenged the correctness of the order under appeal were :

(1) That the decree entered in terms of the arbitrator's award was in effect a decree in favour of the plaintiff not personally but in his "representative capacity" as "the Acting Rubber Commissioner of Ceylon" ; and that, when the plaintiff had vacated that office on 1st April, 1950, his rights under the decree and under the pending execution proceedings had been "transmitted by operation of law" to his successor in office, who alone was competent thereafter to proceed with the litigation.

(2) That the application for the execution of the decree had been signed by Mr. John Wilson (junior), Proctor, in whose favour no valid letter of appointment had at that time been filed of record authorising him to represent the plaintiff in the action (vide Sec. 27 of the Civil Procedure Code) ; and that in the result the execution proceedings were void *ab initio* and inoperative as against the defendant.

The view which I have taken is that there is no substance in either of these grounds of objection. The decree must, in my opinion, be interpreted as having been entered in favour of the plantiff *personally*, and the commission issued to the arbitrator makes it clear that this was done in conformity with the expressed intention of the parties. If the defendant had contracted with the plaintiff purely as a public officer acting for and on behalf of the Government of Ceylon, the action should, in accordance with the provisions of the Civil Procedure Code, have been instituted in the name of the Attorney-General, and not in the name of the plaintiff either personally or in any representative capacity. The public office of "Rubber Commissioner" has not been declared by statute to create a distinct legal *persona* competent to sue or to be sued in our Courts, or capable, as such, of being "represented" in legal proceedings by someone else. The words "Acting Rubber Commissioner" appearing after the plaintiff's name in the caption to the plaint are therefore words only of description. If the cause of action pleaded by the plaintiff did not entitle him to assert a personal right to sue the defendant (*vide* Bowstead on Agency, 9th Edn., Art. 130) the defendant should not have agreed that, in the event of his liability being established, a decree should be entered against him *in favour of the plaintiff*. He is certainly precluded from raising the issue at this stage. Indeed, the plaintiff has now explained that he was in truth acting as an agent for and on behalf of an undisclosed

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principal, namely, the Board of Trade in England, and not on behalf of the Government of Ceylon. The terms of his agency and of his contract with the defendant do not rebut the presumption that, in these circumstances, he was entitled to institute the action in his own name for the benefit of his principal in London. I therefore hold that the plaintiff's rights under the decree sought to be executed were not extinguished by reason of his retirement from the office of Rubber Commissioner.

There remains for consideration the effect of the admitted irregularity occasioned by the absence of a proxy granted by the plaintiff in favour of the proctor who had signed the formal application to execute the decree. It is common ground that the only proctor authorised in writing to act for the plaintiff at that time was Mr. John Wilson (senior), whose son had joined his father's business as an assistant. Nor is it disputed that, at various stages during the trial and the arbitration proceedings, Mr. Wilson (junior) had from time to time, without objection from the defendant or his lawyers, acted as the plaintiff's proctor in the litigation in his father's absence. It has been argued that the acquiescence of the defendant's lawyers in these professional appearances had been prompted only by courtesy. That I do not doubt, but the courtesy extended to Mr. Wilson (junior) was, nevertheless, the courtesy of recognition, *vide Cassim Satar v. Marikar* [1].

There are two other matters which are relevant to a consideration of this particular ground of objection. In the first place, Mr. Wilson (junior) had admittedly signed the formal application *on behalf* of the proctor on record, and not as a proctor purporting to act independently on his own responsibility. In the second place, when the defendant obtained an interim order for a stay of execution pending the inquiry into the main application, he had raised no objection at the time complaining that the application for execution of the decree had been initiated by a proctor without authority. This conduct constituted a further recognition of Mr. Wilson (junior)'s professional status in the litigation. At a much later date, when the objection to Mr. Wilson (junior)'s status was for the first time taken on the defendant's behalf, the plaintiff formally appointed him to act in association with his father as his assistant, and expressly ratified all professional steps previously taken by him in that capacity. In the circumstances of this case, I take the view that the earlier defects of which the defendant had belatedly complained were cured. Different considerations would no doubt have arisen if Mr. Wilson (junior) had purported to act as the plaintiff's proctor in substitution for and to the exclusion of the proctor whose proxy stood unrevoked at the relevant date, but in the present case there is no room for applying the rule that a principal cannot by subsequent ratification give validity to an act which was at its inception unlawful or void.

In my opinion the defendant's appeal must be dismissed with costs, and I would make order accordingly.

GUNASEKARA J.—I agree.

Appeal dismissed.

[1] (1885) 7 S. C. C. 42.

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1953 *Present :* **Gratiaen J. and H. A. de Silva J.**

A. A. JAFFERJEE *et al.*, Appellants, *and* CYRIL DE ZOYSA, Respondent

S. C. 238—D. C. Colombo, 5430/L

Lessor and lessee—Improvements effected by lessee—Compensation.

(i) Under the general law, and subject to any agreement to the contrary, a lessee who has erected buildings with the lessor's consent or acquiescence has, upon the expiration of the lease, the option either of removing the materials affixed to the soil or of permitting ownership in them to pass to the owner of the land ; in the latter event, he must be compensated for the loss of his materials.

(ii) Under the terms of a contract of lease the lessee was entitled at his discretion to erect buildings on the leased property, and he agreed in that event " to yield up and surrender " such buildings to the lessor at the determination of the lease. The contract did not stipulate for the payment by the lessor of compensation for the buildings.

Held, that, at the determination of the lease, the lessor was entitled to take possession of the property, including the buildings, without payment of compensation. The lessee had in effect renounced his option (under the general law) either of removing the materials or of claiming compensation for them.

APPEAL from a judgment of the District Court, Colombo.

S. J. V. Chelvanayakam, Q.C., with *N. Samarakoon*, *I. Perera* and *G. Candappa*, for the plaintiffs appellants.

H. V. Perera, Q.C., with *H. W. Jayewardene* and *D. R. P. Goonetilleke*, for the 2nd defendant respondent.

Cur. adv. vult.

October 29, 1953. GRATIAEN J.—

The appellants are the executors and trustees of the late Abdulhussein Jafferjee who died on 1st September, 1946. By an indenture of lease P1 dated 13th November, 1937, Jafferjee had leased an allotment of bare land situated in Galle Road, Colombo, to the Shell Company of Ceylon, Ltd., for a period of ten years commencing on 1st November, 1937. It is quite evident from the terms of the lease that the erection of substantial buildings on the land at the lessee's expense (but entirely at his discretion) was within the contemplation of both parties. In that connection, the lessee undertook *inter alia :*

" 3. To pay the cost and charges for gas incandescent and/or for other illuminant used or consumed in *the buildings that may be erected on the demised premises* and to pay the water rate levied in respect of the said buildings.

" 4. Not to sell or dispose of any earth cabook clay gravel or sand from the said demised premises *nor to excavate the same except so far as may be necessary for the erection of the said buildings.*

" 5. *From time to time well and substantially to repair and clean all new buildings structures and erections which may at any time during the said term be erected* on the said demised premises.

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" 7. At all times to observe fulfil and comply with the laws bye-laws rules and regulations of the Municipal Council of Colombo in respect of the sanitation of the City of Colombo and all the other requirements in regard to the occupation and use of the demised premises *and the said buildings to be erected thereon* and to keep the Lessor at all times indemnified against all prosecutions and fines for the breach of or non-compliance with any of the laws bye-laws or regulations of the said Municipal Council.

" 9. *At the determination of the tenancy to yield up and surrender to the said Lessor the demised premises with all the buildings that may be erected on the said demised premises and all the permanent fixtures that may be affixed thereon* during the said term *in good and tenantable repair and condition* in accordance with the covenants hereinbefore contained. "

By a contemporaneous indenture of lease P2 (attested by the same notary) the lessee, with the lessor's consent, sublet the land to the respondent for the full term of the lease. P2 conferred and imposed on the respondent in respect of " the buildings that may be erected " rights and obligations precisely similar to those contained in P1 which I have previously quoted.

The respondent was placed in occupation of the land as sub-lessee, and from time to time erected fairly substantial buildings on it. At a later stage he himself sublet the property to various persons on the terms of monthly sub-tenancies, and at the time of the expiry of the main lease, the 3rd and 4th defendants to this action were the tenants in occupation on that basis.

On 29th July, 1948, the appellants instituted this action against the Shell Company (as 1st defendant), the respondent (as 2nd defendant) and the 3rd and 4th defendants, claiming (*a*) a declaration that they were entitled to the leased premises and all the buildings and fixtures standing thereon *without payment of compensation*, (*b*) for ejectment, damages and continuing damages.

On 15th November, 1949, while the action was still pending, a partial adjustment of the dispute between the parties was arrived at whereby the 3rd and 4th defendants attorned to the appellants and continued thereafter to occupy the premises as their monthly tenants at an agreed rental ; the respondent undertook to pay to the appellant the arrears of rent (or more strictly, the damages) for the period 1st November, 1947, to 30th November, 1949—this amount being subsequently fixed by agreement at Rs. 4,465 ; and the 1st, 3rd and 4th defendants were discharged from the action.

The only dispute which remained for adjudication was the question whether the appellants were entitled, as lessors under the original lease P1, to take over the buildings erected on the land without payment of compensation (as they contended) or on payment of compensation to the respondent (as he alleged). For the purposes of this dispute the other defendants—i.e., the original lessee and the subsequent sub-lessees—expressly ceded to the respondent such rights, if any, to compensation as they enjoyed against the appellants.

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The learned District Judge held that the provisions of P1 and P2 did not operate as a surrender of the right of either lessee (under the general law) to recover compensation for improvements effected by him during the period of the lease. He accordingly decided that the appellants were liable to pay compensation which he assessed at Rs. 20,000. On this basis, a decree was entered in favour of the respondent for Rs. 15,535 (i.e., Rs. 20,000 less the agreed amount representing accrued rent or damages). The present appeal is from this decision.

Mr. Chelvanayakam abandoned in the course of his argument the objections raised in the petition of appeal to the *quantum* of compensation payable by the appellants in the event of their liability being established. We need only decide, therefore, whether, in the circumstances of this case (i.e., upon the true construction of the indentures of lease or, alternatively, under the general law), the appellants are liable to pay compensation to the respondent for the improvements effected by him during the currency of the lease.

It is convenient, I think, to inquire in the first instance whether the appellants would have been liable *under the general law*—and without any reference to the terms of the contracts P1 and P2—to pay compensation for the buildings erected by the respondent (and eventually " yielded up and surrendered " to them after the determination of the lease). We shall then be in a better position to judge the extent, if any, to which the rights and obligations of one party or the other have been enlarged or reduced *by agreement*.

According to the Roman-Dutch common law a *bona fide* possessor was entitled to claim compensation for necessary and useful expenses and to retain possession until compensated—see *Grotius : Introduction to Roman-Dutch Law 2.10.8*, *Muttiah v. Clements* [1], *Mudianse v. Sellandyar* [2] (both cases of occupiers—in one case occupying in expectation of getting a lease, in the other occupying under a planting agreement—who were treated as being on the footing, *not* of lessees, but of *bona fide* possessors) ; *cf. Soysa v. Mohideen* [3]. A *mala fide* possessor, on the other hand, was generally entitled (on the view which has prevailed in Ceylon) to necessary expenses only, and (subject to certain exceptions) he has no right of retention—*General Ceylon Tea Estates Co., Ltd. v. Pulle* [4].

As regards lessees, Grotius said (2.10.8) that they were entitled to compensation for improvements in the same way as *bona fide* possessors. In Ceylon, however, as far back as 43 years ago, the principle was laid down in *Punchirala v. Mohideen* [5] that the claim to compensation of a lessee, who is technically in the eye of the law not a " possessor " at all, depends on special considerations. The principles laid down in this case as regulating a lessee's right to compensation were said to be based on Van Der Keessel's *Select Theses* and on a passage in Maasdorp's *Institutes of Cape Law* which was " derived from the ruling in the South African case of *De Beers Consolidated Mines v. London & S. African Exploration Co.*[6] quoted by Mr. Walter Pereira in his little book on the Right of Compensation for Improvements ". As the principles laid down in

[1] (*1900*) *4 N. L. R. 158.*
[2] (*1907*) *10 N. L. R. 209.*
[3] (*1914*) *17 N. L. R. 279 at 281–2 and 284–5.*
[4] (*1906*) *9 N. L. R. 98.*
[5] (*1910*) *13 N. L. R. 193.*
[6] (*1893*) *10 S. C. 359.*

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Punchirala v. Mohideen (*supra*) have been uniformly accepted and applied in subsequent cases—see, e.g., *Soysa v. Mohideen* [1], *Saboor v. Appuhamy* [2], *Silva v. Banda* [3], *Alles v. Krishnan* [4]—it is necessary to consider the principles expounded in the classic judgment of De Villiers C.J. in *De Beers' case* cited in *Punchirala v. Mohideen* (*supra*) and expressly approved by the Privy Council in appeal (*1895*) *12 S. C. 107.*

De Villiers C.J. explains that the Roman and Dutch jurists, in dealing with the case of one person building on the property of another, reconciled as far as possible the rigours of the ancient maxim that " everything built on the soil accedes to it " with the more liberal maxim that " no one should gain profit to the detriment of another ". He then comes to consider improvements made by a lessee which, as mentioned above, are governed by special considerations. He points out that such cases were governed by a Placaat of 26th September, 1658, Articles 10 to 12 of which, says the Chief Justice (at p. 370), are treated by Van der Keessel " as having been *incorporated into the common law of Holland and Friesland relating to landlord and tenant* ".

De Villiers C.J. sets out the provisions of these articles of the Placaat, the effect of which were to give a lessee who has built structures with the lessor's consent a claim to what the materials would be worth if demolished and removed (the claim being enforceable only after vacating possession), and to give even those lessees who built without the lessor's consent a right of removing the materials before the expiry of the lease.

In his judgment, the learned Chief Justice shows how the Roman-Dutch law, in relation to those improvements to which the Placaat applies, modified the maxim " whatever is affixed to the soil accedes thereto " by applying the principle prohibiting unjust enrichment. " The Dutch law . . . . gives the tenant an opportunity during his tenancy of preventing the rigid application of the more ancient maxim and, *if it deprives him after the expiration of his term of the ownership in the materials affixed by him, it allows him to recover the cost of those materials if they had been affixed with the landlord's consent* ".

These principles were doubtless influenced in certain respects by the terms of the Placaat of 26th September, 1658. The question may be asked whether it is proper to regard any part of that enactment as having been incorporated in the general law of Ceylon. No submissions were made to us either way upon this point, but the answer, I think, admits of little difficulty. The Roman-Dutch Law was first introduced into Ceylon in 1656, and *prima facie* a Placaat enacted subsequently would have no application in this country in the absence of clear proof that it has, either by custom or by binding judicial interpretation, become incorporated at some stage in our legal system. *Karonchihamy v. Angohamy* [5] *cf. Lee : Introduction to Roman-Dutch Law* (5th Edn.) p. 7, *Estate Heinemann v. Heinemann* [6]. Applying this test, I am perfectly satisfied that, *as far as a lessee's right to compensation is concerned*, the rules enunciated by De Villiers C.J. in *De Beers' case* (*supra*) have for over forty years been accepted and consistently acted upon in this country ever since their

[1] (*1914*) *17 N. L. R. at 286.*
[2] (*1916*) *2 C. W. R. 186 at 187.*
[3] (*1924*) *26 N. L. R. 97 at 100.*
[4] (*1952*) *54 N. L. R. 154 at pp. 156–7.*
[5] (*1904*) *8 N. L. R. 1.*
[6] (*1919*) *S. A. A. D. 99 at 114.*

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adoption in *Punchirala v. Mohideen* (*supra*). In these circumstances, the extent to which they were originally influenced by articles 10 to 12 of the Placaat is at this stage only of academic interest : it is too late now to challenge the irrevocable incorporation of the rules themselves into our general law. [On issues affecting *the quantum of compensation*, however, the development of our law need not be examined in connection with this appeal.]

Let me attempt to summarise, for the purposes of the present appeal, what has been accepted by the Courts in this country as the basis of a lessee's right to compensation for buildings erected with the lessor's consent or acquiescence. He is presumed, in the absence of an agreement to the contrary, to have effected these improvements only " for the sake of temporary and not perpetual use " ; he is accordingly regarded as retaining the ownership of the materials affixed to the soil throughout the period of his tenancy, and, at the expiration of that term, he has the option *either* of removing what is in truth his own property *or* of permitting ownership in them to pass to the owner of the land ; in the latter event, he must be compensated for the loss of his materials which, by operation of law, passed to the lessor.

It logically follows that, *if the terms of the contract between the parties show that the building improvements were effected not only for the lessee's temporary use, but also for the lessor's future benefit, he has in effect renounced the option* (*which he would otherwise have had under the general law*) *either of removing the materials or of claiming compensation for them.* In other words, the maxim *quidquid inaedificatur solo, cedit solo* is not tempered in such a case by the application of the rule against unjust enrichment, so that the lessor cannot claim compensation *unless he has expressly stipulated for its payment.*

The extent and limits of the right of a lessee to claim compensation for buildings erected on the leased premises are now made clear, and I do not doubt that, unless this right had been renounced " by special agreement " (either expressly or by necessary implication) in the present case, the respondent's claim would be irresistible. For it is admitted that the buildings had all been erected with Jafferjee's consent (antecedently given upon the execution of the document P1).

I now proceed to examine the indentures of lease P1 and P2. Under neither contract was the lessee obliged to erect any buildings on the land, but, if he did so, he undertook at all times *to maintain them in good condition ;* and he unequivocally agreed, at the determination of the lease, to " *yield up and surrender* " (the significance of these words may fairly be emphasised) the buildings " *in good and tenantable repair and condition in accordance with the covenants hereinbefore contained* ". These clauses, I am convinced, can only lead to one conclusion : they very clearly rebut the presumption that the materials affixed by the lessee to the lessor's soil were intended to be fixed exclusively for the sake of his temporary use ; they were affixed and maintained in good repair for the lessor's future benefit as well ; the ownership of " any buildings to be erected " therefore vested immediately in the lessor ; in other words, the lessee had by necessary implication given up his right under the general

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law to remove the materials during the pendency of the lease—indeed, they were not his to remove in the circumstances of this particular case after they became affixed to the lessor's soil. For the same reason, there was—in the absence of agreement to that effect—no legal foundation for the exercise of the alternative right to be compensated for the loss of the improvements after the lease had expired.

It is true that, in certain contexts, the renunciation of one of two alternative courses of action need not be construed as an implied renunciation of the other. But if two alternative remedies are based upon a single right, the renunciation of that right necessarily extinguishes every remedy that flows from it.

In the present case, no provision has been made in the indentures of lease for the payment of any compensation, and the respondent has therefore not established a cause of action either under the general law or under the terms of a contract. The issue of " hardship " is irrelevant and merely introduces dangerous opportunities for speculation. The respondent was free to regulate his affairs as sub-lessee as he thought would be most advantageous to his own interests ; after all, he was under no duty to erect any buildings on the land. There are cases in which the law does allow a person to be enriched at another's expense without making compensation. " *Enrichment is not without cause* (*unjustified*) *if it is permitted* (*or*) *when it is the consequence of a contract*, no matter how disadvantageous it may be to one or other of the parties "—Lee : *Introduction* (5th Edn.) at pp. 347–8 ; *cf. Urtel v. Jacobs* [1].

The judgments of Garvin J. in *Appuhamy v. Doloswala Tea & Rubber Co.* [2], and of Bertram C.J. in *Silva v. Banda* [3] have not, in my opinion, laid down any principle contrary to the views which I have here expressed. Without doubt, a lessee can maintain his right to compensation under the general law " where the contract is silent ", but to my mind the contracts P1 and P2 are far from " silent " on the questions arising on this appeal. *Silva v. Banda* (*supra*) deals with a very different situation. A lessee who had improved the leased premises had stipulated that, in lieu of compensation which he expressly waived, he should have the option of renewing his lease for a further period of ten years. After the improvements had been completed, it was discovered that the lessor (who was a trustee) had no right to lease out the property at all, and the option of renewal was therefore of no avail. Bertram C.J. held that in the circumstances the lessor could not refuse the renewal of the lease and insist at the same time on the lessee's renunciation of his right to compensation. In the present case, by way of contrast, the appellants have not repudiated the contractual obligations in any respect.

We were referred during the argument to a passage in *Wille : Landlord and Tenant* (4th Edn.) p. 271 quoting *Bennet & Tatham v. Koovarjee and Kasaw* [4]. This report was unfortunately not available in Ceylon, but

[1] (*1920*) *C. P. D. at 493.*
[2] (*1923*) *25 N. L. R. 267.*
[3] (*1924*) *26 N. L. R. 97.*
[4] (*1906*) *27 Natal L. R. 110.*

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after I had prepared my judgment, Mr. Chelvanayakam was able to obtain for me an authenticated copy of the opinion there expressed by Bale C.J. A clause in the contract of lease in that case was to the following effect :

> " 10. The said tenant shall give up possession of the land granted, with any improvements and all standing crops, and all fruit trees and plants thereon, on the day of the expiration of the tenancy ". (at p. 113).

The Supreme Court of Natal held that, upon the termination of the lease, (whether by effluxion of time or upon prior forfeiture), the terms of the contract " clearly entitled the lessor to take possession of the property, including the improvements, *without paying any compensation* ". I am fortified by this decision in the view which I had independently reached. Wille regards the case as providing an example of an implied contractual renunciation of a lessee's right to be compensated under the general law for improvements effected by him.

I would set aside the judgment appealed from. The respondent's counter-claim for compensation must be dismissed, and a decree entered against him in favour of the appellants for his admitted liability in the sum of Rs. 4,465. The respondent will also pay to the appellants their costs in both Courts.

H. A. DE SILVA J.—I agree.

Appeal allowed.

1953 *Present :* **Gratiaen J. and K. D. de Silva J.**

SWAMI SIVAGNANANDA, Appellant, *and* THE BISHOP OF KANDY, Respondent

S. C. 51, with Application 95—D. C. Kandy, L 3,444

Rent Restriction Act—Distinction between tenancy and licence—Test of exclusive possession.

When a prospective purchaser of certain premises is permitted, pending his purchase, to occupy the premises on payment of a stipulated sum of money, his occupation is, at best, that of a licensee and not that of a contractual tenant entitled to claim the protection of the Rent Restriction Act. If the contemplated sale does not take place, the duration of the licence expires and the licensee becomes a trespasser liable to be ejected at the instance of the owner of the property.

" Although a person who is let into exclusive possession is *prima facie* to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. "

APPEAL from a judgment of the District Court, Kandy.

S. J. V. Chelvanayakam, Q.C., with *K. C. Kamalanadan* and *G. Candappa*, for the defendant appellant.

H. V. Perera, Q.C., with *Cyril E. S. Perera, Q.C.*, and *P. Somatilakam*, for the plaintiff respondent.

Cur. adv. vult.

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July 22, 1953. GRATIAEN J.—

This is a *rei vindicatio* action. The plaintiff purchased certain premises, which are situated within the Municipal limits of Kandy, from their previous owners in June, 1951. Shortly afterwards he sued the defendant, who is the Manager of a school, for, *inter alia*, declaration of title and for ejectment on the footing that he was a trespasser on the premises. After trial, the learned District Judge entered judgment in the plaintiff's favour as prayed for with costs.

The basis on which the defendant contested the plaintiff's claim in the lower Court had not been very clearly defined in his pleadings, but the relevant facts which form the background of his defence are not in dispute. The previous owners of the premises had for some time been anxious to sell them in the open market, and on 29th November, 1950, they entered into an informal agreement (P 6) with the defendant whereby he undertook *inter alia* to purchase the premises for a sum of Rs. 80,000 within a period of 90 days, or in the alternative to deposit within that period a sum of Rs. 50,000 in part payment of the purchase price, in which latter event he would enter into a formal notarial agreement binding himself to complete the purchase not later than 30th April, 1951. A contemporaneous, ancillary agreement was entered into whereby he was to be permitted by the owners to occupy the premises immediately in anticipation of his purchase "during the time preceding the first instalment", paying a sum calculated at the rate of Rs. 200 per mensem as consideration "for the usage of the property" during the interim period. The defendant entered into occupation in pursuance of this ancillary agreement, which made no express provision, however, for the eventuality of his defaulting in his principal obligation to complete the purchase within the stipulated period.

As events turned out, the defendant had been over-optimistic as to his prospects of collecting sufficient funds to implement his promise to purchase the property. He was granted one or two short postponements of the date for completion, but ultimately the owners informed him that, unless the sale was concluded on or before 2nd March, 1951, they would sell the premises to some one else. He failed to make payment within that time, and it was in these circumstances that the plaintiff became the purchaser.

The defendant refused to vacate the premises. In his correspondence with the previous owners before the action commenced, he took up the untenable position that the non-notarial agreement of sale in his favour (which was of no force or avail in law quite apart from the expiry of the stipulated time for completion) took priority over the plaintiff's purchase, and that the plaintiff's only remedy was to recover from him a sum of Rs. 80,000 representing the amount which he had promised to pay for the premises. In this Court, Mr. Chelvanayakam contrived to present the defence upon a more respectable basis, and he argued that the defendant's occupation was from its inception that of a contractual tenant under the previous owners and that the premises, by reason of their situation, were protected by the provisions of the Rent Restriction Act. In the result, he contends, the plaintiff's action was misconceived, because he has neither pleaded nor proved that any of the circumstances enumerated in the Act have arisen to justify a decree for ejectment

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Although this new defence was not raised specifically at the trial, all the facts necessary for a determination of the precise nature of the defendant's occupation are before us. Upon those facts, I am satisfied, as a matter of law, that the defendant was at no time a contractual tenant of the premises, but that he was at best a licensee (in the sense in which that term is now understood) enjoying a " permissive occupation which falls short of a tenancy "—*per* Denning L.J. in *Marcroft Wagons Ltd. v. Smith* [1]. The duration of the licence granted in the original agreement (and later extended until 2nd March, 1951) had expired long before the action commenced. In consequence, he became a trespasser liable to be ejected at the instance of the present owner of the property.

Mr. Chelvanayakam referred us to certain earlier decisions of the English Courts in support of his submission that a prospective purchaser who is permitted, pending his purchase, to occupy the premises on payment of an agreed consideration may legitimately be regarded as enjoying the rights of a tenant during that period. In *Howard v. Shaw* [2], however, Lord Abinger C.B. ruled that " while the defendant occupied under (even a valid) contract for the sale of the property to him, he could not be considered as a tenant ". Discussing these conflicting authorities, the Court of Appeal in England recently pointed out that " after the lapse of a hundred years, it has become clear that the view of Lord Abinger was right. The test of exclusive possession is by no means decisive ". *Errington v. Errington and Woods* [3].

The question whether or not the parties to an agreement intend to create as between themselves the relationship of landlord and tenant must in the last resort be a question of intention—*per* Lord Greene M.R. in *Booker v. Palmer* [4]. Similarly, Denning L.J. said in *Errington's case* (*supra*) " Although a person who is let into exclusive possession is *prima facie* to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted *a personal privilege, with no interest in the land*, he will be held to be a licensee only."

Let us examine the terms of the informal agreement P 6 in the light of these principles. Can it be reasonably supposed that the prospective purchaser who was permitted, on payment of a stipulated sum of money, to occupy the premises for a period not exceeding 90 days in anticipation of his implementing his previous undertaking to become the owner by purchase within that time, was intended, if he defaulted in the principal obligation, to continue nevertheless to occupy the premises as a contractual tenant enjoying, in addition to all the common law rights attaching to that status, the statutory protection of the Rent Restriction Act ? The agreement does not say so, and to imply such term would, in my opinion, be wholly artificial in the background of the negotiations which preceded it. Had the defendant and the owners originally discussed what should happen if the contemplated sale fell through owing to the defendant's default, I do not doubt that they would both have

[1] *(1951) 2 K.B. 496 at 506.*
[2] *8 M. & W. 118 (=151 E.R. 973).*
[3] *(1952) 1 K. B. 290.*
[4] *(1942) 2 A. E. R. 676.*

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declared, " it goes without saying that the concession of occupying the premises must automatically cease ". To my mind, it borders on the fantastic to suppose that the previous owner who was so anxious to dispose of his premises could have intended to saddle the premises with a tenant enjoying substantial protection from eviction under the Rent Restriction Act. Evershed M.R. points out in *Marcroft Wagons Ltd. v. Smith* [1] that " Every owner of a property today appreciates that the effect of the Rent Restriction Acts is such that in all human probability, should he claim or desire possession of the property, he will have to go to the (County) Court for an order . . . . In judging from the inference to be drawn from such events as those which took place here, it seems to me vital to bear in mind that this is the background against which people must now discuss and regulate their affairs. " I quote these observations because they apply so aptly to the present context.

For the reasons which I have given, I would hold that the defendant's occupation falls far short of that of a tenant entitled to claim the protection of the Rent Restriction Act. Indeed, he has refused to recognise the plaintiff as his " landlord " by attornment. The judgment and decree under appeal must therefore be affirmed, subject to the deletion of that part of the decree which orders the defendant to pay to the plaintiff a sum of Rs. 3,000 as damages upon the fourth cause of action pleaded in paragraph 12 of the plaint. Although there is little doubt that the defendant has caused certain damage to the property since he commenced to occupy it, the evidence does not establish that the wrongful acts complained of were committed *after* the plaintiff became the owner. Subject to the amendment of the decree in this respect, I would dismiss the appeal with costs. I would however direct that writ of ejectment should not issue until 31st October, 1953. This concession will mitigate the hardship which might otherwise be caused to the pupils of the defendant's school.

K. D. DE SILVA J.—I agree.

Appeal mainly dismissed.

1952 *Present :* **Gratiaen J. and Gunasekara J.**

V. RAMALINGAM, Appellant, *and* MANGALESWARI, Respondent

S. C. 21—D. C. Chavakachcheri, 315

Thesavalamai—Pre-emption—Sale of land—Omission to give notice to pre-emptor—Justification.

Plaintiff sought to enforce a right of pre-emption under the *Thesavalamai* by claiming to have a sale of land set aside on the ground that the property had been sold without previous notice to her.

Held, that as plaintiff had no sufficient means to purchase the property at the time it was sold the failure to give her notice of the sale was immaterial.

Velupillai v. Pulendra (1951) 53 N. L. R. 472, followed.

[1] *(1951) 2 K. B. 496 at 502.*

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APPEAL from a judgment of the District Court, Chavakachcheri.

H. W. Tambiah, with *C. Manohara*, for the 2nd defendant appellant.

N. E. Weerasooria, Q.C., with *C. Renganathan* and *K. Palasunderam*, for the plaintiff respondent.

Cur. adv. vult.

June 25, 1952. GUNASEKARA J.—

The second defendant appeals against the judgment given for the plaintiff in this action to enforce a right of pre-emption under the *Tesavalamai*. The plaintiff and her father the first defendant were co-owners of a piece of land which they had inherited in equal shares under her mother's last will in 1935. The subject of the action is the share inherited by the first defendant. This he mortgaged in July 1936 as security for a debt of Rs. 1,000 and in September 1937 sold to the second defendant for Rs. 1,500. The mortgage bond, which was discharged on the occasion of the sale, describes the debt of Rs. 1,000 as being made up of a sum of Rs. 860 due from the first defendant and his wife (the plaintiff's mother) on a promissory note of April 1933 and a further sum of Rs. 140 borrowed by him later. A fraction of the share bought by the second defendant was sold in August 1947 to the fourth defendant, who is the wife of the third. The learned District Judge holds that the plaintiff was entitled to notice of the sale to the second defendant but had no notice of it, and he has accordingly made order setting aside the two deeds of sale and directing that the half share in question should be conveyed to the plaintiff for Rs. 1,500, which he holds was its market value. A condition of the order, that the plaintiff should deposit this sum in Court on or before the 18th December 1950, has been complied with. The learned Judge has also awarded to the second defendant a sum of Rs. 1,500 as compensation for improvements made by him as a *bona fide* possessor, and this sum too has been deposited in Court by the plaintiff.

The plaintiff, who was born in 1930 and was still a minor when this action was instituted in August 1950, was only seven years old at the time of the sale to the second defendant. It is contended in support of the appeal that her natural guardian, who was the first defendant, was necessarily aware of the sale to the second defendant and that in any event she had no sufficient means to pre-empt the share, and that therefore she is not entitled to have the sale set aside on the ground of want of notice.

The second defendant averred in his answer that "the plaintiff had and has no means to buy the share sought to be pre-empted", and one of the issues tried was as to whether the plaintiff was "a *bona fide* pre-emptor having funds to pay for the purchase of this half share". The learned Judge answered this issue in the affirmative for the reason that she "may still be able to find the funds to pre-empt this share by mortgaging her own share", which he finds has appreciated in value. He holds that it "may be that she has been put up by the first defendant to file this action because the price of lands now is high". The event proved that she was able to raise the necessary funds by the 18th December, 1950, but it seems

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to be clear from the evidence that her estate was insufficient for the purpose at the time of the sale by the first defendant to the second in 1937. Her father, the first defendant, was a labourer employed at a mill, and it is unlikely that his seven year old daughter was possessed of any property other than the half share of this piece of land that she had inherited from her mother. According to her own evidence, she had no other landed property but she had been told by Sinnammah, her next friend in this action, that her mother had entrusted to Sinnammah a sum of Rs. 1,000 in cash to be held for her. Sinnammah herself did not give evidence, and there is no evidence from any other source to prove the truth of the information that she is alleged to have given the plaintiff. The learned Judge's own view is that " it is likely that the story that the Next Friend has Rs. 1,000 entrusted to her by the plaintiff's mother is an invention ".

As it appears that the plaintiff had no sufficient means to pre-empt the share in 1937 it is immaterial whether she had notice of the first defendant's intention to sell it. As was observed by my brother Gratiaen in the case of *Velupillai v. Pulendra et al.* [1] " it is fundamental to the cause of action such as is alleged to have arisen in this case that the pre-emptor should establish by positive proof that, had he in fact received the requisite notice, he would and could have purchased the property himself within a reasonable time rather than permit it to be sold to a stranger. "

I would allow the appeal and dismiss the plaintiff's action with costs in this Court and the Court below.

GRATIAEN J.—I agree. *Appeal allowed.*

1953 *Present:* **Nagalingam A.C.J.**

ADRIAN DIAS, Appellant, *and* WEERASINGHAM (Excise Inspector), Respondent

S. C. 37—M. C. Colombo South, 40,646

Autrefois acquit—*Failure of prosecutor to lead evidence—" Discharge " of accused—Right of prosecutor to institute fresh proceedings—Criminal Procedure Code, ss. 190, 191, 289 (5), 330.*

When, in a summary case, the prosecutor is not ready to proceed with his case on the date of trial, even after he has been given ample opportunity to place his evidence, an order of Court refusing postponement and "discharging" the accused operates as an acquittal. It is not open then to the prosecutor to institute fresh proceedings upon the same charge.

Senaratne v. Lenohamy (1917) 20 N. L. R. 44, distinguished.

[1] *(1951) 53 N. L. R. 472.*

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APPEAL from a judgment of the Magistrate's Court, Colombo South.

E. R. S. R. Coomaraswamy, for the accused appellant.

S. S. Wijesinha, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

September 25, 1953. NAGALINGAM A.C.J.—

A plea of autrefois acquit is urged against the conviction of the appellant, who has been found guilty under section 17 of the Excise Ordinance with having illicitly sold arrack and of having been in possession of arrack in excess of the quantity allowed by law. The plea arises on these facts : In case No. 35,759 of the Magistrate's Court of Colombo South the appellant was charged on 27th April, 1951, with having committed the offence of which he has been subsequently found guilty. That case was duly fixed for trial, and there were no less than five postponements. It would appear that two of those dates were granted, one on the application of the accused on the ground that he was not ready on the very first date of trial, and the second as the accused had not appeared in Court, but on the other three occasions the prosecution was not ready. On 11th January, 1952, which was the last trial date fixed in the case, the prosecutor applied for a postponement on the ground that one of his witnesses was not present, but the learned Magistrate acting under section 289 (5) of the Criminal Procedure Code, refused the postponement, and as the prosecutor said he could not proceed with the case, discharged the accused. Thereafter, on 22nd February, 1952, the present proceedings were initiated against the accused on the identical charges, and he has been found guilty after trial.

It has been urged on behalf of the appellant that though the learned Magistrate used the term " discharge " in connection with the previous proceedings that term should correctly be regarded as an order of acquittal.

Sections 190 and 191 are the two relevant sections of the Criminal Procedure Code that need consideration for the purpose of adjudicating upon the contention put forward. These sections have been the subject of several decisions in our Courts. In fact there is one case which is referred to as a Full Bench Case, and that is the case of *Senaratne v. Lenohamy*[1]. In that case the facts were that on the accused person appearing in Court and on the charge being read out to him and on his being called upon to plead, he said he was not guilty and the trial was immediately thereafter taken up, but the prosecutor was not ready and the learned Magistrate made order of discharge. It will be noticed that the facts tend to show that the prosecutor had not been given a fair opportunity of placing his evidence before Court, and in those circumstances the majority of the Court took the view that the order was an order of discharge and not of acquittal. But one of the Judges who expressed the majority view in regard to the case expressed himself in

[1] *(1917) 20 N. L. R. 44.*

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language which quite clearly and completely expresses the view I had formed on a reading of these sections. I venture to cite the relevant extract from the judgment of de Sampayo J. The learned Judge said :—

> " The words ' at any previous stage of the case ' to my mind import that all the evidence of the prosecution as contemplated by section 190 have not been taken, but if the prosecutor has put before the Court all the evidence which is available to him or which he is allowed reasonable opportunity to produce, the accused will be entitled to demand a verdict at the hands of the Magistrate instead of an inconclusive order of discharge, so that he may not be vexed again."

A similar view seems to have been entertained by Garvin J. See the cases of *Weerasinghe v. Wijeysinghe* [1] and *Gabriel v. Soysa* [2].

In this case no less than five dates of trial were fixed in the earlier proceedings, and I would hold that the Magistrate made his order of discharge not under any power vested in him under section 191 but under section 190, under which he had jurisdiction either to make an order of acquittal or of conviction.

The Magistrate was prepared to take all the evidence that the prosecution and defence were prepared to place before him. The prosecution had no evidence to place before him, so that as there was no evidence placed before the Magistrate he had no option but to find the accused not guilty and enter a verdict accordingly. In my opinion, an order under section 191 can only be justified when, for instance, before the prosecutor has led all the evidence that is available to him and which he is ready and willing to place before the court, the court for some reason stops the proceedings and enters an order of discharge of the accused person. Where, on the other hand, the prosecutor has closed his case and led all the evidence, and objection in law is raised by the defence without calling any evidence, it will not be open to the Magistrate to make order of discharge under section 191, and any such order made would have the effect of an order of acquittal under section 190—see the case of *Solicitor-General v. Aradiel* [3]. On the other hand if the view were adopted that whenever a prosecutor is not ready to proceed with the case even after he has been given ample opportunity to placing his evidence before court, the Magistrate should enter an order of discharge, leaving it open to the prosecutor to institute fresh proceedings upon the same charge, it would be, as Ennis J. stated in the case of *Senaratne v. Lenohamy* (*supra*), to allow the prosecutor " an indefinite postponement " while refusing a postponement of a few weeks.

I am of opinion that the order entered by the learned Magistrate in the earlier proceedings has the effect of an order of acquittal and that the present proceedings are therefore barred by that order. I therefore set aside the conviction and acquit the accused.

Appeal allowed.

[1] *(1927) 39 N. L. R. 208.* [2] *(1930) 31 N. L. R. 314.*

[3] *(1948) 50 N. L. R. 233.*

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1953 *Present :* **Swan J.**

M. J. ABEYWARDENE, Petitioner, *and* C. A. DHARMAPALA, Respondent

Election Petition No. 19 of 1952, Hakmana

Election Petition—Status of petitioner to present petition—Burden of proof—Evidence Ordinance, s. 103—Ceylon (Parliamentary Elections) Order in Council, 1946, s. 79.

In an election petition it is incumbent on the petitioner to lead evidence to prove his qualification to present the petition under section 79 of the Parliamentary Elections Order in Council.

Objection by the respondent that the petitioner's status has not been proved may be raised by him at the close of the petitioner's case.

ORDER made in the course of the trial of Election Petition, Hakmana.

N. Nadarasa, with *S. P. Amarasingham*, *Izzadeen Mohamed* and *A. K. Premadasa*, for the petitioner.

E. G. Wikramanayake, Q.C., with *G. E. Chitty*, *R. A. Kannangara* and *A. S. Vanigasooriyar*, for the respondent.

Cur. adv. vult.

September 25, 1953. SWAN J.—

At the close of the petitioner's case Mr. Wikramanayake appearing for the respondent drew my attention and the attention of petitioner's counsel to the fact that there was no proof that the petitioner had any status to file the election petition. He said that he did not want to take the petitioner's counsel by surprise but would be moving to have the petition dismissed if no evidence was led regarding the status of the petitioner. Mr. Nadarasa then said that he would recall Dr. Wickremasinghe to prove that the petitioner was a person who had a right to vote at the election and did in fact exercise that right. I pointed out to Mr. Nadarasa that the evidence of Dr. Wickremasinghe would not be enough because it was not possible for him to say that the petitioner had actually voted, nor could he identify the petitioner as the person whose name appeared in the Electoral Register as M. J. Abeywardene. Thereupon Mr. Nadarasa stated that he would be calling evidence on the following day in order to satisfy me that the petitioner had the necessary status.

On the following day, however, he took up the position that it was not incumbent on the petitioner to prove either that he voted or was entitled to vote at the election because the burden was on the respondent to establish that the petitioner was not qualified to file the petition. He submitted further that the objection raised by counsel for the respondent came too late. On this point he contended that the law and practice in England was that an objection of this nature should be taken by way of a substantive motion and before the trial.

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I shall deal with this point first before I consider the question of the burden of proof. I do not think, as Mr. Nadarasa argued, that a substantive motion must necessarily be a motion in writing. In my opinion a substantive motion is one of real importance. I am unable to agree with Mr. Nadarasa that it must be taken *in limine* before the trial and if not so taken must be deemed to have been waived. In *East Cork* 6 O'M. & H. 361 the objection that the petitioner's status had not been proved was taken at the close of the whole case so that the petitioner had no opportunity to meet it. It was therefore properly overruled. I consider the application of Mr. Wikramanayake made at the close of the petitioner's case to have the petition dismissed unless evidence was led to prove the petitioner's qualification to file the petition to be a substantive motion and that it has not been made so late as to entitle me to reject it.

It should be noted that at the initial stages of the case the petitioner attended court almost everyday and at no stage was it indicated by Mr. Nadarasa that he was not going to call the petitioner. On the other hand I have a faint recollection that he stated that certain points in dispute would be clarified and proved when the petitioner gave evidence. However that may be there was absolutely no indication that the petitioner would not be called until his case was closed. I do not think it can be said that Mr. Wikramanayake did anything improper when at the close of the petitioner's case he drew everybody's attention to the fact that an element in the case had not been established. He could not have known till then that the petitioner was not giving evidence.

At this stage Mr. Nadarasa seemed to agree that he would have to lead evidence to establish that the petitioner was entitled to file the petition. In fact I adjourned Court much earlier than usual in order to give Mr. Nadarasa an opportunity to lead such evidence. On the following day, however, he took up an entirely different position. He submitted that it was not for him to establish that the petitioner had the requisite status but that it was for the respondent to prove that the petitioner had not that status. This appeared to be a startling proposition but it was argued at length and very earnestly by counsel for the petitioner. He referred me to certain passages in *Rogers on Elections* Vol. 2 at pp. 164 and 215 and 216 and in *Nanakchand on The Law of Elections & Election Proceedings* at pp. 481–483.

A cursory reading of these passages might give the reader the idea that the law in England and the law in India is that there is a presumption that a man who files an election petition is qualified so to do, and if his status is challenged it is for the respondent to prove that he is disqualified.

I shall first deal with the reference to Nanakchand. There can be no doubt that the learned author is merely stating the law as set out by Rogers. It will be observed that the case to which he refers in support of his dictum that " *the burden of proof rests on the respondent to show that the petitioner is not qualified to present a petition* " is the identical case cited by Rogers, namely *Walsall* (1892) Day's Election Cases 1. There is no reference to any Indian authority where it has been held that there is a

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presumption in favour of the petitioner of his status to file and maintain a petition and that the burden is on the respondent to rebut that presumption.

Unfortunately the report of the case cited by Rogers and Nanakchand is not available here, but reading the passages to which I have been referred I do not think I can be persuaded that there is any presumption in favour of the petitioner and that the burden is on the respondent to prove that the petitioner has not the necessary status to file the petition.

There may be occasions where the burden might shift to the respondent to prove that the petitioner is disqualified. If, for instance, the petitioner gave evidence and said that he had voted and pointed to the fact that his name appeared on the Electoral Register as a duly qualified voter, and the respondent challenged his status, or contended that he was disqualified, or that he was not the person who was duly registered although his name appeared on the Electoral Register but that the person registered was somebody else residing in the same village and bearing the same name, then the burden would be on the respondent to prove the facts he alleges.

In my opinion the question of the burden of proof is governed by the Evidence Ordinance and I do not think that the law, practice or procedure in England in Election cases is different. Section 103 provides that "*the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person*". It is an elementary principle of law that every fact that is not admitted must be proved by the person who asserts that fact. In this case I can find no admission, direct or indirect, on the part of the respondent that the petitioner either voted at the election or had the right to vote. It is thus incumbent on the petitioner to satisfy me that he had the right to file this election petition under Section 79 of the Order in Council. I therefore call upon Mr. Nadarasa to lead evidence on this point.

Objection raised by respondent upheld.

1953 *Present :* **Swan J.**

S. J. V. CHELVANAYAKAM, Petitioner, *and* S. NATESAN, Respondent

Election Petition 17 of 1952, Kankesanthurai

Election Petition—Particulars relating to certain charges—What particulars should be given and when they should be given—Scope of Rule 5 of Schedule 3 of Ceylon (Parliamentary Elections) Order in Council, 1946.

Where the date of trial of an election petition has been fixed, the election judge is entitled to specify a particular date for the filing of particulars.

Where the petitioner relies upon a false statement made by the respondent to a particular individual or group of known individuals regarding the petitioner's character and conduct, he may be ordered to give the name or names of such

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individual or individuals and their addresses, occupations and numbers (if any) on the electoral register. The names of the witnesses, however, need not be stated. (Rule 5 of Schedule 3 of the Parliamentary Elections Order in Council, 1946.) Similar particulars should also be given where the petitioner relies on charges of undue influence or distribution of improper advertisements or handbills to any particular individual or group of known individuals. Where posting of placards and posters is alleged, the petitioner may be directed to give, where possible, the places of posting.

With regard to the charge of hiring, borrowing and using prohibited vehicles for the conveyance of voters, the petitioner must furnish *inter alia* the details of each trip, namely the starting-point and the destination and, if known, the number of persons conveyed, their names, addresses, occupations and numbers on the electoral register, and, if known, the amounts paid and to whom they were paid.

With regard to the charge of making a false return concerning election expenses, the petitioner cannot be compelled to state the names, &c. of the witnesses to be called to prove each alleged omitted or impugned item of expense.

APPLICATION to furnish particulars regarding certain charges in Election Petition, Kankesanthurai.

C. S. Barr-Kumarakulasinghe, with *G. T. Samarawickreme*, *T. W. Rajaratnam* and *G. Candappa*, for the petitioner.

E. G. Wikramanayake, *Q.C.*, with *G. E. Chitty*, *C. C. Rasaratnam* and *N. Nadarasa*, for the respondent.

Cur. adv. vult.

September 9, 1953. SWAN J.—

This inquiry has arisen out of an application by the respondent for particulars of the charges. The original petition had only four charges, namely :—

(1) making and publishing false statements of fact in relation to the character and conduct of the petitioner ;

(2) printing, publishing, distributing and posting advertisements, handbills, placards and posters not bearing upon their faces the names and addresses of the printers and publishers ;

(3) undue influence *and*

(4) hiring, borrowing and using prohibited vehicles for the conveyance of voters.

The petition was filed on 23.6.52. On 16.7.52 the agent of the respondent asked for full particulars of the charges. Before this application could be dealt with the petitioner moved to amend the petition by the addition of a further charge, namely the corrupt practice of the making of a false return regarding election expenses. This application to amend the petition was, despite strenuous opposition, allowed by me in my capacity as a Judge of the Supreme Court. (See proceedings of 26.9.52 and order dated 21.10.52).

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Thereafter the additional security necessitated by the added charge was duly deposited and a copy of the amended petition filed. On 17.1.53 I was appointed the Election Judge. On 16.2.53 the agent for the petitioner moved that the case be fixed for trial and also applied for summons on certain witnesses to produce certain documents on a day to be fixed by Court before the date of trial. The trial was fixed for 21.9.53. The application for summons was inquired into on 20.2.53 and disallowed on 31.3.53.

On 4.8.53 the agent for the respondent referring to his application of 16.7.52 moved the Court that the petitioner be required to furnish full particulars of the added charge as well. On 20.8.53 a motion was filed to amend the previous two applications ; and the "*full*" particulars which the respondent demanded are set out in detail in the second motion of 20.8.53 (marked 42 in the record).

It was this matter which came up for consideration on 2.9.53. Opposing counsel were agreed as to certain particulars. It is upon those particulars asked for by the respondent and which counsel for the petitioner refused or was reluctant to give that I am called upon to make an order.

Rule 5 sets out that :—" Evidence need not be stated in the petition, but the Judge may, upon application in writing by a respondent, order such particulars as may be necessary *to prevent surprise and unnecessary expense and to ensure a fair and effectual trial* upon such terms as to costs or otherwise as may be ordered. "

Mr. Wikremanayake submits that the wording of the rule implies that the particulars should convey to the respondent a summary of what the petitioner's case will be. His contention seems to be that as the rule does not require "*evidence*" to be stated in the petition it follows that " evidence " should be supplied in the particulars. With this contention I cannot agree. Our Rule 5 is the same as Rule 6 in England, and it has never been even contended, far less held that the particulars must contain a *gist* or *summary* of the petitioner's case. One must realize they are *particulars* of the *charges*, not an outline of how the petitioner proposes to prove them. But the particulars must be sufficient to secure the three-fold object of :—

(1) preventing surprise ;

(2) saving unnecessary expense *and*

(3) securing a fair and effectual trial.

Mr. Barr-Kumarakulasinghe seems to think that the particulars should not be *full* but the barest minimum. He has an obsession that if too many particulars are furnished it will give the respondent an opportunity of getting at the petitioner's witnesses. That is an unworthy suggestion to make because it casts an unwarranted aspersion on both the respondent as well as the petitioner's witnesses—that the latter are

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corruptible and the former is capable of bribing and corrupting them. I do not think an election court would tolerate such a suggestion when it considers what particulars should be given and when they should be given. Mr. Barr-Kumarakulasinghe wanted me to make order that the particulars should be filed so many days before the trial so that if the trial had to be postponed the date of filing particulars would also be postponed. Undoubtedly the practice in England is to order particulars to be furnished a given number of days before the trial. But where the date of trial is fixed I see no reason why a particular date should not be specified for the filing of particulars. That would avoid any dispute or controversy as to the computation of time.

In this particular case I thought, taking into consideration the number of charges involved, that three or four weeks before the trial should be allowed, and I fixed December 4, 1953, as the particular date having regard to the Christmas Vacation.

I shall now deal with the particulars upon which counsel could not agree. With regard to the first charge, namely the making and publishing of false statements in relation to the character and conduct of the petitioner, the respondent demands, in addition to what the petitioner has agreed to give, the names, addresses, occupations and numbers (if any) on the electoral register of the persons to whom each such act of publication was made ; the names, addresses, occupations and numbers (if any) on the electoral register of the persons in whose presence each such separate act of publication was made and the names, addresses, occupations and numbers (if any) on the electoral register of the witnesses to be called to prove each such separate act of publication.

Where the petitioner relies upon a false statement made to a particular individual or group of known individuals I consider it necessary that the respondent should be given the name or names of such individual or individuals and their addresses, occupations and numbers (if any) on the electoral register. I do not however think that the petitioner should also state the names of the persons in whose presence the false statement was made or the names of the witnesses to be called to prove each such act. That would not fall within the ambit and meaning of the term " particulars of the charges ". It would be in the nature of what evidence the petitioner proposes to lead to establish the charges. That the petitioner would not be entitled to know until the trial begins and the petitioner's case is opened.

With regard to the second charge, namely the printing, publishing, distributing and posting of advertisements, handbills, placards and posters I would make a similar order as above, namely that where the petitioner relies on the distribution of advertisements or handbills to any particular individual or group of known individuals he should give their names, addresses, occupations and numbers (if any) on the electoral register. With regard to the posting of placards and posters I direct the petitioner to give, where possible, the places of posting.

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With regard to the third charge I direct the petitioner to give the necessary particulars to identify the person or persons upon whom any act of alleged undue influence was exercised, that is their names, addresses and occupations with their numbers on the electoral register.

With regard to the fourth charge, namely the charge of hiring, borrowing and using prohibited vehicles the petitioner must furnish, in addition to the particulars agreed upon, details of each trip, namely the starting-point and the destination and, if known, the number of persons conveyed, their names, addresses, occupations and numbers on the electoral register, and, if known, the amounts paid and to whom they were paid. I do not think that the petitioner can be required to state the witnesses he will be calling to prove each of the alleged illegal acts specified in this charge.

As regards the fifth charge I refuse the respondent's application to compel the petitioner to state the names, &c. of the witnesses to be called to prove each alleged omitted or impugned item of expense.

These particulars will be furnished along with the agreed particulars on or before 4.12.53. The costs of this inquiry will be costs in the cause.

Particulars to be furnished regarding certain charges.

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1953 *Present :* **Rose C.J., Nagalingam S.P.J. and Gratiaen J.**

K. RAMALINGAM, Appellant, *and* V. KUMARASWAMY, Respondent

ELECTION PETITION APPEAL NO. 2 OF 1953—CHAVAKACHCHERI ELECTION PETITION NO. 16 OF 1952

Election Petition—Right of appeal—Scope—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 81, 82A, 82B, as amended by Parliamentary Elections (Amendment) Act, No. 19 of 1948.

An election petition was dismissed by the Election Judge on the ground that notice of the presentation of the petition had not been served on the respondent as required by Rule 15 of the Parliamentary Election Rules. In the appeal preferred by the petitioner, the respondent raised the preliminary objection that appeal did not lie against the order of the Election Judge.

Held, that there was no right of appeal. One pre-requisite for an appeal under section 82 A (1) of the Parliamentary Elections (Amendment) Act, No. 19 of 1948, is that it must be against the "determination" of an Election Judge under section 81. In the present case, there had been no "determination" within the meaning of section 81 of the Act.

APPEAL in Chavakachcheri Election Petition No. 16 of 1952.

S. J. V. Chelvanayakam, Q.C., with *C. S. Barr Kumarakulasinghe*, *G. T. Samerawickreme* and *G. Candappa*, for the petitioner appellant.

H. V. Perera, Q.C., with *E. B. Wikramanayake, Q.C.*, *H. Wanigatunga* and *E. A. D. Atukorale*, for the respondent.

Cur. adv. vult.

November 13, 1953. ROSE C.J.—

In this matter the petitioner appeals from an order of the Election Judge dismissing his petition on the ground that notice of the presentation of the petition was not served on the respondent as required by Rule 15 of the Parliamentary Election Rules, 1946.

The election for the Chavakachcheri electoral district held on the 26th May, 1952, and its result was published in the *Government Gazette Extraordinary* No. 10,404 dated 31st May, 1952. The last date on which

2——J. N. B 30491-1,590 (10/53)

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a petition could properly have been filed was the 21st June, 1952, and it was on this day that the petitioner filed his petition. In accordance with the provisions of Rule 15 notice of the presentation of this petition should have been served by the petitioner on the respondent within 10 days of the 21st June, 1952. The relevant rules read as follows :—

" 10. Any person returned as a Member may at any time, after he is returned, send or leave at the office of the Registrar a writing, signed by him on his behalf, appointing a person entitled to practise as a proctor of the Supreme Court to act as his agent in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within the City of Colombo at which notices addressed to him may be left, and if no such writing be left or address given, all notices and proceedings may be given or served by leaving the same at the office of the Registrar. Every such writing shall be stamped with the duty payable thereon under the law for the time being in force. "

" 15. Notice of the presentation of a petition, accompanied by a copy thereof, shall within ten days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the agent appointed by the respondent under rule 10 or by posting the same in a registered letter to the address given under rule 10 at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned or if no agent has been appointed, nor such address given, by a notice published in the *Government Gazette* stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar."

A notice of the presentation of the petition was in fact published in the *Gazette* on the 27th June, 1952, but the learned Election Judge came to the conclusion, after hearing evidence, that an agent had in fact been appointed by the respondent under Rule 10, and that therefore the publication in the *Government Gazette* as provided in Rule 15 was not appropriate in the case of the present petition and could not avail the petitioner. It is against this order of the learned Election Judge that the petitioner now appeals. The respondent raises the preliminary objection that no appeal lies against the present order.

Section 81 of the Ceylon (Parliamentary Elections) Order in Council in its unamended form reads as follows :—

" 81. 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

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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. ''

It will be seen that the determination of an Election Judge under that section is final and is not subject to any appeal. It is interesting to recall that after the 1947 general election in Ceylon one candidate who lost his seat as a result of a successful election petition against him endeavoured to appeal to the Privy Council from the Order of the Election Judge. The matter is reported in 50 N. L. R. at page 481. (*G. E. de Silva v. Attorney General and others*). At page 483 Lord Simonds, the present Lord Chancellor, says,

" 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 jurisdiction demands that this question should be answered in the negative . . . . . 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 submitted 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. It is for these reasons that their Lordships have humbly tendered their advice to His Majesty that the petition ought not to be granted.

That, then, was the position under the Order in Council as unamended. By the Parliamentary Elections (Amendment) Act, No. 19 of 1948, section 81 of the Order in Council was repealed and the following Section substituted :—

" 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 in writing under his hand. Such certificate shall be kept in the custody of the Registrar of the Supreme Court to be dealt with as hereinafter provided. ''

Section 82 was also repealed and in its place appear new sections 82, 82A, 82B, 82C, 82D.

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The new section 82A provides, in certain circumstances, a right of appeal to the Supreme Court from a determination of an Election Judge. The relevant sub-section reads as follows :

> 82A (1) : " An appeal to the Supreme Court shall lie on a question of law, but not otherwise, against the determination of an election judge under Section 81. "

It will be seen that there are two pre-requisites for an appeal. First, it must be a question of law ; secondly, it must be against the determination of an Election Judge under Section 81. In order to ascertain what is meant by " determination " it is helpful to refer to Section 81 itself, which sets out what it is that the Election Judge has to determine ; namely—in the case of a contested election—whether the member whose election is complained of was duly elected, or whether the election was void. It is relevant to note that when an election Judge has made such a determination it is his duty to certify such determination in writing under his hand. In any case where no appeal is preferred against the determination of the Election Judge or where an appeal is preferred but the Election Judge's determination is confirmed, such certificate has to be transmitted to the Governor-General under section 82C. Upon the transmission to the Governor-General of this certificate certain legal results follow, which are set out in Section 82D.

In the present matter the learned election Judge has not issued a certificate for the reason, no doubt, that he considered that his dismissal of this petition was not a determination under Section 81 of the Act. He evidently took the view, with which I am in agreement, that before it became necessary for him to determine the matters which are contemplated in Section 81, certain conditions precedent had to be fulfilled ; such as the proper giving of security as required by Rule 12, and the due service of notice as required by Rule 15. Such requirements are not unusual in this type of matter and it was held in an old English case, *Williams v. The Mayor of Tenby and others* [1], that it is a condition precedent to the trial of a municipal election petition that, within five days after the presentation of it, the petitioner should in the prescribed manner serve on the respondent a notice of the presentation of the petition.

Learned Counsel for the appellant contends that an appeal lies under section 82A (1) to the Supreme Court on any question of law and that an election Judge should regard section 81 as requiring him to issue a certificate in all cases, even where the petition is rejected on the ground of a non-compliance with one of the conditions precedent to its determination, on the footing that any rejection of a petition on such grounds necessarily implies a determination that the respondent member has been duly returned or elected.

[1] *L. R. 5 C. P. D. (1879 and 1880) p. 135.*

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Apart from the fact that such an interpretation, in my opinion, does violence to the language of section 81, the matter seems to me to be put beyond all doubt by section 82B, which prescribes the powers of the Supreme Court in appeals under the Act. Sub-section (1) of the Section reads as follows :—

> " The Supreme Court may, upon any appeal preferred under Section 82A, affirm or reverse the determination of the Election Judge ; and where it reverses the determination, the Court shall decide whether the Member whose return or election was complained of in the election petition, or any other and what person, was duly returned or elected, or whether the election was void, and a certificate of such decision shall be issued by the Court. "

It is to be noted that where the Supreme Court reverses a determination, as we are invited to do in this case, it has to make a decision as to whether the member whose election was complained of was duly elected, or whether the election was void ; moreover, sub-section (3) provides that this decision is final and conclusive.

It would seem to follow from this that this Court has no power to remit a matter to the Election Judge for further consideration or for disposal of the remaining issues. Such a conclusion would perhaps seem to be self-evident, but if an instance is required in an analogous case it is provided in *Abdul Fareed v. The Tribunal of Appeal, Motor Transport and another* [1] where it was held that the Tribunal of Appeal under the Omnibus Service Licensing Ordinance, No. 47 of 1942, has no power to remit the matter for decision by the Commissioner, or even for the re-consideration of any particular points by the Commissioner. Under sub-sections (2) and (3) of section 14 of the Ordinance, the Tribunal of Appeal can do one of two things only, namely, either confirm the Commissioner's refusal of a licence or order that the licence be issued.

Quite apart from the fact that the provisions of the Sections of the Parliamentary Elections (Amendment) Act, which I have been considering, seem to me to afford no ambiguity, I would in any event be reluctant to accord them an interpretation which would result in the causing of that very type of delay which it is so clearly in the public interest to obviate.

Finally, it would hardly seem to be necessary to repeat what has already been pointed out by Swan J. in *Cooray v. Fernando* [2] that when an election petition is presented the petitioner should serve notice of it on the respondent within the prescribed time. The failure to do so is a fatal defect. The fact that the respondent had knowledge of the presentation of the petition does not amount to notice and does not dispense with the requirement as to service of notice.

[1] *(1950) 51 N. L. R. 211.* [2] *(1953) 54 N. L. R. 400.*

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For these reasons I am of opinion that no appeal lies to the Supreme Court against this Order of the Election Judge. The appeal is therefore rejected. The appellant will pay the costs of the respondent in the sum of Rs. 1,050.

NAGALINGAM S.P.J.—I agree.

GRATIAEN J.—

Section 81 of the Order-in-Council, in its original as well as in its amended form, does not operate until the completion of all the steps preliminary to the investigation of the grounds on which an election is challenged. The petitioner must first satisfy the conditions precedent to his right to have the petition tried on the merits—*Williams v. The Mayor of Tenby* [1]. It is then only that the trial can properly commence for the " determination " of the vital question " whether the Member . . . . or any other . . . . person, was duly returned or elected, or whether the election was void ". The right of appeal conferred by the new section 82A (1) is not unlimited ; it is restricted to appeals on questions of law against an Election Judge's " determination " (under section 81) which, but for such appeal, would have resulted in a final and conclusive decision as to the validity of the election.

The limitations placed on an aggrieved party's right of appeal under section 82A (1) are implicit in the language of the section itself ; they are further emphasised in section 82B which prescribes the duties imposed on this Court whenever it is called upon to exercise its appellate jurisdiction. For, in disposing of an appeal, this Court has power only to *affirm or reverse* the earlier " determination " of the election judge. If that " determination " is affirmed, sections 82C (1) and 82D (1) (*a*) are brought into operation. If, on the other hand, it is reversed, the Court " *shall* " immediately proceed to decide " whether the Member . . . . or any other and what person, was duly returned or elected, or whether the election was void ". *The Election Judge's findings upon any issues of fact which may be relevant to the validity of an election must, unless completely vitiated by misdirection or by a total absence of evidence, supply the material which (interpreted in the light of correct legal principles) forms the basis of the ultimate decision of this Court.* A certificate of this decision is then issued, and the provisions of sections 82C (2) and 82D operate to give effect to it.

It is quite apparent from the language of the relevant sections that, upon the termination of an appeal, *a final decision was intended by Parliament to follow one way or the other as to the validity of the return or election of the " Member ", so that no middle course is open to the Court.* This rules out Mr. Chelvanayakam's contention that a right of appeal is also conferred against an Election Judge's decision (at an earlier stage) upholding an objection to the petitioner's right to have his allegations against the " Member " investigated on the merits. In the first place, such a decision is not a " determination " of the issues specified in section

[1] *(1879) 5 C. P. D. 135.*

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81 ; it amounts only to a ruling that the petitioner has forfeited the right to have his allegations investigated at all. In the second place, the argument assumes quite wrongly that this Court enjoys some unexpressed but inherent statutory power, if it disagrees with an Election Judge's decision upholding a preliminary objection, to ignore the express and imperative directions of section 82 by ordering him instead to commence an election trial under section 81 which has not yet taken place. Mr. Chelvanayakam very properly did not suggest, as an alternative solution, that the section requires us, in such a case to assume an *original jurisdiction* to hear evidence for the first time in order to " determine " for ourselves the vital issue whether or not the return or election should be set aside.

A recognition of the importance, in the public interest, of reaching finality as early as possible in the disposal of complaints concerning the validity of parliamentary elections is implicit in the entire scheme of the Order-in-Council which, in its original form, made no provision for appeals against an Election Judge's decisions (right or wrong). There are always two conflicting considerations in a matter of this kind—on the one hand, the desirability of providing reasonable safeguards against the possibility of human error in the judicial decision of important issues ; on the other, the avoidance of delay in ascertaining who precisely are the persons duly elected to represent the people in Parliament. How that conflict should best be resolved, is for the Legislature alone to decide.

It is in that context that we must interpret the amending Act, and the invitation that we should discover in the new sections a vesting of such inherent powers as those suggested by Mr. Chelvanayakam is, to my mind, an invitation to indulge in " a naked usurpation of the legislative function under the thin guise of interpretation "—*Magor & St. Mellons R. D. C. v. Newport Corpn.*[1] What is still worse, this suggested " judicial " legislation would be calculated to add to the delays which, in the public interest, Parliament was concerned to minimise.

We have been asked to consider the consequences of an election judge making a manifestly erroneous preliminary order rejecting an election petition, or arriving at a determination under section 81 (upholding an election) which is largely influenced by his refusal to admit a large volume of relevant and admissible evidence. In all these hypothetical cases, the argument continues, justice requires that the appellate jurisdiction of this Court should include a power to remit the case for further proceedings according to law. The short answer to this submission is that no such jurisdiction has been conferred on us, and that the arguments should be addressed to the legislature and not to us. This Court, in the present context, must strictly confine its judicial functions within the sphere of the limited jurisdiction which it does possess, and cannot travel outside those limits in order to exercise over election judges some form of unregulated supervisory control.

I agree that the petitioner has no right of appeal against the order of which he complains, and I agree that costs should be fixed as directed by my Lord the Chief Justice.

Appeal rejected.

[1] *(1952) A. C. 189 at 191.*

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1953 *Present :* **Gratiaen J. and K. D. de Silva J.**

CHETTINAD CORPORATION LTD., Appellant,
and A. M. M. ZANEEK, Respondent

S. C. 165—D. C. Colombo, 379Z

Rent Restriction Act—Notarial lease—Lessee in arrears of rent—Right of lessor to eject lessee—Termination of lease—Condition precedent.

A lessor cannot sue his lessee for ejectment under the Rent Restriction Act for being in default of rent unless he can first establish the termination of the contract of lease either by due notice or by effluxion of time.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *P. Navaratnarajah*, for the defendant appellant.

E. B. Wikramanayake, Q.C., with *N. Samarakoon*, for the plaintiff respondent.

Cur. adv. vult.

October 15, 1953. GRATIAEN J.—

A person named Abdul Majeed died on 20th March, 1946, leaving a last will and testament whereby he appointed S. C. Samuel to be the executor of his estate, and devised, *inter alia*, the property which is the subject matter of this action to the plaintiff and two others.

S. C. Samuel, in the exercise of the powers vested in him as executor, leased the property to the defendant Company under the terms of a notarially attested indenture of lease P 1 dated 4th May, 1949. The stipulated rental was Rs. 500 *per mensem* and the lease was, subject to certain conditions, to continue until 31st May, 1952. The leased property was protected by the provisions of the Rent Restriction Act, No. 29 of 1948.

On 12th June, 1950, Samuel as executor purported to convey the property to the plaintiff and his co-devisees, but it is clear law that the title to the property had already passed to them automatically upon Abdul Majeed's death, subject of course to the special powers vested in the executor for purposes of administration.

On 8th November, 1951, Samuel wrote to the defendant Company directing them to pay all future lease rent under the indenture P1 to the plaintiff, and this the Company agreed to do. In these circumstances the plaintiff was the " person entitled to receive the rent " to the exclusion of Samuel, and therefore became the " landlord " of the premises within the meaning of Section 27 of the Rent Restriction Act. On 11th January, 1952, he gave notice to the Company that he would require the property to be returned *to him* on the expiry of the lease, *namely on 31st May, 1952.*

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I shall assume for the purposes of this appeal (although I do not decide) that the plaintiff had " stepped into the shoes " of Samuel, the original lessor, for all purposes connected with the enforcement of the Company's contractual obligations under the indenture of lease P1. *Upon this assumption*, as the Company had defaulted in the payment of rent to the substituted contractual lessor, he was entitled to claim the ejectment of the lessee *after the termination of the lessee's rights of occupation under the lease*. But this is precisely what the plaintiff did not do. Instead, on 21st May, 1952—i.e., 10 days before the expiry of his notice dated 11th January, 1952—he sued the Company (*a*) for arrears of rent, (*b*) for an order declaring the indenture of lease P1 cancelled, and (*c*) for ejectment. It seems to me that, even upon the view most favourable to the plaintiff, his action was premature in so far as the claims for cancellation and ejectment were concerned. It is true that under the Rent Restriction Act a tenant who is in default of rent for over a stipulated period becomes deprived of the statutory protection which he may ordinarily claim after the contract of tenancy has been duly terminated. But this does not relieve the landlord of establishing the termination of the contract (either by due notice or by effluxion of time) before claiming a decree for ejectment. This aspect of the legal position does not seem to have been brought to the notice of the learned District Judge.

In my opinion, the plaintiff's action was premature in so far as he claimed a decree for ejectment and a declaration that the indenture of lease P1 was duly terminated. On the other hand, his claim for arrears of rent was clearly maintainable.

I would set aside the decree under appeal and substitute for it a decree ordering the defendant Company to pay to the plaintiff a sum of Rs. 1,500 (representing arrears of rent) with legal interest thereon from the date of action until payment in full. In other respects, the plaintiff's action must be dismissed. The plaintiff is entitled to his costs of trial, but must pay to the defendant Company the costs of this appeal.

K. D. DE SILVA J.—I agree.

Decree varied.

1953

Present : **Rose C.J.**

N. SIVAGURU, Appellant, *and* MRS. C. JANAKI, Respondent

S. C. 103—C. R. Colombo, 40,937

Rent Restriction Act—Action for ejectment—Tenant's divestment, pending action, of alternative accommodation—Factor for consideration.

In determining the question of the relative hardships which would be incurred by the landlord and the tenant by the granting or withholding of an order for possession in an action for ejectment under the Rent Restriction Act, it would be proper for the court to take into consideration that the tenant had, in the interval between the service of the notice to quit and the hearing of the action, deliberately divested himself of property which was under his hand in order to defeat the landlord's claim for possession of the leased premises.

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APPEAL from a judgment of the Court of Requests, Colombo.

H. W. Tambiah, with *S. Sharvananda*, for the plaintiff appellant.

Vernon Wijetunge, for the defendant respondent.

Cur. adv. vult.

November 12, 1953. ROSE C.J.—

In this matter the plaintiff-appellant suggests that the case should be remitted to the learned Commissioner of Requests to enable him to reconsider the question as to whether the defendant-respondent by her own act divested herself of suitable alternative accommodation after service of the notice to quit and, if so, whether his opinion of the relative hardship which would be incurred by the parties would be modified.

The plaintiff-appellant, who is a man of some means, bought the property in question in December, 1951, the respondent already being in occupation as a tenant of the previous owner. A final notice to quit was given in June, 1952, the plaintiff-appellant contending that the premises were reasonably required by him for the residence of himself and his family.

It appears that the defendant respondent occupied the premises in suit which bore the number 79 of the Street in question. She carried on a firewood business in premises No. 77, which was next door to premises No. 79, and which consisted of a shed which she used as her firewood depot, a lavatory and a bathroom and another small shed into which she had permitted a Tamil family consisting of a man and wife and four or five children to occupy.

Although the date of the granting of this permission is not quite clear from the evidence, it is suggested by learned counsel for the appellant—and it may be so—that this permission was given after the service of the notice to quit.

As Mr. Megarry points out in his book on the Rent Acts (7th edition) at page 270, it will usually be irrelevant in considering a landlord's circumstances to consider past events, such as the sale by the landlord of another house which would have provided an alternative home for him, the principle, of course, being that a landlord is entitled if he wishes to select from the properties at his disposal which one he desires to occupy for himself. Mr. Megarry points out, however, that this principle "applies with diminished force if at all" to the tenant's circumstances, as for instance where he has failed to accept other accommodation in the past. *A fortiori* the principle would not seem to be applicable to a tenant who in the interval between the service of the notice to quit and the hearing of the action has deliberately divested herself of property which was under her hand in order to defeat the plaintiff's claim for possession.

It seems that in such a case it would be proper for a court to take this factor into consideration in determining the question of the relative hardships which would be incurred by the parties by the granting or withholding of an order of possession.

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After careful consideration of the facts of the present case, however, I consider that it is undesirable and indeed would put the parties to unnecessary expense to remit the matter for further consideration of this issue. It appears from the evidence of the respondent that the shed into which she allowed the Tamil family to lodge is small and in the main unsuitable for human occupation. She states—and her statement was not challenged in cross-examination—that the premises were so cramped that the children were allowed to sleep in her own premises at No. 79. The respondent's position is that her sole means of support is this small firewood business, which necessitates her living at or near her firewood depot. She has living with her her mother and her niece who have no means of livelihood and who have been dependent upon her for the last eight years.

As against this the plaintiff was found by the learned Commissioner not to have established a case of equal need. I agree with the learned Commissioner's assessment of the respective hardships of the parties and in the circumstances see no reason to dissent from his conclusions.

The appeal is therefore dismissed with costs.

Appeal dismissed.

1953 *Present:* **Gratiaen J.**

P. M. PETER SINGHO, Appellant, *and* M. B. WERAPITIYA (S. I., Police), Respondent

S. C. 835—M. C. Badulla-Haldumulla, 10,128

Evidence—Character—Evidence of pending prosecution—Presumption of innocence—Evidence Ordinance, s. 54—Effect of reception of inadmissible evidence in Magistrate's Court.

An accused person who put his "good character" in issue was asked in cross-examination whether there was not pending against him a criminal case—

Held, that the question was inadmissible.

Where a trial Judge has permitted himself, through an improper appreciation of the law, to allow evidence to be led which is of such a character as to prejudice the chances of a fair trial on the real issues in the case, the improper reception of the evidence is fatal to the conviction of the accused, although the accused has been tried not by lay jurors but by a Magistrate trained in the law.

APPEAL from a judgment of the Magistrate's Court, Badulla-Haldumulla.

H. V. Perera, Q.C., with *M. M. Kumarakulasingham*, for the accused appellant.

N. T. D. Kanakaratne, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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July 14, 1953. GRATIAEN J.—

This is an appeal against two convictions on charges of cheating.

The evidence in the case discloses a most disturbing state of affairs in regard to the techniques which are unashamedly claimed to be employed by certain classes of people in the hope of securing employment for their friends or relatives as Government school teachers.

The case for the prosecution is that in 1949 a contractor of moderate means in Bandarawela was anxious that his daughter Leelawathie, who had recently passed her S. S. C. Examination in Sinhalese, should obtain employment as a school teacher. He consulted his friend, an Ayurvedic physician, who apparently devotes his spare time to the activities of a "contact man", as to how this ambition could be realised. This friend suggested that they should approach the Headmaster of a Government school (the accused) who was believed to enjoy the confidence of a certain Education Officer. Indeed, the physician concerned asserts that he had obtained similar employment for his own daughter by bribery through the agency of "another headmaster". The accused was accordingly approached; and, after certain preliminary discussions of a thoroughly discreditable nature had been concluded, it was agreed that he should offer a bribe of Rs. 100 to an Education Officer. A few months after the money was paid, the girl was still unemployed. The accused explained that a further bribe of Rs. 100 was necessary. This sum was also handed to him for transmission to the "proper authority". A considerable time elapsed, but the girl did not receive her promised letter of employment. The disappointed parent complained to the authorities, who ordered a departmental inquiry, which curiously enough, resulted in a compromise whereby the parent agreed to treat the sum of Rs. 200 as a "loan" granted by him to the accused. *Two years later* the accused was prosecuted in the Magistrate's Court of Badulla-Haldumulla for cheating the parent in respect of each sum of Rs. 100 by "deceiving him into the belief that he would get his daughter a teacher's appointment by offering a bribe to the Education Officer, Badulla".

The manner of cheating specified in the charge is not quite clear, and one is left in doubt as to what precisely was the false representation complained of. If, for instance, the alleged bribe was actually offered and accepted, was the offence nevertheless established because the alleged assurance of employment had failed to materialise? Was the false representation complained of that the bribe would be offered *or* that the employment of Leelawathie would be secured? A charge of cheating should always particularise the facts relied upon as constituting the offence which is sought to be established. I have not been able to ascertain with any certainty how the learned Magistrate or the parties understood the case which the accused was called upon to meet in the lower Court.

The defence set up by the accused was itself thoroughly discreditable. He admits some of the facts spoken to by his self-confessed accomplices, but his version, if true, exonerates him of cheating. In the sharp conflict

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of testimony which arose on the vital issues in the case, the learned Magistrate accepted the evidence led by the prosecution, and convicted the accused on both counts.

Mr. Perera has criticised the judgment in many respects, but, in the view which I have taken, it is sufficient to say that the convictions cannot stand owing to the gravely prejudicial misreception at the trial of one particular item of inadmissible evidence.

The accused had advisedly taken the risk of putting his "good character" in issue. It was, therefore, open to the prosecution, if they could, to prove his "bad character" under section 54 of the Evidence Ordinance. Instead of doing so they suggested to him in cross-examination (and he was forced to admit) that there was pending against him at the time a criminal case in which he was charged with forgery.

"The mere fact that a man has been charged with an offence is no proof that he committed the offence. Such a fact is irrelevant; it goes neither to show that the prisoner did the acts for which he is actually being tried nor does it go to his credibility as a witness". *Maxwell v. D. P. P.*[1]. This principle was reaffirmed by Lord Simon in *Stirland v. D. P. P.*[2]. "It is no disproof of good character" he said, "that a man has been suspected or accused of a previous crime. Such questions as 'Were you suspected?' or 'Were you accused?' are inadmissible because they are irrelevant to the issue of character, and can only be asked if the accused has expressly sworn to the contrary".

If and when the pending charge of forgery is taken up for trial, the accused will be entitled to rely on the presumption of innocence until his guilt is established beyond reasonable doubt. How then can the mere existence of that charge which has not yet been established, be regarded as a slur on his character for the purpose of discrediting him in the present trial? Any such notion, as Lord Sankey pointed out in *Maxwell's case* (supra), is contrary to the whole idea of criminal jurisprudence.

Learned Crown Counsel conceded that this evidence should not have been admitted, but he invited me to hold, as was done in *The King v. Perera*[3], that its improper reception was not fatal to the conviction because the accused had been tried not by lay jurors but by a Magistrate trained in the law. I do not see how this distinction can be drawn where a Judge of first instance has, in spite of his legal training and experience, permitted himself, through an improper appreciation of the law, to allow evidence to be led which was of such a character as to prejudice the chances of a fair trial on the real issues in the case.

I have anxiously considered whether I should send the case back for re-trial before another Magistrate. The charges against the accused are of a serious nature and it may be that, upon the relevant and admissible evidence, his conviction would have been justified. But we are here concerned with offences alleged to have been committed over four years

[1] *(1935) A. C. 309.* [2] *(1944) A. C. 315.*

[3] *(1941) 42 N. L. R. 526.*

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ago, and it does not seem to me just to call upon him to defend himself a second time after such an unconscionable lapse of time. I, therefore, set aside the convictions and acquit the accused.

I cannot conclude without a reference to one aspect of the evidence of the accused. He expressed the view, without any apparent sense of shame, that he saw no particular harm in bribing a public officer to secure employment for Leelawathie, " because it was a meritorious thing to get a job for a girl ". One can but hope that this Headmaster of a Government school has not imparted these contemptible doctrines to the children entrusted to his care. Upon his own version of this sordid incident, the accused stands condemned as a person who is disqualified to undertake the responsibilities of a school-teacher.

Convictions set aside.

1952 *Present :* **Gunasekara J. and Swan J.**

M. T. VELUPILLAI, Appellant, *and* C. K. PALANYANDY *et al.*, Respondents .

S. C. 91 Inty.—D. C. Batticaloa, 817 (Miscellaneous)

Civil Procedure Code, s. 671—" Any party "—Appointment of receiver—Powers of Court.

Under section 671 of the Civil Procedure Code a defendant may apply to Court for the appointment of a receiver against a co-defendant.

When a Court makes an order under section 671 it is not confined to the prayer of the applicant. It has jurisdiction to make any order it thinks necessary for the preservation or better custody or management of the property in question.

APPEAL from an order of the District Court, Batticaloa.

C. T. Olegasegarem, for the first defendant appellant.

C. Renganathan, for the second defendant respondent.

No appearance for the plaintiffs respondents.

Cur. adv. vult.

October 7, 1952. SWAN J.—

This action was instituted by the plaintiffs-respondents who claimed to be regular worshippers of the Sinthayathirai Pillayar Kovil situated at Veeramunai in the Batticaloa District. They alleged that it was the custom to elect two trustees, one from among the worshippers belonging to the Vellala caste and the other from among those of the Seerapatha caste, and that accordingly in September, 1935, the congregation elected the first defendant-appellant and one S. P. H. Kalikuddy as trustees. They alleged further that upon the death of Kalikuddy the first defendant-appellant in defiance of the custom of appointing trustees and against

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the wishes of the congregation purported to appoint the second defendant-respondent as his co-trustee. One of the prayers in the plaint was that this appointment should be declared null and void. The plaintiffs-respondents also alleged that the first defendant-appellant had neglected the temple and misappropriated its income, and they asked that he be removed from office and required to render an account of the income and expenditure of the temple from the year 1935. There was certain other relief claimed in the prayer of the plaint, namely, the election of new trustees and the settlement of a scheme of management.

The first defendant-appellant filed answer stating that the temple and its lands had been granted to his ancestors. He denied the manner of appointment of trustees as set out in the plaint and asserted that he was a hereditary trustee and functioned as such, and not by virtue of election by the Vellala members of the congregation. He stated that Kalikuddy was a Vannakku or trustee appointed by the Seerapatha members of the congregation and that his rights as trustee, as well as the rights of Kalikuddy as co-trustee, were recognized by the Court in D. C. Batticaloa 7,963. He denied that he had appointed the second defendant-respondent as trustee. He also denied the allegation of mismanagement and prayed that the action be dismissed.

The second defendant-respondent filed a separate answer more or less on the same lines as the answer of the first defendant-appellant. He alleged that he had been elected a trustee by the Seerapatha members of the congregation ; and made common cause with the first defendant-appellant in denying the charge of mismanagement. He too prayed for the dismissal of the action.

It is clear that at the stage of filing answer the two defendants were on good terms. Thereafter, apparently, they fell out, for on September 25, 1951, the second defendant-respondent made the application which is the subject-matter of this appeal. He filed a petition, supported by affidavit, making the first defendant and the plaintiffs respondents thereto, and asked the Court to issue an injunction restraining the first defendant from selling the leasehold rights of the temple lands for the year 1951–1952, and praying that the Court should direct one of its officers to sell the said leasehold rights by public auction and deposit the proceeds of sale in Court.

The application was substantially for the appointment of a receiver and there can be no doubt that the first defendant-appellant regarded it as such, for, in his objections, he categorically states that the petitioner was not entitled in law to ask for the appointment of a receiver.

The learned District Judge in allowing the application of the petitioner made the following order :—

> " I do not agree with Mr. Adv. Kanagasunderam's contention that this is an application for an injunction and is therefore governed by section 87 of the Courts Ordinance. Accordingly I make order that the leasehold rights of the temple properties be sold by the Secretary of this Court and by nobody else *whenever the need arises for such sale* and the money deposited to the credit of this case after deducting expenses."

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Mr. Olegasegeram for the appellant contends (1) that the Court had no jurisdiction to make the order and (2) in any event the Court could not have made order for the sale of any leasehold rights other than for the year 1951–1952.

In my opinion the Court was empowered to make the order it made. It was, as I have already stated, substantially an application for the appointment of a receiver. Section 671 of the Civil Procedure Code provides that any party who can establish a *prima facie* interest in the property may apply to Court for the appointment of a receiver ; and the Court should make the appointment if it appears to be necessary *inter alia* for the preservation or better custody or management of the property. The right of the second defendant to function as trustee might be disputed but there can be no question that he has an interest in the property.

As regards the second point made by Mr. Olegasegeram, I do not think the Court exceeded its powers when it made order regarding the sale of all future rents pending the action. In my opinion when a Court makes an order under section 671 it is not confined to the prayer of the applicant. It has jurisdiction to make any order it thinks necessary for the preservation, or better custody or management of the property.

The only other matter urged on behalf of the appellant is that the Court should not have directed that the entire proceeds of sale should remain in Court, without any provision for the necessary expenses of the temple. As I read the order of the Court I can see nothing in it to preclude any party interested from applying to the Court to direct the Secretary to pay out such sums of money as may from time to time be needed for the upkeep and maintenance of the temple.

I would dismiss the appeal with costs.

GUNASEKARA J.—I agree.

Appeal dismissed.

1952 *Present :* **Swan J.**

D. Y. EDIRISINGHE, Appellant, *and* P. S. NANAYAKKARA, Respondent

S. C. 476—M. C. Galle, 3,467

Mischief—Trespassing cow—Right to destroy it.

Accused shot a cow after he had made several unsuccessful attempts to drive it away and as a last means of saving his field from further damage.

Held, that there was no offence of mischief.

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APPEAL from a judgment of the Magistrate's Court, Galle.

G. E. Chitty, with *E. B. Vannitamby*, for the accused appellant.

W. Mendis, for the complainant respondent.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 4, 1952. SWAN J.—

The appellant was charged with mischief by killing a cow belonging to the complainant. His defence was that he fired at the animal while it was trespassing on and causing damage to his paddy field. The learned Magistrate accepted the appellant's version of the facts but found him guilty because the cow was of greater value than the damage caused. I shall quote that passage from the judgment :—

> " in the circumstances of this case I find that I cannot lose sight of the fact that this cow is a valuable cow. It yields no less than three bottles of milk per day and there can be no doubt that by the destruction of this cow, the complainant had been put to very great damage. Now, was this destruction of the cow in the circumstances of the case in proportion to the damage caused to the crop? It is my view that if it is out of proportion to the damage caused or likely to be caused the destruction cannot be described as anything but criminal. "

I do not think that the relative values of the cow and the damage done had any bearing on the matter in issue, namely, whether the accused had killed the cow with intent to cause or knowing that he was likely to cause wrongful loss or damage to the complainant. I express this view despite the fact that Schneider J. in *Saibo v. Perera* [1] said :—

> " In judging a man's state of mind in killing or injuring an animal the valuable nature of that animal cannot be lost sight of. A person could hardly justify the destruction of an elephant, a horse or a valuable cow on the ground that he had done the act to protect a field under paddy even if he has made an effort to drive it away. "

In that case, however, Schneider J., having reviewed all the authorities up to that time and considering the facts in the light of those authorities, set aside the conviction on the ground that the destruction of the fowls was done for the protection of property, and not with the intention or knowledge of causing wrongful loss to the complainant.

Mr. Chitty has referred me to *Russel on Crimes* (1950 Ed.) Vol. 2, pages 1650 et seq. and has also cited the very recent case of *Goodway v. Becher* [2]. I do not think it necessary or prudent to look to the English authorities

[1] *24 N. L. R. 65 at page 72.*

[2] *(1951) A. E. R. 349.*

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for help or guidance. There the matter is governed by sections 40 and 41 of the Malicious Damage Act 1861 (as amended by subsequent legislation). We have sufficient local authority and the Penal Code to guide and direct us.

In an attempt to support the conviction learned Crown Counsel drew my attention to the anonymous case reported in *5 N. L. R.* at page 23 as well as the case of *King v. Menchohami* [1]. I do not think that the view I take of the facts of this case conflicts with the view of Bonser C.J. in the former of the cases referred to above. The learned Chief Justice held that it was a wrongful act to inflict wanton injury upon an animal belonging to another merely because it was trespassing on your ground. Nor is my view in conflict with that expressed by Wendt J. in *King v. Menchohami*[1]. In that case the animal had been cut while it was going away from the land. Wendt J. said :—

> " In the present case the evidence shows that the animal when chased by the accused was going away from the land and would presumbly have left it. The cut inflicted by the accused was therefore an injury caused without previous ineffectual attempt to save the land from further damage. "

Here the evidence reveals that the accused fired at the cow after he had made several unsuccessful attempts to drive it away, and that he fired at it as a last means of saving his field from further damage.

Each case will depend on its merits. The wounding or destruction of an animal would be *prima facie* evidence of that intention or knowledge which is an essential ingredient of the offence of mischief. If the evidence as a whole negatives that intention or knowledge the accused is entitled to an acquittal.

I set aside the conviction and acquit the accused.

Appeal allowed.

1953 *Present :* **K. D. de Silva J.**

S. ARUMUGAM *et al.*, Appellants, *and* SEETHEVI, Respondent

S. C. 264–268, with Application 118—M. C. Point Pedro, 16,335

Evidence—Criminal intimidation—Competency of spouse of accused to give evidence—Penal Code, s. 486—Evidence Ordinance, ss. 100, 120.

Under section 120 (4) of the Evidence Ordinance the wife is a competent witness for the prosecution where a husband is charged under section 486 of the Penal Code with intimidating his wife.

[1] *8 N. L. R. 309.*

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APPEALS, with application in revision, from a judgment of the Magistrate's Court, Point Pedro.

C. E. Jayewardene, with *S. J. Kadirgamer*, for the accused appellants.

Cecil N. Gunawardene, Crown Counsel, as *amicus curiae*.

Cur. adv. vult.

August 25, 1953. K. D. DE SILVA J.—

In this case the complainant-respondent charged the five appellants with committing offences punishable under sections 433, 314 and 486 of the Ceylon Penal Code. Muthan Sivapackiam the 4th accused-appellant is the husband of the complainant, and at the times material to these proceedings they were living in separation. The story for the prosecution in brief is as follows : On December 16 last year at about 12 noon Arumugam the brother of the complainant was going past the house of the 1st accused when he met a crowd of people some of whom were these accused. On seeing him one person in the crowd shouted out " get hold of Arumugam we will murder him ". Through fear Arumugam ran into the complainant's house and took shelter there. The crowd pursued him and these five accused entered the complainant's compound and threatened to murder him and the complainant. These accused also began to cause damage to the house. When the complainant raised cries the 1st, 2nd and 3rd accused assaulted her. After trial, the Magistrate convicted all the accused under sections 433 and 486, while the 1st, 2nd and 3rd accused were also convicted of the charge under section 314 of the Ceylon Penal Code. On each of the counts under sections 433 and 486 the accused were fined Rs. 10 each while on the other count the 1st, 2nd and 3rd accused were fined Rs. 30 each. All the five accused have appealed from the conviction and sentence. The 1st, 2nd and 3rd accused have also applied in revision that the conviction and sentence be set aside. In the petition of appeal it was submitted that the prosecution had failed to establish the charge under section 486 and that therefore the learned Magistrate had no jurisdiction to try the case. This submission was certified as a point of law by the Proctor for the appellants. But I see no merit in that contention. There was quite sufficient evidence for the Magistrate to hold that the charge under section 486 of the Ceylon Penal Code had been established.

When this appeal was argued, Mr. Advocate C. E. Jayawardene, who appeared for the appellants, raised an interesting point of law. He contended that as the learned Magistrate acquitted the 4th accused on the charge of causing simple hurt to the complainant, the other charges against the 4th accused should have been dismissed, the reason being that the complainant, who is the wife of the 4th accused, was not a competent witness against the latter in respect of such charges. He based this argument on section 120 of the Evidence Ordinance (Cap. 11). Sub-sections (2), (3), (4) and (5) of that section deal with the competency of a person to give evidence in criminal proceedings in which his or her spouse is a party. Sub-section (2) entitles a person charged with an

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offence to call his or her spouse as a witness for the defence. According to sub-section (3) "in criminal proceedings against a husband or wife for any bodily injury or violence inflicted on his or her wife or husband, such wife or husband shall be a competent and compellable witness". Sub-section (4) reads "In criminal proceedings against a husband or wife for any attempt to cause bodily injury or violence on him or her wife or husband, such wife or husband shall be a competent witness for the prosecution". Sub-section (5) provides that a person is entitled to give evidence against his or her spouse on a charge of bigamy.

Mr. Jayawardene argued that a wife or husband is not entitled to give evidence against her or his spouse in criminal proceedings outside the scope of the sub-sections 2 to 5 of section 120. The charges under sections 433 and 486 of the Ceylon Penal Code he maintained are not covered by these sub-sections and that, therefore, the evidence of the complainant against the 4th accused in support of those two charges is inadmissible. I may here observe that even if the complainant's evidence is eliminated, those two charges have been established by the evidence of Arumugam whom the Magistrate accepted as a truthful witness. But I do not propose to dispose of the appeal on that ground. The point of law raised by the Counsel is of some importance and should be decided after consideration.

According to section 118 of the Evidence Ordinance (Cap. 11) all persons are competent to testify unless they suffer from certain physical disabilities referred to therein. The provisions of section 120 restrict the operation of section 118 in so far as the competency of a person to give evidence for or against his or her spouse is concerned. This restriction is primarily based on an English Common Law principle, the reasons for the origin of which can be gathered from the following passage— "Husband and wife, say our books, are considered as one and the same person in law, and to have the same affections and interests; from whence it has been established as a general rule that the husband cannot be a witness for or against the wife, nor the wife be a witness for or against the husband, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case" (Best on Evidence—12th Edition—page 164, paragraph 175). This principle in certain circumstances was calculated to cause injustice and hardship, and therefore its application was relaxed by creating exceptions by common law as well as by statute. The competency of a person to give evidence against his or her spouse in the case of personal injury is one of those exceptions which arose out of Common Law (Taylor on Evidence—12th Edition—page 861, paragraph 1370). The Criminal Evidence Act, 1898 (61 and 62 Vict. C 36) also created a number of exceptions to this rule, but those exceptions are not relevant to the decision of this case. Section 120 of the Evidence Ordinance would appear to incorporate the common law principle as well as the exception relating to personal injury. The charge of intimidation, in my view, would come under sub-section (4) and is covered by the words "attempt to cause any bodily injury or violence".

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Strictly construed, it is true, the offence of intimidation is not an attempt to cause bodily injury or violence but it has been held in England that " a threat of personal violence " comes within the exception to the general principle. " To this branch also exceptions are not wanting. When one of the married parties used or *threatened personal violence* to the other, the law would not allow the supposed unity of person in husband and wife to supersede the more important principle that the State is bound to protect the lives and limbs of its citizens " (Best on Evidence, paragraph 176 at page 165). A similar view is expressed at page 140 of Roscoe's Criminal Evidence in the following passage " a spouse witness is compellable for the prosecution or for the defence of the spouse when the offence charged is personal injury (including threats and attempts) or forcible abduction and marriage, and only in those cases ". If sub-section (4) of Section 120 of the Evidence Ordinance is not wide enough to include a charge of intimidation, the provisions of Section 100 of that Ordinance can be invoked to bring in the English Law of Evidence to operate on this point. Therefore I hold that the evidence of the complainant was correctly admitted to prove the charge under Section 486 of the Ceylon Penal Code. I agree with Mr. Jayawardene that if the complainant's evidence was not admissible as against her husband the 4th accused, her evidence would not have been admissible against the other accused as well in these proceedings. The 4th accused was also convicted on the charge of criminal trespass. That charge, however, cannot be maintained against him by the complainant. Therefore I set aside the conviction of the 4th accused under Section 433 of the Ceylon Penal Code. Subject to that variation the appeals and the application in revision are dismissed.

Appeals mainly dismissed.

1953 *Present :* **H. A. de Silva J.**

MALLIS SILVA, Petitioner, *and* I. D. USUPH, Respondent

S. C. 370—Application in revision in M. C. Hambantota, 15,761

Criminal Procedure Code—Section 289—Absence of accused on date of trial—Post ponement—Power of Court to award costs in favour of complainant.

The accused was absent on the date of trial and was not represented by counsel or proctor. The Magistrate re-fixed the trial for another date and, purporting to act under section 289 of the Criminal Procedure Code, ordered the accused to pay to the complainant a certain sum as costs of the day.

Held, that under section 289 of the Criminal Procedure Code a Magistrate has no power to order an accused person to pay costs to the complainant when an adjournment of the trial becomes necessary or advisable.

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APPLICATION to revise an order of the Magistrate's Court, Hambantota.

A. H. C. de Silva, with *A. K. Premadasa*, for the accused petitioner.

S. H. Mohamed, for the complainant respondent.

H. A. Wijemanne, Crown Counsel, with *N. T. D. Kanakaratne*, Crown Counsel, for the Attorney-General, *amicus curiae*.

Cur. adv. vult.

August 18, 1953. H. A. DE SILVA J.—

This matter comes up in revision. The question that comes up for decision in this case is whether under section 289 of the Criminal Procedure Code the Court is empowered to order costs of the day against the accused on an adjournment of the trial. As the matter is of some importance, I sought the assistance of the Attorney-General. Crown Counsel representing the Attorney-General has kindly assisted the Court at the argument.

It would appear that on the 21st June, 1951, when this case came up for trial before the Magistrate the complainant Mallis Silva was present and the accused was absent. The complainant was represented by his counsel, Mr. Azeez, instructed by his proctor. The accused was not represented by counsel or proctor. He sent a medical certificate to the effect that he was unfit to attend Court on that day, owing to ill-health, whereupon counsel for the complainant challenged the medical certificate and objected to an adjournment of the trial. The learned Magistrate, having recorded the evidence of a witness called by counsel for the complainant, re-fixed the trial for the 31/8/51, and ordered the accused to pay to the complainant a sum of Rs. 250 as costs of the day. The learned Magistrate has purported to act under section 289 of the Criminal Procedure Code, when he made that order.

Section 289 empowers the Court to postpone the commencement of or adjournment of any inquiry or trial if from the absence of a witness or any other reasonable cause it becomes necessary or advisable to do so. The section further says that the Court may from time to time order a postponement or adjournment on such terms as it thinks fit for such time as it considers reasonable and may remand the accused if in custody or may commit him to custody or take bail in his own recognizance or with sureties for his appearance.

Two local authorities bearing on this point have been cited to me at the argument. Sir Thomas de Sampayo J., in *Paul v. Sinniah Kangany*[1], held that a Magistrate had no power to order an accused to pay the costs of the complainant's attendance at Court. De Sampayo J. observed thus :

> " The ' terms ' here referred to obviously do not include payment of the costs to one side or the other, but purely to such conditions as are referred to in the subsequent part of the section. There is no authority

[1] *5 Ceylon Weekly Reporter 143.*

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for a Criminal Court ordering costs to be paid by one side or the other except such costs as Crown costs and compensation, which are mentioned in section 197, for bringing a frivolous or vexatious case. The order is beyond the powers of the Police Court, and is therefore set aside."

In the case considered by Sir Thomas de Sampayo J., the accused was present in Court and was represented by a Proctor on the date of trial. The accused's Proctor took objection to the jurisdiction of the Court, and for that purpose the evidence of two witnesses who were not present in Court was found necessary, and the case was adjourned for the purpose.

In the present case under consideration the accused was absent, and he was not represented by a pleader. The other local case that was cited before me was *Sabapathy v. Tharmalingam* [1]; there de Kretser J. held that a Police Magistrate had power in granting an adjournment of a case to order costs to be paid by a party on whose application the adjournment was made. De Kretser J. did not follow the decision in *Paul v. Sinniah Kangany* (supra), though that case was cited before him. He has referred to certain Indian cases when arriving at his decision.

Learned Counsel for the accused-petitioner has argued that the law as laid down in *Paul v. Sinniah Kangany* (supra) was correct and should be followed. He draws the attention of the Court to the omission of the words "as to costs" after the words "on such terms" in section 289 of the Criminal Procedure Code. He argues that "such terms" in that section clearly refers to the words which have been used in the latter part of secton 289 (1) of the Criminal Procedure Code. The terms contemplated there, he argues, may be the placing of the accused on bail in his own recognizance or with sureties for his appearance, if he is not already on bail, or if he is on bail, he may cancel bail, &c. In *Sabapathy v. Tharmalingam* (supra) the costs were ordered to be paid by the complainant to the accused, but de Kretser J. drew no distinction between the complainant and the accused in the application of the provisions of section 289 of the Code.

This matter has been considered by the Indian Courts. The section of the Indian Penal Code which corresponds to our section is section 344. Sohoni's Code of Criminal Procedure, 14th Edition at page 680, deals with the question of the payment of costs by an accused on an adjournment being granted. The learned commentator has referred to three Indian cases and summarised the principles laid down therein as follows :—

"where the accused was absent at the date of hearing and he was not represented by any pleader or counsel, the adjournment of the case is altogether unnecessary, since the Court could not proceed with the trial or record evidence in the absence of the accused. Under such circumstances, costs of the adjournment could not be awarded

[1] *(1938) 40 N. L. R. 79.*

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against the accused person, as it is entirely opposed to the spirit of conducting criminal trials to impose such terms on the accused, even while granting adjournments for his benefit and at his request."

The simple test one has to apply in a case of this nature is, what is the Court's duty when an accused is absent on the date of trial? It is obvious that no evidence can be recorded either at the trial or at the inquiry, where special provision is not made therefor, in the absence of the accused. The trial in a criminal case cannot proceed in his absence. That being so, the Court has got to adjourn the trial or inquiry and order a warrant upon the accused in order to secure his attendance and if he is already on bail to issue a notice on him and/or his surety, if any, to show cause why the bail bond should not be cancelled or forfeited.

In certain sections of our Criminal Procedure Code special provision has been made for the payment of costs, vide sections 253 (*b*), 325 (3), 194 and 352.

Some of the Indian authorities afford guidance for the interpretation of section 289 of the Criminal Procedure Code, vide *Brown v. Chanda Singh* [1], where it was held that it would be entirely opposed to the spirit of section 344 that a Magistrate would pass orders awarding costs of adjournment against the accused who was absent on the date of hearing. In *Gulam Singh and another, accused, v. Inder Singh and others* [2], it was held that an order for costs against an accused person who was not present and who was unrepresented was unjustified when an adjournment was necessary. The learned Judge who decided this case has followed the ruling in *Brown v. Chanda Singh* (supra).

Learned Crown Counsel who assisted me in this matter has supported the argument urged by learned counsel for the accused-petitioner, and cited to me various Indian authorities which have a direct bearing on this matter. He has argued that the correct principle has been laid down by the Indian Courts. He has referred me to *Gulam Singh and another v. Inder Singh and others* (supra), and *Mohan Lal Saraji v. Mohini Mohan Das* [3]. The interpretation and the reasoning in the Indian cases are in accord with our local case, *Paul v. Sinniah Kangany* (supra).

I am of opinion that on a correct interpretation of section 289 of our Criminal Procedure Code, a Magistrate is not empowered to order an accused person to pay costs to the complainant, when an adjournment of the trial has become necessary or advisable.

The order of the Magistrate dated 21st June, 1951, condemning the accused to pay Rs. 250 to the complainant is set aside, and if the costs have been already paid, same will be returned to the accused.

Order set aside.

[1] *4 Criminal Law Journal, p. 78.*

[2] *The Criminal Law Journal of India, Vol. 36, p. 101.*

[3] *1948 A. I. R. (Calcutta) Vol. 35, p. 194.*

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1953 *Present :* **Gratiaen J. and Weerasooriya J.**

D. WARNAKULASOORIYA, Appellant, *and* TRANSPORT & GENERAL FINANCE CO., LTD., Respondent

S. C. 105—D. C. Colombo, 18,213 M

Contract—Illegality—Effect as between the parties—Hire-purchase—Ownership of goods—Is it a material factor ?

A transfer of property made in pursuance of an unlawful agreement cannot be upset merely on the ground of illegality.

Quaere, whether a condition precedent to a hire-purchase agreement is that the person who lets goods on hire should be the lawful owner of such goods at the time the agreement is entered into.

APPEAL from a judgment of the District Court, Colombo.

E. B. Wikramanayake, Q.C., with *N. Nadarasa* and *S. Canagarayar*, for the second defendant appellant.—The plaintiff was at no stage the owner of the motor car. The evidence was that the first defendant " was buying the car through the plaintiff company ". It was the first defendant who bought the car from Rajapakse. It is, besides, an implied condition of every hire-purchase agreement that the person who lets the thing on hire is the owner—*Karflex v. Poole*[1]. That case was decided before the English Hire-Purchase Act of 1938. Nor could the plaintiff company become owner of the vehicle in view of section 3 (1) of the Defence (Motor Cars) (Special Provisions) Regulations, 1943, which prohibited any person from " purchasing or otherwise acquiring " any registered motor car without a permit, and a person who contravenes these regulations was guilty of an offence punishable under regulation 52 of the Defence (Miscellaneous) Regulations. The plaintiffs represented they were the lawful owners which they were not and could not be. P1 refers to the plaintiff company as the " owners " and expressly provides in art. 11, "The vehicle being the property of the owners shall not be subject to any lien, &c." A contract founded on an illegal transaction will not be enforced. The claim here is for the hire and the return of the car. *Boissevain v. Weil*[2]. The 2nd defendant is only a guarantor and is discharged if the creditor fails to acquire and preserve his rights against the debtor. *Wessels on Contract, paras. 4361, 4363.*

H. V. Perera, Q.C., with *P. Navaratnarajah* and *G. D. C. Weerasinghe*, for the plaintiff respondent.—P1, the hire-purchase agreement, is not governed by the English law. It is not a simple contract of sale of goods. It is also a hire and as such is governed by the Roman-Dutch law. The transaction as a whole falls to be governed by the Roman-Dutch law. Under that law, a person other than the owner can hire goods. There is no warranty that the seller is the owner of the goods—Diemont's

[1] *(1933) 2 K.B. 251.*

[2] *(1950) 1 All E.R. 728 at 734.*

2——J. N. B 30492-1,592 (10/53)

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Law of Hire-Purchase in South Africa, p. 54. Even under an illegal contract property in the goods may pass—*Benjamin on Sale, 8th edn., p. 494 ; The American Restatement of the Law of Contract, Vol. 2, section 580.* For the nature of the contract of hire-purchase in English law see *Scammell v. Ouston*[1].

Counsel also cited *Scarfe v. Morgan*[2] and *Benjamin on Sale, p. 498.*

E. B. Wikramanayake, Q.C., in reply.—The prohibition applies to all claims connected with or directly founded on the prohibited transaction—*Mackeurtan on Sale of Goods in South Africa, p. 123.*

Cur. adv. vult.

August 31, 1953. GRATIAEN J.—

The plaintiff Company had, in terms of a hire-purchase agreement dated 24th April, 1946, let on hire to the first defendant a second-hand motor car, granting him at the same time the option of purchasing the vehicle provided that he duly complied with the conditions of the agreement. The appellant guaranteed the performance by the first defendant of his obligations under the agreement, and in doing so waived certain privileges to which a guarantor would normally be entitled. Contemporaneously with the signing of the agreement, the first defendant took delivery of the vehicle as hirer.

The motor car previously belonged to a man named Rajapakse, and the first defendant had been anxious to purchase it, but did not possess the necessary funds to do so. He accordingly approached the plaintiff Company, which is a finance corporation, and it was in these circumstances that the Company purchased the vehicle from Rajapakse. As between the parties to the hire-purchase agreement dated 24th April, 1946, the transaction was " a contract of hiring coupled with a conditional contract or undertaking to sell "—*Helby v. Matthews*[3]. As Lord Wright explained in *Scammel v. Ouston*[4], " the property in the chattel does not pass while the agreement is current, but the hirer merely gets the use of it ", and, in the event of his due compliance with the various terms of the agreement, he has the option (which he is under no obligation, however, to exercise) to buy the chattel on payment of a sum ascertained by reference to the relevant terms of the agreement. The grant of this option constitutes " a binding offer to sell which remains open during the stipulated period ", and it is not unless and until the offer is accepted before the period has elapsed that a binding contract of sale is concluded between the parties—*Van Pletsen v. Henning*[5].

The first defendant defaulted in the payment of hire after a few months. In addition, he sold it to a third party, taking dishonest advantage of the fact that he alone, as the " person entitled to the possession of " the vehicle had been registered as its " owner " under the Motor Car Ordinance, No. 45 of 1938, which was in force at the relevant time. In the meantime,

[1] *(1941) A.C. 271.*
[2] *(1838) 4 M. & W. 270 at 281.*
[3] *(1895) A.C. 471.*
[4] *(1941) A.C. 271.*
[5] *(1913) S.A.A.D. 82 at 98.*

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the Company had given due notice terminating the agreement, and eventually sued both defendants (*a*) for arrears of hire, (*b*) for the return of the vehicle or in the alternative for damages. After trial the learned District Judge entered judgment against both defendants for arrears of hire and damages, amounting in the aggregate to a sum of Rs. 1,319·85.

The appellant disputes his liability as guarantor under the agreement sued on for the following reasons :—

(1) that, upon a true construction of the document, there was an express as well as an implied condition that the Company was its owner at the time when the transaction was entered into—*Karflex v. Poole*[1] ; and

(2) that, although the Company had purported to purchase the vehicle from Rajapakse, that transaction was an illegal contract which had taken place in contravention of the Defence (Motor Cars) (Special Provisions) Regulations, 1943, which were then in force ; in consequence, Rajapakse continued to be the lawful owner at and after the hire-purchase agreement was entered into, so that the Company had no right to give the first defendant an option to purchase it.

It will be convenient in the first instance to discuss the validity of the second ground of appeal to which I have referred, because, if that fails, there is no need to decide the interesting question whether the principle of English Law laid down in *Karflex v. Poole* (supra) (and subsequently prescribed by statute) applies to hire-purchase agreements entered into in Ceylon.

The Defence Regulations in question were without doubt in operation at the time when the Company purchased the vehicle from Rajapakse in order to place it at the first defendant's disposal under the terms of the hire-purchase agreement sued on. Section 3 (1) expressly prohibited any person from " purchasing or otherwise acquiring " any registered motor car except under the authority of a permit issued to him by the proper authority. Similarly, section 4 prohibited the sale of a registered motor car to any person except upon the surrender by him of the permit contemplated in section 3 (1).

The Company had admittedly obtained no permit in its own favour for the purchase of the vehicle at the relevant time. On the other hand, the first defendant, for whose benefit the purchase had in fact been made, did possess such a permit which was duly surrendered before the vehicle was handed over by Rajapakse. The Regulations were introduced to ensure an equitable distribution of motor cars under war conditions, and it might well have been argued in criminal proceedings that a " purchase " by a hire-purchase finance Company, *not for its own use but for use by a permit-holder*, did not contravene the spirit of the Regulations. I am content, however, to assume for the purpose of my decision that the purchase, as between the Company and Rajapakse, was illegal. But does it follow that the transaction was for that reason void in the sense that, after Rajapakse had parted with the vehicle which he had purported to sell, he nevertheless retained legal ownership of it so as to

[1] *(1933) 2 K.B. 251.*

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disentitle the Company from selling it to the first defendant if and when he exercised the option granted to him in terms of the hire-purchase agreement ?

" The general principle of our law is that a Court will not come to the assistance of either party where the object of the obligation is unlawful or immoral . . . If money is paid or if something is delivered, under an illegal or immoral contract, it cannot as a rule be recovered back ".—*Wessels : Contract* Vol. 1, para. 665. If, therefore, performance of the allegedly illegal contract between the Company and Rajapakse had not been complete, neither party could have sued the other for the enforcement of an unfulfilled obligation under it, as none of the exceptions specified by *Wessels* (paras. 666–681) would have applied. But we are here concerned with a transaction in which both parties had fulfilled their obligations, so that *there was nothing left to be performed which required the aid of a Court of Justice for its enforcement.* The English Law is to the same effect. " If there has been a completely executed transfer of property made in pursuance of an unlawful agreement . . . the transfer cannot be upset merely on the ground of illegality "—*Cheshire & Fifoot : Contracts* (1st Edn.) p. 240. The position would have been different if, for instance, Rajapakse had been induced by misrepresentation to sell the car to the Company.

The decision in *Elder v. Kelly*[1] illustrates the effect of an illegal, but concluded, contract of sale in contravention of the Sunday Observance Act, 1667, of England. " What I understand to have happened " said Bray J., " was that the purchaser came to the shop, asked for some milk, paid for it, and took it away. In my opinion that transaction clearly operated to pass the property in the milk from the seller to the purchaser, *and it was to that extent an effective sale* ". Similarly, the contract of sale between Rajapakse and the Company was completed by delivery and payment, and, notwithstanding the imputation of illegality, ownership of the vehicle passed to the Company before the hire-purchase agreement sued on was entered into with the defendants and the appellant. In the result, the appellant's defence fails *in limine*, and the applicability of the principle laid down in *Karflex v. Poole* (supra) to hire-purchase agreements in Ceylon does not call for a final decision in this case.

I would dismiss the appeal with costs. With regard to the Company's cross-objection in which it contends that the sum awarded under the decree should be increased, Mr. Perera has conceded that this issue, affecting as it does the obligations of the first defendant as well, could only be raised upon a properly constituted appeal to which both the hirer and the guarantor were made parties. The cross-objections must therefore be rejected, but without costs.

WEERASOORIYA J.—I agree.

Appeal dismissed.

Cross-objections rejected.

[1] *(1919) 2 K.B. 179.*

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[COURT OF CRIMINAL APPEAL]

1953 *Present:* **Rose C.J. (President), H. A. de Silva J. and K. D. de Silva J.**

PEERIS SINGHO *et al.*, Appellants, *and* THE QUEEN, Respondent

APPEALS 62-64, WITH APPLICATIONS 100-102

S. C. 32—M. C. Kanadulla, 1,708

Court of Criminal Appeal—Unreasonable verdict—Certificate of trial Judge—Weight which should be attached to it—Court of Criminal Appeal Ordinance, No. 23 of 1938, ss. 4 (b), 5 (1).

Although the certificate of the trial Judge that a case is fit for appeal is no ground in itself for setting aside a verdict, it is, however, an element which the Court of Criminal Appeal will take into consideration together with other elements in deciding whether or not a particular verdict should stand.

The Court of Criminal Appeal may, though rarely, decide that a verdict is unreasonable if upon a consideration of the case as a whole it is felt that the verdict is not satisfactory. It is not necessary for the Court to single out any particular item upon which it bases its view.

APPEALS, with applications for leave to appeal, against three convictions in a trial before the Supreme Court.

C. E. Mackenzie Pereira, for the accused appellants.

G. P. A. Silva, Crown Counsel, with *N. T. D. Kanekeratne*, Crown Counsel, for the Crown.

Cur. adv. vult.

November 3, 1953. ROSE C.J.—

In this case the three appellants were convicted of the murder of a man called Babasingho. It is one of those somewhat difficult cases in which we are invited to say that the verdict of the jury was unreasonable. There is no doubt from a perusal of the learned trial Judge's charge that he himself had formed a view upon the evidence that was favourable to the appellants. Moreover, he has himself certified that this is a fit case for appeal. As, of course, has been said in very many cases, the fact that a learned trial Judge himself might have come to a different conclusion from that of the jury is no ground in itself for setting aside a verdict. It is, however, an element which this Court will take into consideration together with other elements in deciding whether or not a particular verdict should stand.

Now, on the facts of this case, the case for the prosecution depends in substance upon the evidence of a single witness, an alleged eye-witness, a woman called Leelawathie, who was the daughter of the deceased man.

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She states that upon the evening of the 2nd of March, 1953, the three appellants who are related to each other, the 1st appellant being the father of the 2nd and the 3rd being a son-in-law of the 1st, accosted her and her father on the road in the vicinity of their house, made a joint attack upon her father and removed him into the compound of their house where he was subsequently done to death with a katty. She says that she saw these events by means of an electric torch she had in her hand and that she then returned to her house and in the course of the night she says that she informed her husband and the Village Headman of the complicity of these appellants in these events.

Now, in considering this matter, very strong criticisms have been directed against the witness Leelawathie and as to why we should say that her evidence should not have been accepted by the jury. First it is said that her evidence is belated. The episode in question took place at 8 or 8.30 p.m. on the evening of the 2nd of March and according to the evidence which it is suggested we must accept apart from that of Leelawathie herself, the first statement that she made to anyone in authority was at 9.45 a.m. on the following morning, the 3rd of March, when the Police came to her house. The Village Headman denies that she made a statement to him that night and he was called as a witness for the prosecution. The question of course whether a statement of a witness is belated and whether therefore it should be rejected upon that ground is eminently one for the consideration of a jury. We do not suggest that in this case or in any case a matter like that should be decisive in coming to a conclusion on the question of whether a jury's verdict is unreasonable, but it is of course an element which may be taken into consideration with other elements in the case.

The second point why it is suggested that this woman's evidence is unlikely to be true is that she puts the beginning of the contest in the road. It appears that the spot on the road which she indicated to the Police as being where these events began is some 88 feet from the spot where the unfortunate deceased man was subsequently found fallen, that is according to the evidence of the Police which has not been challenged in this case. The defence case is that the episode began in their (the appellants') house and the distance from where the episode began in their house to where they say the struggle concluded is only a matter of some 30 feet. Now, Counsel for the appellant points out that one would have expected, if there had been anything in the nature of a scuffle or a struggle between these men from the road to this point in the compound 88 feet away, that there would have been some evidence of marks on the ground or something of that sort which might tend to corroborate the fact that the struggle or episode had taken place over such a considerable area. The Police Sergeant who made investigations into this matter stated, and apparently that was not challenged, that the only blood marks that he found were at the point in the compound where the deceased man was found fallen and that he found no other marks either in the house or in the compound or in the road, which led him to conclude that anything untoward had occurred there. We then have the further relatively minor criticism which relates to the medical evidence. The medical evidence is that the only injuries found upon the deceased man were

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three injuries, two on the head and one on the shoulder, the two on the head being necessarily fatal, and that they were all caused with a cutting instrument such as a katty. There is no evidence of any contusions or marks such as might have been expected to be caused by a club or any weapon of that kind. Now, Leelawathie's evidence is that upon the road this episode began with a series of club blows and that it was only at a later stage that the 3rd appellant handed the katty to the 1st appellant who then inflicted the fatal injuries.

We have then, before coming to the evidence on the appellants' side, two further matters which might have a slight bearing on this matter. We have first the fact that the deceased man had, according to the medical evidence, been taking alcoholic drink shortly before this incident, that is to say, the stomach contents still contained traces of alcohol. We have next the fact that, according to the Village Headman, the deceased man was known to be a man of violent character in the village. He was also a reconvicted criminal and was apparently a powerfully built man. Evidence of good character was led on behalf of the three appellants which was not in any way challenged by the prosecution. We have also the fact that there was a motive, although as learned Crown Counsel correctly points out, that motive was a double edged motive, annoyance over a land dispute, which might of course have operated as a motive for an attack by the deceased man upon the appellants or an attack by the appellants upon the deceased man.

Now, the story of the appellants as told by the 2nd appellant, the son of the 1st appellant, who was the only one of the three to give evidence, was that at 8 or 8.30 p.m. that evening Babasingho accompanied by another man, Punchi Banda, who as soon as the fight began ran away and took no further part in the proceedings, came in an aggressive mood to their house and made an attack upon the 1st appellant, the 2nd appellant's father. He says that the attack was made with a club, that the father who was lying down at the time got up and struggled for the club, that the two men grappled with each other, that he and the 3rd appellant, the son-in-law, went to the assistance of the father and that being unable to separate them a blow was struck, or more than one blow with a katty as a result of which this man Babasingho met with his death.

Learned Crown Counsel says to us, and there is reason in his observations, that all these are eminently matters for a jury and that this is not a class of case in which we should interfere. We have given the matter very anxious consideration and we are fully alive to the evils that may flow from this Court too freely intervening in matters which have been decided by a jury and in which there was, technically at any rate, material upon which they could properly have come to their conclusion. We feel, however, that in all the circumstances of the case and paying regard to the learned trial Judge's own view of the matter, that this is one of those rare cases in which we should interfere. I may perhaps repeat what was said by Mr. Justice Humphreys, in the case of *Rex v. Frederick Barnes*[1], "Those cases tend to show that it is often, as we think it is in

[1] *28 Criminal Appeal Reports 144.*

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this case, difficult to place upon a single legal ground the reason why we have come to the conclusion at which we have in fact arrived, that the verdict of the jury in this case was not satisfactory ". We prefer in this case not to single out any particular item upon which we base our view. We say that upon a consideration of the case as a whole and of the matters which have been put before us by learned Counsel we feel that the verdict of the jury is not satisfactory and that upon the evidence at their disposal it must be held to be unreasonable within the meaning of the appropriate section of the Court of Criminal Appeal Ordinance. That being so, we think that the convictions cannot stand and the appeals must be allowed and the appellants acquitted.

Appeals allowed.

1952 *Present :* **Gratiaen J. and Gunasekara J.**

S. SIVASAMBU *et al.*, Appellants, *and* KATHIRESAR AMBAGAR *et al.*, Respondents

S. C. 496—D. C. Jaffna, 652

Contract—Transfer of property—Condition for reconveyance—Provision for damages on refusal to reconvey—Is obligation of transferee alternative ?—Specific performance—Trusts Ordinance, s. 93.

Where property is transferred subject to the terms that the transferee should reconvey it to the transferor upon payment of a certain price within a stipulated period and that, on refusal to reconvey, the transferee should pay a certain sum as damages, action for specific performance of the reconveyance would lie at the instance of the transferor if the promise to pay damages represents merely a penal stipulation which is nothing more than accessory to the principal obligation. If, on the other hand, the promise to pay damages introduces in truth an alternative obligation at the transferee's option, it is open to the transferee to discharge the contract by complying with either (and not both) of the alternative obligations stipulated in the contract.

APPEAL from a judgment of the District Court, Jaffna.

N. E. Weerasooria, Q.C., with *C. Shanmuganayagam*, for the 4th defendant appellant.

H. W. Tambiah, with *V. Ratnasabapathy*, for the plaintiffs respondents.

Cur. adv. vult.

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May 28, 1952. GRATIAEN J.—

By a deed No. 15,600 dated 17th September, 1941, the 1st, 2nd and 3rd plaintiffs sold the land to which this action relates to Poothar Sittamparapillai for a consideration of Rs. 5,300. The deed contingently provided for a reconveyance of the property to the plaintiffs (or to their nominee Thambipillai) upon the following conditions :—

> " We do further declare that if we jointly and severally or Thambipillai Nalliah of Udduvvi with our consent, pay the consideration of Rs. 5,300 with interest thereon at the rate of 6½ per cent. p.a. within 3 years of the date hereof and ask for a transfer at our expense the said Sithamparapillai or his heirs and administrators should transfer the said lands without any objection and if they refuse to execute accordingly should pay a sum of Rs. 2,700 as damages. We do hereby further declare and bind ourselves that if we fail to pay the said principal and interest within the time prescribed and obtain a transfer of the said lands from him or from his aforewritten the said lands do belong to the said Sithamparapillai and his heirs after the said period without asserting any right, title or interest from the said lands. "

The learned District Judge has held, and I accept his finding, that the sum of Rs. 5,300 and interest had been duly tendered to Sithamparapillai within the time stipulated. Nevertheless, the reconveyance asked for was " refused " and Sithamparapillai sold the property shortly afterwards to the appellant for valuable consideration in terms of Deed No. 1,222 dated 20th September, 1944.

In the present action the 1st, 2nd and 3rd plaintiffs and Thambipillai sued Sithamparapillai for the execution of a conveyance in terms of the original agreement, and the appellant was added as a party defendant when his subsequent purchase was disclosed. The stipulated consideration was deposited in Court by the plaintiffs to the credit of the action.

Some of the original parties died during the pendency of the proceedings, and the substitution of their representatives in interest has contributed to the long delay in arriving at a final determination of the litigation.

The learned District Judge has correctly held that, by virtue of the provisions of Section 93 of the Trusts Ordinance, such rights as had vested in the plaintiffs and in Thambipillai under the deed No. 15,600 against Sithamparapillai have become legally enforceable against the appellant as purchaser of the property. He also took the view that, upon a proper interpretation of the deed, an action for specific performance did lie. A decree against the appellant was entered upon that footing.

For the purposes of this appeal it is necessary to examine and construe the language of the clause which I have quoted. If, as the learned District Judge has held, Sithamparapillai had undertaken without qualification to reconvey the property upon payment of the agreed price within the stipulated period, and if his promise to pay Rs. 2,700 merely represented a penal stipulation which was merely accessory to the principal obligation, then an action for specific performance of that principal obligation

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lay at the instance of the 1st, 2nd and 3rd plaintiffs and/or of Thambipillai with their consent. If, on the other hand the stipulation for the payment of Rs. 2,700 introduces in truth an alternative obligation at the obligor's option it was clearly open to Sithamparapillai (or his successor-in-title) to discharge the contract by complying with either (and not both) of the alternative obligations stipulated in the deeds.

The principle under consideration has been explained by *Pothier on Obligations* [1] in the following terms :—

" An alternative obligation is contracted when a person engages to do, or to give, several things in such a manner that the payment of one will acquit him from all . . . . In order to constitute an alternative obigation, it is necessary that two or more things should be promised *disjunctively*. When they are promised *conjunctively*, there are as many obligations as the things which are enumerated, and the debtor cannot be wholly liberated without discharging them all ; but when they are promised in the alternative, though they are all due, there is but one obligation which may be discharged by the payment of any of them. *The choice belongs to the debtor.* "

The method of approach laid down by Pothier exactly corresponds with that indicated in *Fry on Specific Performance* [2] where reference is made to a class of contract in which " the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done ". As was held in *Roper v. Bartholomew* [3] " the Court must in all cases look for their guide to the primary intention of the parties as it may be gathered from the instrument upon the effect of which they are to decide, and for that purpose to ascertain the precise nature and object of the obligation ".

Our attention has been drawn to a number of earlier decisions of this Court where similar problems of interpretation have arisen, vide *Mathes Appuhamy v. Raymond* [4] ; *Appuhamy v. Silva* [5] ; *Paiva v. Marikar* [6] and *De Silva v. Senaratne* [7]. As I read these judgments, they have all adopted the test which Pothier lays down, but in each case the language of the document under consideration differed widely from the language of those construed in the others. With respect I think that, so long as the true principle is borne in mind, the interpretation (right or wrong) of any particular words appearing in one written instrument is seldom of much assistance as a precedent for deciding the true meaning of some other written instrument.

Having given my best consideration to the language of the deed 15,600 dated 17th September, 1941, I have reached the conclusion that Sithamparapillai had bound himself and his successors-in-title *either* to convey the property " without any objection " upon due payment of the agreed consideration *or*, should he " refuse " to fulfil that particular

[1] *Vol. 1 page 136 (Article 6 Paragraphs 245–247).*
[2] *(5th Ed.) page 68 Section 142.*
[3] *12 PRI. 821 (147 E. R. 880).*
[4] *(1896) 2 N. L. R. 270.*
[5] *(1914) 17 N. L. R. 238.*
[6] *(1936) 39 N. L. R. 255.*
[7] *(1949) 50 N. L. R. 313.*

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obligation, to pay instead a sum of Rs. 2,700. I am quite unable to subscribe to the view that both these promises were made conjunctively in the sense that failure to fulfil the first obligation exposed him to the duty to fulfil them both. In this particular context the word "and" is not inconsistent, I think, with the idea of disjunctive promises. Finally, the word "refuse" seems to negative to some extent the view that the alternative obligations provided by the agreement were enforceable *at the option of the proposed purchasers of the property.*

Fry on Specific Performance [1] refers to the authority of *Hobson v. Trevor* which is not available to me, for the proposition that "where the amount of penalty is small, as compared with the value of the subject of the contract, it is a reason for treating the sum reserved as a mere penalty, and not in the nature of an alternative contract". It seems to me that a stipulation for a substantial payment may reasonably be accepted as some indication that the parties intend to provide for an alternative obligation at the debtor's option. In the present case, the plaintiffs could hardly have been in a position in September, 1941, to persuade Sithamparapillai to bind himself to pay so large a sum, in proportion to the contract price, either as a penalty for securing the performance of a single and compellable obligation or even as liquidated damages, payable at the purchaser's option, in the event of its breach. The plaintiffs must have been pressed for money at the time of the transaction, and presumably they could not prevail upon Sithamparapillai to pay them Rs. 5,300 except as consideration a *sale rather than a mortgage* of the property. Having secured an absolute transfer in his favour, he agreed *either* to reconvey the property in exchange for that sum, together with reasonable interest if paid within 3 years *or*, in effect, to increase the amount of the original purchase price from Rs. 5,300 to a round sum of Rs. 8,000. The language of the deed does not suggest to my mind any other acceptable theory as to how precisely the sum of Rs. 2,700 could have been arrived at by agreement between the parties.

In the view which I have taken, the claim for specific performance of the first alternative obligation, namely, the promise to convey the property, is not enforceable by the plaintiffs as of right. The other alternative obligation to pay a sum of Rs. 2,700 therefore became enforceable upon Sithamparapillai's refusal to convey the property, and Mr. Weerasuriya conceded that this obligation has now passed to the appellant. I would accordingly substitute for the decree entered in the Court below a decree ordering the appellant to pay the 1st, 2nd and 3rd plaintiffs a sum of Rs. 2,700 with legal interest thereon from the date of the institution of this action until payment in full. Subject to this, the appellant is entitled to his costs both here and in the Court below, the aggregate amount of which must upon taxation be deducted from the sum payable by him to the plaintiffs under this decree.

GUNASEKARA J.—I agree.

Appeal allowed.

[1] *Page 74.*

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1953 *Present :* **Gratiaen J. and K. D. de Silva J.**

ABDUL W. M. N. HAMEEN, Appellant, *and* H. S. P. SUGATHADASA, Respondent.

S. C. 120—D. C. Colombo, 25,523.

Rent Restriction Act—Business premises—" Reasonable requirement " of landlord—Section 13 (1).

In a tenancy action, the landlord obtained a decree for his tenant's ejectment on the ground that he " reasonably required " the premises in question for his own business within the meaning of the Rent Restriction Act. It was established that the tenant was already carrying on a business in the premises and that the effect of the decree against him would be to throw him out of business altogether and to involve him in very considerable financial loss. If, on the other hand, the *status quo* remained, the landlord would only lose the additional profits which he hoped to make by moving into the premises from his present shop.

Held, that, in the circumstances, it would be wholly unreasonable to authorise a decree for ejectment.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *M. H. Aziz*, for the defendant appellant.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the plaintiff respondent.

Cur. adv. vult.

July 23, 1953. GRATIAEN J.—

This is a tenancy action in respect of premises No. 85, Chatham Street, Fort, to which the provisions of the Rent Restriction Act apply. The landlord obtained a decree for his tenant's ejectment on the ground that he " reasonably required " the premises for his own business within the meaning of the Act, but the learned Judge directed that, in order to mitigate the consequential hardships which the tenant would suffer, the execution of the writ should be postponed for a period of 18 months.

The tenant's appeal was based on the contention that, upon the facts as found by the learned Judge, the landlord's requirement of the premises was wholly unreasonable *inter partes*. While I appreciate the limits of the jurisdiction of an appellate tribunal in litigation of this kind—vide *Coplans v. King* [1] and *Cresswell v. Hodgson* [2]—I have come to the conclusion that it is our duty to set aside the judgment in the present case.

[1] *(1947) 2 A. E. R. 393.* [2] *(1951) 2 K. B. 92.*

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Indeed, the very circumstance that the learned Judge was unwilling to interfere with the *status quo* for as long a period as 18 months indicates strongly to my mind that the landlord's present requirement was considered to lack reasonableness at the present time.

The landlord has since 1929 been carrying on a well-established business in the sale of ebony elephants in a shop situated in Canal Row, Fort. His customers are, in the main, tourist passengers, and he complains that in recent years his business has declined owing to a variety of unsatisfactory features connected with the situation of his present shop. He asserted that his profits would appreciate substantially if he could transfer the business to Chatham Street. The learned Judge took the view that he had " rather exaggerated the loss to his business during recent years " and that, generally speaking, " the conditions under which he carried on the business before 1944 and those during the last 4 years could not differ very much ". The final conclusion on this part of the case was that " the plaintiff has a reasonably prosperous business (in his present shop) but, if he has more suitable premises (in Chatham Street) the business would prosper still more ". In other words, the landlord genuinely desires to occupy the premises in order to gain some pecuniary advantage for himself, and is therefore entitled to succeed in the action provided also that his requirement is " reasonable " having regard to the effect which a decree for ejectment would have on his tenant.

Let us now consider the position of the tenant. He was until June 1951 a co-owner of the premises (the landlord himself being a substantial shareholder) and had in 1949 purchased the share of another co-owner, together with the goodwill of a profitable hotel business, which he has carried on in the premises ever since. In June 1951 the premises were put up for sale under the Partition Ordinance and were purchased by the landlord. Thereafter the tenant ceased to be a co-owner in occupation and became instead a contractual tenant under the landlord at a rental of Rs. 306 per mensem. Three months later this action was instituted.

It is common ground that, even if the tenant were ejected from the premises at a later date, there would be no reasonable prospect of his finding other suitable accommodation in the locality in which he could continue his hotel business. In the result, the effect of a decree for his ejectment would be to throw him out of business altogether, and to involve him in very considerable financial loss. If, on the other hand, the *status quo* remains, the plaintiff can continue to sell his ebony elephants as he did before, and will continue to receive a fair rental for his property in Chatham Street, losing only the additional profits which he hopes to make by moving into them himself. Tested in this way, it would be wholly unreasonable to authorise a decree for ejectment. I would therefore allow the appeal and dismiss the plaintiff's action with costs in both Courts.

K. D. DE SILVA J.—I agree.

Appeal allowed.

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1952 *Present*: **Gratiaen J. and Gunasekara J.**

W. H. BUS CO., LTD., Appellant, *and* J. SAMARANAYAKE, Respondent

S. C. 427—D. C. Kandy, 2,545

Collision—Contributory negligence—Test of reasonableness—Damages for loss of income—Proof necessary.

A collision took place between plaintiff's hiring car and defendant's omnibus at a junction where two highways met. Plaintiff's car was admittedly being driven along the " major road ". Moreover, it had reached the junction before the other vehicle.

Held, that the issue whether the plaintiff was guilty of contributory negligence should be decided by " the test of reasonableness " and depended on whether the plaintiff, assuming he knew of defendant's driver's negligence, could reasonably have been expected to avert the accident.

Held further, that when the owner of a car which has been damaged claims damages for loss of income owing to the fact that he has been deprived of the means of earning his living, he should adduce precise proof of the pecuniary loss suffered.

APPEAL from a judgment of the District Court, Kandy.

S. J. Kadirgamar, for the defendant appellant.

H. W. Jayewardene, for the plaintiff respondent.

Cur. adv. vult.

May 15, 1952. GRATIAEN J.—

This is an appeal against a judgment awarding the plaintiff a sum of Rs. 3,000 as damages in respect of a collision which took place between his motor car No. X 6571 and the Company's omnibus No. C. E. 4836 during the early hours of the morning of 18th March, 1946.

The plaintiff's motor car, though of some antiquity, was in a serviceable condition before the accident, and he used it to convey passengers for hire in the Kandy District. On the morning in question he was driving it from the direction of Katugastota along Trincomalee Street when the defendant's omnibus, which was being driven along Colombo Street, collided with it at the junction where the two highways intersect. As a result of the impact the car was pushed some distance across the street and sustained fairly substantial damage.

The learned District Judge found as a fact that the collision was caused by the negligence of the defendant's bus driver, and he awarded the plaintiff (*a*) a sum of Rs. 2,000 as compensation for the estimated damage to the vehicle and (*b*) a further sum of Rs. 1,000 " as damages for being thrown out of employment for ten months before the action was brought ".

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In my opinion the decision in favour of the plaintiff on the issue of negligence was perfectly correct. Trincomalee Street was admittedly a " major road ", and there was a notice which gave ample warning of this fact to the drivers of vehicles approaching the junction along Colombo Street. Moreover, the plaintiff's car had reached the junction before the other vehicle, and it was clearly a negligent act on the part of the defendant's driver not to have taken all reasonable steps within his power to avoid a collision. Indeed, I would have been disposed to hold that, even if traffic proceeding along Colombo Street had been entitled to claim the right of way, it was the negligence of the defendant's driver which in the circumstances of this particular case " substantially caused the injury " [1].

Mr. Kadirgamar has argued that in any event the plaintiff was himself guilty of contributory negligence in not taking steps to avoid the impending collision. I am quite unable to accept this submission. " Fast moving traffic would become impossible if compliance with the ordinary rules of the road on the part of those concerned could not, in the first instance, be taken for granted. The test to be applied in order to ascertain when the person duly and properly using the road should waive his rights is the test of reasonableness. As soon as it would be evident to a reasonable man that there is danger of an accident arising from the inability, refusal or neglect of the wrongdoer to give way, the rightful user of the road is bound to take all reasonable steps to avoid an accident " [2]. As Innes C.J. points out, however, the conduct of a motorist placed in such a situation " is not to be judged in the light of subsequent events, but by the standard of what a reasonable man would have done at the time ".

It is idle to suggest that, if his conduct be judged in the light of this principle, the plaintiff could reasonably have been expected to avert the accident which did occur. The time available for deciding how he should act " in the grip of the impending disaster " could not, at best, have exceeded the fraction of a second, and I certainly do not construe his attitude at this critical point of time as that of a man who obstinately insisted, regardless of the consequences, that it was solely the other man's business to prevent a collision. The facts set out in the judgment of *Robinson v. Henderson* [3] were entirely different. Adopting the language of Lord Birkenhead's classic expression of the principles of contributory negligence in *The Volute* [4], I would hold that " in the ordinary plain common sense of the business ", the negligence of the defendant's driver was " the sole cause of the collision ". The plaintiff must therefore be compensated for the pecuniary loss which he suffered in consequence.

I am satisfied that the learned trial Judge correctly estimated the compensation payable for the damage sustained by the plaintiff's vehicle. The estimated cost of repairing the car was rather less than Rs. 2,000, and in normal circumstances, no doubt, this would have represented the proper sum to be awarded under this head of damages. But the evidence

[1] *Swadling v. Cooper (1931) A. C. 1.*
[2] *Solomon et al. v. Mussett & Bright, Ltd. (1916) S. A. A. D. 427.*
[3] *(1928) S. A. A. D. 138.*
[4] *(1922) 1 A. C. 38.*

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shows that such repairs would not have fully restored the car to its earlier state of efficiency. In these circumstances, the learned Judge assessed the damage by reference to the extent to which the value of the car had depreciated by reason of the accident, and in my opinion this was the proper method of approach to the question.

With regard to the further award of a sum of Rs. 1,000 for loss of income, I think that the evidence on record was insufficient to justify the plaintiff's claim. His own evidence is extremely vague as to the period of time which elapsed before he succeeded in obtaining other employment after the accident occurred, and there is no material of any kind upon which a Court could assess, except by a process of pure speculation, the loss of income sustained by reason of the damage to the vehicle. " If the owner of a car which has been damaged claims damages for loss of income owing to the fact that he has been deprived of the means of earning his living, he should adduce evidence as to his average daily income and, when the car has been repaired, as to the time it took to be repaired. If it has not been repaired, evidence should be led to show how long it would ordinarily take to repair the car "[1]. Notwithstanding the absence of such evidence, the learned Judge, purporting to " take all the circumstances into consideration ", awarded a round sum of Rs. 1,000 for loss of income. With respect, this is not a legitimate approach to the determining of an issue where the pecuniary loss claimed by a party is, by its very nature, capable of precise proof.

In my opinion the award of Rs. 1,000 for loss of income should be deleted, and I would accordingly vary the decree entered in the plaintiff's favour by restricting the damages to Rs. 2,000. The plaintiff is entitled to his costs in the Court below, but these must be taxed on the footing that the action was instituted for the recovery of Rs. 2,000 only. Each party has partially succeeded upon this appeal, and I would therefore award no costs of appeal to either side.

GUNASEKARA J.—I agree.

Decree varied.

1953 *Present :* **Rose C.J.**

T. T. PERERA, Appellant, *and* T. P. B. MEDAWELA (S. I. Police), Respondent

S. C. 25—M. C. Avissawella, 5,951

Motor Traffic Act, No. 14 of 1951—Section 158—" Running board ".

In a prosecution for riding on a running board of a motor vehicle in contravention of section 158 of the Motor Traffic Act—

Held, that a running board which is inside a bus or car and does not project outside is not covered by the enactment.

[1] *Mossel Bay Divisional Council v. Oosthuizen (1933) C. P. D. 509.*

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APPEAL from a judgment of the Magistrate's Court, Avissawella.

M. M. Kumarakulasingham, with *J. C. Thurairatnam*, for the accused appellant.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

October 1, 1953. ROSE C.J.—

This matter turns upon the interpretation of the phrase "running board" in section 158 of the Motor Traffic Act, No. 14 of 1951. The appellant in this case, who is a ticket inspector, was apparently admittedly standing on a platform, to use a neutral phrase, of a bus which is described as a Nelson bus. The appellant called no evidence on his behalf, but Mr. Medawela, the Sub-Inspector of Police, who was called for the prosecution, said in cross-examination that in regard to the bus in question the running board was not a projection outside the bus but was within the body of the bus. In the absence of any definition in the Ordinance of the phrase "running board", it seems to me that regard should be had to the purpose of the section which is to prevent persons from standing on the running board so as to endanger themselves. It seems to me therefore that a running board that projects from a bus or from a motor car or is outside a bus or a motor car would be covered by the section, but that a board which is inside the bus or the car and does not project outside would not be so covered.

Having regard to the evidence and to the admitted facts in the present case, I consider that the offence has not been proved. The appeal will therefore be allowed and the conviction quashed.

Appeal allowed.

1953 *Present :* **Rose C.J.**

V. VYTHILINGAM, Appellant, *and* K. VAIRAMUTTU, Respondent

S. C. 244—C. R. Mallakam, 14,589.

Servitude—Use of a well—Does it include the use of the well sweep ?

A servitude giving right to a "share of the water" in a well does not include the right to the use of the well sweep if no mention of the well sweep is made in the grant.

APPEAL from a judgment of the Court of Requests, Mallakam.

C. Thiagalingam, Q.C., with *C. Vanniasingham* and *C. Shanmuganayagam*, for the defendants appellants.

T. K. Curtis, for the plaintiff respondent.

Cur adv. vult.

November 11, 1953. ROSE C.J.—

This matter concerns an alleged servitude involving the use of a well by the respondent on the appellant's land. The plaintiff respondent relied on a document P 1 dated 4th December, 1919, which states *inter*

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alia—and the position is not disputed by the defendants-appellants—that the premises conveyed included a " share of the water in the well . . . . and the right of the usual way and watercourse ".

The appellants concede that the respondent is entitled to a share of the water in the well and the use of any aqueduct or water course that exists and to the necessary access to the well. The point at issue in this case, however, relates to the use of a well sweep which has been constructed upon the land of the appellants and which it is, no doubt, convenient for parties drawing water from the well to use.

It is to be noted that no mention of the well sweep is made in the Deed and it is not suggested by the respondent—and the finding of the learned Commissioner does not support that position—that there was sufficient evidence of prescriptive user of the well sweep.

The respondent contends that the right of way granted to him under the Deed P 1 must reasonably be construed as including the right to use the well sweep on the appellant's land. He further contends—and this may well be true—that he himself contributed to the expense of the reconditioning of the well sweep in question. Be that as it may, the only question with which I am concerned in this case is whether a servitude which includes the use of the well sweep has been established. Learned counsel for the respondent has referred me to an unreported judgment of de Sampayo J. (S. C. No. 182—C. R. Chavakachcheri No. 20,263 [1]) in which a similar dispute as to the use of a well and a well sweep was considered.

It is to be noted in that case that the question under consideration was the extent of the relief which was intended to be granted to the plaintiff by the original decree in the case. The original decree as drawn up by the Commissioner of Requests was to the effect that the plaintiff was entitled to draw water from the well in question and to use a certain path to go to and from the well. The Commissioner of Requests expressed his view that the decree merely gave the right to the plaintiff to draw water which he might do by means of a bucket and a rope or any other way and that he had no right under the decree to the use of the well sweep for the purpose of drawing water. De Sampayo J., after commenting on the fact that the dispute appeared to be trivial—as indeed it does in the case which I am now considering—pointed out that the decree in question was interpreting the judgment of his (de Sampayo's) own, and he proceeds to state " I must say in regard to my own judgment in appeal on the previous occasion that I never intended to restrict the plaintiff's right merely to draw water. The well means not merely the actual hole in the ground but the entire arrangement by which it can be used. That being so it seems to me that it is quite unreasonable to disconnect the well sweep from the well itself ". The learned Judge, however, goes on to point out that some practical difficulties might arise if, for example, the sweep were to go out of order or were to require reconditioning ; in which case he added the hope that the good sense of the parties might be sufficient to resolve such difficulties.

Now, it may well be that in the facts of that case the order in question was appropriate—it would, of course, depend entirely upon the nature of

[1] *S. C. Minutes of February, 1916.*

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the evidence which was adduced in support of the servitude claimed. But unfortunately it does not seem to me to be sufficient for this court to rely upon the good sense of parties, when it is clearly its duty to adjudicate upon the parties' legal rights.

A servitude is a right that must, according to all the authorities, be construed strictly and I am attracted by the argument of learned counsel for the appellants that it would be wrong to permit the respondent, under the guise of exercising a servitude, to enlarge or extend his right which, according to the Deed P 1, comprised a share of the water in the well and the right of the usual way and watercourse, so as to cover the right to use a well sweep which is not mentioned in the Deed and which is the property of the appellants.

It may well be that the most convenient and practical way of drawing water from this well is by means of the sweep. The fact remains, however, that on the evidence adduced in this case no prescriptive user of the well sweep has been established and there is no finding by the learned Commissioner to the effect that it has.

It may well be that if the respondent has paid monies to the appellants for the erection of the reconditioning of the well sweep he might be able to maintain a claim on some contractual footing. I am, however, not concerned with that aspect of the matter. The only claim which was put forward by the respondent and was adjudicated upon by the learned Commissioner was this claim by way of servitude.

While I have a certain sympathy for the respondent in this matter I feel that it would be introducing a dangerous principle to assist him by extending his right, which is carefully defined in his Deed, to cover the well sweep.

That being so the appeal is allowed. The judgment of the learned Commissioner is set aside and judgment entered for the defendants appellants with costs here and below.

Appeal allowed.

1953 *Present :* **Gratiaen J.**

LAMBERT ALWIS, Appellant, *and* S. D. RATNAYAKE, Respondent

S. C. 1,161—M. C. Kurunegala, 7,131

Hotel Keepers Protection Ordinance (Cap. 30)—Prosecution thereunder—A necessary ingredient.

In a prosecution for failure to discharge a debt due to a hotel keeper, the complainant must prove, under section 3 of the Hotel Keepers Protection Ordinance, not only that a copy of the Ordinance was exhibited in the hotel but also that it was exhibited in some conspicuous place therein.

When a monthly lodger at a hotel becomes liable to be sued in a civil court for the recovery of what is payable by him, he is not necessarily liable to conviction under the Hotel Keepers Protection Ordinance.

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APPEAL from a judgment of the Magistrate's Court, Kurunegala.

H. V. Perera, Q.C., with *A. C. Gooneratne* and *K. Sivasubramaniam*, for the accused appellant.

T. B. Dissanayake, for the complainant respondent.

July 8, 1953. GRATIAEN J.—

This is an appeal from a conviction under the Hotel Keepers Protection Ordinance (Cap. 30). It is clear from the facts that the appellant had during the relevant period been a lodger in the respondent's hotel, the terms being that the appellant was to pay his bill at the end of each month of residence. There is no doubt that, apart from any controversy as to the amount payable by the appellant, he has not in fact paid what he owed for the latter period of his residence in the hotel. In the result he became liable to be sued in a civil court for the recovery of what was payable by him. This does not mean that he is necessarily liable to conviction under the Hotel Keepers Protection Ordinance. It is idle to suggest that he did not " give notice that he would require credit " within the meaning of section 2 (1) of the Ordnance, having regard to the fact that the terms arranged between ihimself and the hotel keeper involved the granting of credit. Apart from this objection, Mr. Perera points out that section 3 requires as a condition to liability to conviction under the Ordinance that the hotel keeper must exhibit a copy of the Ordinance " in some conspicuous place ". The complainant certainly states that he did exhibit a copy of the Ordinance in his hotel, but he nowhere states where the copy was in fact exhibited. In that state of things it is impossible for a Court to hold that the copy of the Ordinance had been exhibited sufficiently conspicuously to attract the attention of customers.

I therefore set aside the conviction and make order acquitting the accused.

Appeal allowed.

1953 *Present :* **Swan J.**

H. NANDUWA, Appellant, *and* R. NANDAWATHIE, Respondent

S. C. 76—M. C. Panwila, 7,121

Maintenance Ordinance, s. 6—Application on behalf of illegitimate child—Evidence—Silence may amount to admission—Corroboration.

In an application for the maintenance of an illegitimate child, evidence of the failure of the putative father to refute allegations made against him by a headman on an occasion which demanded a denial or a protest may amount to corroboration.

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APPEAL from a judgment of the Magistrate's Court, Panwila.

K. C. de Silva, with *Ananda de Silva*, for the defendant appellant.

K. Sivasubramaniam, with *D. S. Nethsinha*, for the applicant respondent.

Cur. adv. vult.

March 17, 1953. SWAN J.—

This appeal raises an interesting point, to wit, whether silence can amount to an admission.

The appellant was sued by the respondent for maintenance for an illegitimate child whose paternity he denied. The learned Magistrate accepted the respondent's evidence and held that there was sufficient corroboration. The corroboration relied upon by the learned Magistrate was based on the following facts. The respondent had made a complaint to the headman that she was pregnant and that the appellant was responsible for her condition. As that complaint was made after sexual intimacy had ceased the learned Magistrate, following the judgment of this Court in *Ponnammah v. Seenithamby* [1], held that it did not furnish the corroboration required by Section 6 of the Maintenance Ordinance. But the headman also said that he met the appellant two days later and questioned him. I think I should give in detail the headman's evidence regarding this interview :—

> "I met the respondent and questioned him. I told him that the appellant had complained about him. I asked him to continue to maintain her if he had done so earlier. I believed her story and told him that ordinarily a woman would not make such a complaint unless it was true. The respondent did not protest that it was false."

The learned Magistrate took the view that this amounted to an admission on the appellant's part that he was the father of the child in the respondent's womb. Learned Counsel for the appellant contends that that inference is not reasonable or justifiable in law. Undoubtedly silence does not amount to an admission in every case. But there are occasions when the failure to deny an accusation or to repudiate a charge can be construed to mean a tacit admission of guilt. In the case of *Weideman v. Walpole* [2] Bowen L.J. said, "silence is not evidence of an admission unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not ".

There undoubtedly is authority for the proposition that failure to reply in circumstances in which a man might reasonably be expected to reply to a charge may be evidence against him. And if it is evidence against him, it can also be relied upon as corroboration where corroboration is required by law.

[1] *(1921) 22 N. L. R. 395.* [2] *L. R. (1891) 2 Q.B. 534.*

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In *Rex v. Marks Feigenbaum* [1] where the only corroboration of the evidence of the witnesses for the prosecution, who were undoubtedly accomplices, was the fact that the prisoner when confronted with having set them up to steal did not deny the charge, the Court of Criminal Appeal upheld the conviction. In the course of his judgment Darling J. said,

> " It amounted to this, that the prisoner was charged with inciting the boys to steal ; he was told specifically with what he was charged, and he was told the names of the boys whose detailed statement was read to him ; and in these circumstances he said not one single word. It appears to us that the Deputy-Chairman would have misdirected the jury if he had told them there was no corroboration of the boys' evidence."

There is also a local case exactly in point—*Meenatchipillai v. Sanmukam* [2]. Learned Counsel for the appellant submits that in that case there were other matters that provided the requisite corroboration. Undoubtedly there were, but de Sampayo J. took the view that the defendant's failure to deny the charge or to make any kind of protest was of itself sufficient corroboration.

In the present case, if the headman had merely informed the appellant of the woman's complaint and the appellant had said nothing, no inference of a tacit admission could be drawn. But the headman went further. He told the appellant that he believed the woman's story adding that ordinarily a woman would not make such a complaint unless it was true. Surely this was an occasion which demanded a denial or a protest. I am, therefore, unable to say that the learned Magistrate's inference that the appellant's conduct was corroboration of the truth of the applicant's story is not justifiable in law.

The appeal is dismissed with costs.

Appeal dismissed.

1953 *Present :* **H. A. de Silva J.**

A. R. A. HASSEN, Petitioner, *and* C. L. M. MARIKKAR *et al.*, Respondents

S. C. 689 and 465—Habeas Corpus Application

Muslim law—Custody of children—Preferential right thereto after mother's death.

Under the Muslim law the custody of a male child remains, at least up to his seventh year, with the maternal relations, the mother being dead, and, in the case of female children, until they are married.

HABEAS corpus application.

M. I. M. Haniffa, for the petitioner.

Izadeen Mohamed, for the 2nd respondent.

Cur. adv. vult.

[1] *14 Cr. App. R 1.* [2] *(1916) 3 C. W. R. 366.*

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March 31, 1953. H. A. DE SILVA J.—

The petitioner who is the father of the 3rd, 4th, and 5th respondents asks for their custody.

The petitioner's wife, A. L. M. Khadija Umma, the mother of these three children, died in July, 1950. The 1st respondent is petitioner's late wife's father. The 2nd respondent is a sister of petitioner's deceased wife. The 2nd respondent claims the custody of these three children on the ground that on the death of the children's mother she as a maternal relative has a preferential right to their custody. The learned Magistrate to whom this matter was sent for inquiry and report has after inquiry sent his report. In his report the Magistrate recommended that the custody of these three children be given to their maternal aunt, the 2nd respondent, in whose custody they are at present. The learned Magistrate after considering the facts placed before him and the arguments on the law has made his recommendation. The facts as found by him are these. The petitioner after his marriage to A. L. M. Khadija Umma in the year 1944 lived with his wife in the 1st respondent's house where the 2nd respondent too was living. The 2nd respondent married after two of the children of the petitioner were born. She too continued to live in her father's house with her husband. She has three children. The learned Magistrate has found further that these three children have been looked after well and that they have not been subjected to any indifferent treatment which has rendered their living with the 2nd respondent unhappy.

The petitioner is a business man who is away from his home during the day-time attending to his business and he proposes to place these children now in charge of his widowed sister. The eldest of the three children is a male and the other two are females, their respective ages at the date the petition was filed were 6, 4½ and 3 years. After his wife's death the petitioner was away for sometime in India. The 1st and 2nd respondents looked after the children from the date of their mother's death. The children are quite used to their maternal grandfather and maternal aunt. There appears to have been a dispute between the petitioner on the one side and the 1st respondent, his father-in-law, on the other regarding the estate of the late Khadija Umma which is said to be worth about Rs. 30,000. Hitherto the 1st and 2nd respondents have brought those children up at their expense and under their care. As far as the facts go it seems pretty obvious that the children are quite happy and are being well looked after by the 1st and 2nd respondents.

The next point one has got to consider is the legal position. Mr. Haniffa has contended that on the death of the mother the custody of the children should be with the father under the law applicable to Muslims. The parties are Muslims admittedly of the Shafee sect which is a sub-division of the Sunnis. He cited to me the following authorities amongst others :— *9 S. C. C. 42, 29 N. L. R. 136, 51 N. L. R. 509.* I may say that the case reported in *29 N. L. R.* does not help the petitioner. Lyall Grant J. held as follows : " Where a Muslim child was in the custody of her maternal aunt from her infancy till the ninth year, the Court will not restore the child to her father's custody, where it is of opinion that such

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a change would be to the detriment of the child's welfare ". The case on which Mr. Haniffa laid emphasis is the one reported in *9 S. C. C. 42*; there Burnside C.J., Clarence and Dias JJ., held that the father should be preferred to the maternal grandmother of an infant whose mother was dead. Dias J. has observed that in that case there was no proof as to the sect of Mohammedans to which the infant's parents belonged. On the other hand this authority has been considered and dissented from in the subsequent decisions of this Court. Vide *14 N. L. R. 225*. Wood Renton J. after considering the decisions in *9 S.C.C.* and the other decisions held that the Moors in Ceylon belong to the Shafee sect of Sunnis and that according to the Shafee law the custody of a girl remains with the mother not merely until puberty but till she is actually married. In the case of a boy the custody remains with the mother till completion of his seventh year at all events, and from thence until puberty he may place himself under either parent whom he chooses. Jayawardene A.J. in *32 N. L. R. 63* has come to a similar conclusion. In *Junaid v. Mohideen et al., 34 N. L. R. 141*, having considered most of the earlier authorities including the case reported in *9 S. C. C. 42*, Drieberg J. came to the conclusion that under the Muslim law the maternal grandmother of a girl is entitled to her custody on the mother's death in preference to her father.

The authorities seem to indicate that the custody of a male child at least up to his seventh year remains with the maternal relations, the mother being dead, and in the case of females until they are married.

The petitioner's application fails and it is dismissed. The custody of the children will remain with the 2nd respondent with whom they are at present.

Return papers to the Magistrate to communicate this order to the parties.

Application dismissed.

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1953 *Present* : **Nagalingam A.C.J., Gratiaen J. and Pulle J.**

E. L. SENANAYAKE, Appellant, *and* H. M. NAVARATNE *et al.*, Respondents

ELECTION PETITION APPEAL NO. 1 OF 1953

Election Petition 3 of 1952, Kandy

Election Petition—False declaration as to election expenses—Ground for unseating member—Time limit for presenting election petition—" Candidate "—Corrupt practice of printing and publishing handbills, &c., without disclosing addresses of printer and publisher—Corrupt intention—Necessary ingredient—" Publisher " —Statute with retrospective operation—Scope of its effect—Ceylon (Parliamentary Elections) Order in Council of 1946, ss. 3 (1), 58 (1) (c) and (f), 70, 73A, 77, 82A and B, 83 (1), 83 (1) (b) (i) and (ii), 83 (2)—Ceylon (Parliamentary Elections) (Amendment) Act, No. 26 of 1953, ss. 5, 6.

Held, by NAGALINGAM A.C.J. and PULLE J. (GRATIAEN J. dissenting), that knowingly sending a false return of election expenses, being a corrupt practice under section 58 (1) (*f*) of the Parliamentary Elections Order in Council of 1946, falls within the ambit of sections 77 (*c*) and 83 (1) (*a*). The act of making the declaration is an act done " in pursuance or in furtherance " of that corrupt practice, and no other act is necessary before a petition can be presented within the period of twenty-eight days prescribed in section 83 (1) (*a*). The definition of " candidate " in section 3 (1) is applicable to a candidate even after his election as member.

Held, by GRATIAEN J. and PULLE J. (NAGALINGAM A.C.J. observing to the contrary), that, under section 58 (1) (c) of the Parliamentary Elections Order in Council of 1946, a corrupt intention must be proved in order to establish the corrupt practice of publishing handbills, posters and placards without the name and address of the publisher appearing thereon.

The Parliamentary Elections (Amendment) Act, No. 26 of 1953, has, in the absence of express provision to that effect, no relevancy to the issues involved in determining an election petition appeal which was pending at the time it was passed. Scope of its retrospective operation considered.

Per GRATIAEN J.—Section 58 (1) (*c*) of the Parliamentary Elections Order in Council of 1946 requires both the "printer" and " publisher " to be disclosed in the documents specified. The term " publisher " is not confined in the context to persons professionally engaged in the publishing trade.

APPEAL from the order of the Election Judge in Election Petition, Kandy.

H. V. Perera, Q.C., with *G. E. Chitty, C. C. Rasaratnam, G. T. Samerawickreme* and *Izadeen Mohamed*, for the respondent appellant.

2——J. N. B 31310–1,592 (11/53)

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S. Nadesan, with *Stanley de Zoysa*, *A. I. Rajasingham*, *V. S. A. Pullenayagam*, *C. Mahadeva*, *A. K. Premadasa* and *J. Senathirajah*, for the petitioners respondents.

Cur. adv. vult.

December 18, 1953. NAGALINGAM A.C.J.—

This is an appeal from an order declaring the election of the appellant void on the ground that he was guilty of corrupt practices in that he—

(*a*) published handbills, posters and placards without the name of the publisher appearing thereon ; and

(*b*) knowingly made the declaration as to election expenses falsely.

The appellant contends that the finding of the learned Election Judge in respect of both these questions is erroneous.

I shall first deal with the second of the corrupt practices set out above. It is contended on behalf of the appellant as a matter of law that the corrupt practice of knowingly making a false return of election expenses is not a ground upon which either an election petition can be presented or a member unseated ; and this argument has been based mainly on the language of the proviso to sub-section (1) of section 83 of the Order-in-Council.

Now, the main provision of sub-section (1) of section 83 prescribes the time limit within which an election petition can be presented to Court, and it expressly declares in non-ambiguous language that an election petition must be presented within twenty-one days of the date of publication of the result of the election in the *Government Gazette*. In such a petition every ground set out in section 77 which would avoid an election would be capable of inclusion, whether committed before, during or after the election. It is necessary, however, to pause for a moment to consider the extent to which any corrupt or illegal practice committed after the election could be so included. The petition can include only matters which may have been committed prior to its presentation, so that only corrupt or illegal practices committed subsequent to the election but prior to the presentation of the petition may be set out in an election petition presented within the limit of twenty-one days in regard to corrupt or illegal practices committed after the election. Such a petition cannot, for instance, allege in advance a corrupt or illegal practice that may be committed after its presentation. In fact, if authority were necessary in support of this proposition it is to be found in the case of *Cremer v. Lowles* [1]. That was a case where an election petition had been presented in terms of section 6 of the Parliamentary Election Act, 1868,[2] within twenty-one days after the return of the election had

[1] *(1896) 1 Q. B. 504.*

[2] *31 & 32 Vict. c. 25.*

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been made to the Clerk of the Crown in Chancery embodying not only charges of breach of trust, undue influence and other specific charges but it also *set out in general terms that other corrupt and illegal practices before, during and after the election had been committed.* Particulars were ordered to be filed, and the petitioner furnished *inter alia* particulars of illegal practices alleged to have been committed in connection with the return of election expenses. The return of the election expenses was filed after the expiry of the period of twenty-one days allowed for the filing of the petition, and in fact after the petition itself had been filed. No application to amend the petition as permitted by the relevant provision of the English Statute corresponding to section 83 (2) of our Order-in-Council had been made. On an application to strike out the particulars alleged in relation to election expenses, Lord Halsbury L.C. in allowing the application observed :

" The objection is that the charges founded on the return of expenses are not covered by the petition, to which it is answered that the charges made by the petition are so general in their character that they may be so enlarged by the particulars as to make new and independent charges.

* * * *

The charges dealt with in this statute and of which particulars may be ordered to be given are necessarily the charges made by the petition, and it is really impossible to hold that charges founded on events *which have happened since the presentation of the petition can be said to be charges contained in the petition.*

* * * *

When once the matter is carefully looked at, it becomes clear that if the petitioner's contention is right the time limit of twenty-one days for the presentation is merely colourable, for if the trial of the petition did not come on for some months after the presentation, a member petitioned against in August might be unseated for an offence committed in October and treated as an offence charged in the petition."

In the same case, Lopes L.J. remarked that—

" it is quite right that matters which have happened after the election should be included in the petition. It is very different with regard to the matters which do not happen until after the presentation of the petition itself."

And Rigby L.J. indicated what the petitioner might have done in these words :

" The petitioner ought to have exercised the power of amending the original petition or presenting one founded on the offences complained of within the time limited for so doing."

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This judgment of the House of Lords on an appeal preferred to it is the last of the pronouncements on the subject and is a clear authority for the proposition that an offence committed after the presentation of the petition cannot be brought under a charge, however general in its character, made in the petition.

Furthermore, under the main provision of section 83 (1) not only c annot offences committed subsequent to the presentation of the petition be inquired into, but even offences committed prior thereto, where such offences have neither been set out in the petition nor been added to it by means of an amendment made within the time allowed for the presentation of the petition itself ; and that no amendment in respect of offences committed before the expiry of the period of twenty-one days could be permitted after that period will also be obvious.

In the *Norwich Case*[1] which came up before a Bench of two Judges, in regard to an application to amend the petition *after the expiry of twenty-one days* by alleging further grounds committed prior thereto, the Court refused the amendment, and Matthew J. observed that the Court—

> " had no power to allow of such an amendment after the lapse of twenty-one days, especially when introducing general charges of bribery, etc. The limitation of the period of twenty-one days was the basis of the Statute, and would be defeated if such amendments were allowed."

The case of *Maude v. Lowely*[2] is also to the same effect. That the case is one relating to Municipal Elections makes no difference, for the provisions (sections 3 and 13 of the Corrupt Practices (Municipal Elections) Act[3]) are similar to the corresponding provisions of the Corrupt and Illegal Practices Prevention Act[4], which relates to Parliamentary Elections. That was a case where it was sought to amend the petition after a period of twenty-one days by adding the names of new burgesses on the ground that they had been employed for payment and reward as canvassers for the purpose of the election and that their names were discovered subsequent to the presentation of the petition. The amendment was refused.

Another case relating to Municipal elections is that of *Clerk et al. v. Lowely*[5] where an application to amend the petition by adding a charge of treating committed prior to the expiry of the twenty-one days to a charge of bribery formulated in the petition was refused.

In view of the authorities the following propositions may be deduced from a consideration of the language of the main provision of sub-section (1) of section 83 :—

(1) Corrupt or illegal practices committed, whether before, during or after the election but prior to the expiry of the twenty-one days from the date of publication of the result of the election

[1] *(1885) 2 T. L. R. 273.*
[2] *(1874) L. R. 9 C. P. 165.*
[3] *35 & 36 Vict. c. 60.*
[4] *46 & 47 Vict. c. 51.*
[5] *(1883) 48 T. L. R. 762.*

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in the *Government Gazette* can form the subject of an election petition if such charges are included in a petition presented within twenty-one days.

(2) Such corrupt or illegal practices cannot be included in the petition even by way of amendment after the expiry of twenty-one days.

(3) Corrupt or illegal practices committed after the date of presentation of the petition cannot be made the subject of trial on such a petition, even by reference to the general terms in which the charges had been formulated in the petition.

While the main provision, it will be seen, deals exclusively with corrupt or illegal practices committed not later than twenty-one days after the date of publication of the result in the *Gazette*, the proviso to it extends the time for presenting the petition in respect of corrupt or illegal practices committed after the publication of the result and therefore also after the period of twenty-one days. Advantage cannot be taken under the extended period permitted by the proviso to present a petition in respect of a corrupt practice committed prior to the date of publication of the result. A corrupt practice committed prior to such date must, in view of what I have already stated, and can form only the subject of a petition presented within twenty-one days, although such a corrupt practice may be implemented subsequent to the expiry of the period of twenty-one days. To make my meaning clear, I should take as an illustration the case of a promise of a bribe made prior to election in order to induce the elector to vote. Now, such a promise though not carried into effect and implemented by payment of money is in itself a corrupt practice under section 57 (*a*) of the Order-in-Council. Such a promise can and may form the subject of an election petition presented within twenty-one days of the publication of the result, but it cannot be made the subject of a petition presented under the proviso to section 83 (1). If the promise were in fact implemented, say six months after the publication of the result of the election by payment of money to the voter to whom the promise was made, the payment itself is another and distinct corrupt practice and can properly form the subject of an election petition presented within the terms of the proviso. It is to be emphasized that the circumstance that the promise made anterior to the election is implemented by payment long after does not entitle a petition to be presented on the ground of the promise under the provisions of the proviso. What can in fact be the subject of a petition presented under the proviso as the corrupt practice is the payment of the sum of money, though undoubtedly it must have been in fulfilment of the earlier promise made.

It is necessary at this point to call attention to the requirement of the Order-in-Council that where payment is made to an elector on account of such elector having voted or refrained from voting, it must be established that the payment was made corruptly. In order to establish that the payment was made corruptly, it certainly would be legitimate to tender in evidence that a promise had been made anterior notwithstanding

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the fact that the anterior promise, which itself, as stated earlier, was a corrupt practice, had not been made the subject of an election petition. Such a case is the *Kiddeminster Case*[1]. That is a case where the petition was presented " not under the ordinary law, that is to say within twenty-one days, but under a subsequent part of the sixth section of the Parliamentary Elections Act, 1868 " (corresponding to the proviso to our section 83). There was evidence in that case that promises both anterior to the election and on the day of the election to treat had been made by the candidate and that after the election preparations were made for the treating and the candidate provided funds for such treating. The payment of the funds was the subject of the inquiry, and that was the corrupt practice before the Court. Evidence of the anterior promise was admitted to prove the corrupt motive in providing funds for treating. It may be that the simplest method of proving that payment of a sum of money by way of bribe for having voted in the election and therefore committed subsequent to the election was made corruptly is by giving evidence of some act anterior, such as a promise made anterior to the election, but *non constat* that that is the only method of proving that a bribe given subsequently to the election for having voted at the election had been made corruptly. If, for instance, two months after the declaration of the results a candidate expressly stating that he was rewarding a voter for having voted for him paid a sum of money, no further evidence would be necessary beyond his own statement to show that the payment was made corruptly. Such a case would be within the section, for it is a payment made corruptly for having voted.

To this effect is an observation of Grove J. in the *Poole Election Case*[2]. Indeed the provision itself is abundantly clear, and if the two elements of corruptness and payment for having voted can be established in any manner, the corrupt practice is complete. The *Brecen Case*[3] may be said to lay down the proposition in a contrary sense, but if it is carefully looked at, it will be seen that what the Judge did hold there was that there was no proof of the corrupt treating, and it was a case of treating not having been done with improper motive. The Judge who decided the *Brecen Case* (supra) in the subsequent *Harwich Case*[4] may be said to have taken the opposite view, but that case again if carefully scrutinised would only reveal that he had found as a fact that the payment of the money was made corruptly. There are other cases (*Carrick Fergus*[5] and *Coventry*[6]) which may be said to establish the proposition that the corruptness must be referable to something which preceded the election, but those cases cannot be said to lay down or to negative the proposition that where the corruptness can be shown by proof of circumstances arising entirely subsequent to the declaration of the polls that the offence of corrupt practice is not committed.

It is indisputable that there are corrupt and illegal practices which can only come into existence after the expiry of the said twenty-one days, and that they need not necessarily have any connection with anything done before the expiry of that period cannot also be doubted.

[1] *(1874) 2 O.'M & H. 170.*
[2] *2 O'M. & H. 123.*
[3] *(1871) 2 O'M. & H. 43.*
[4] *(1880) 3 O'M. & H. 70.*
[5] *3 O'M. & H. 90.*
[6] *1 O'M. & H. 106.*

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For instance, payment of money by an election agent in respect of expenses legitimately incurred in the conduct of an election after the expiry of twenty-eight days after the day on which the candidate is declared elected is an illegal practice, and such an illegal practice can only have its nativity after the expiry of the twenty-one days allowed for presenting the petition; or, to take an instance of a corrupt practice, a false declaration in regard to election expenses need only be made within thirty-one days of the publication of the result of the election, and in very many cases such a declaration would in practice be made after the expiry of the twenty-one days limited for the presenting of an election petition under the main provision.

Now, where it is sought to question the return of the candidate on the ground of an illegal practice as instanced above, paragraph (*b*) (ii) of the proviso would permit of such a petition being presented within twenty-eight days after the date on which the illegal payment was made. I can see nothing in the language of paragraph (*b*) (ii) for holding that such an illegal practice is excluded from being made the subject of an election petition. If such were the intention of the Legislature, it could very well have said so, and that quite easily too, but it has not chosen to do so.

It seems to me that paragraph (*b*) (ii) of the proviso would operate if the following are established :—

(1) that the petition questions the return of the candidate on the ground of an illegal practice ;

(2) that a specific allegation of payment of money or other act is made therein ;

(3) that the payment or act alleged should have been made or done after the date of publication of the result of the election ;

(4) that the payment or act was made or done in pursuance or in furtherance of the illegal practice alleged.

If these elements are proved, then an election petition may be presented within twenty-eight days of the date of payment or of the other act.

As this paragraph requires that the payment or act should have been made or done in pursuance or in furtherance of the illegal practice alleged, it is said that the illegal practice must be something distinct from the payment or act made or done, and must precede such payment or act. It is true that the term " in pursuance of " may be used to show the continuation of a process, scheme or act, but it can and does also mean the carrying out the process, scheme or act, and one single action may carry out and at the same time bring into and disclose the existence of the process, scheme or act. For instance, a man in pursuance of committing theft may pick the pocket of another. Here, the picking of the pocket would in itself be the sole action in pursuance of committing

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theft and itself gives birth to and discloses the offence. It will be idle to contend that the theft itself must be something distinct from the act of picking the pocket. The phrase "in furtherance of" has a similar meaning in this context. It means " in advancement, in execution or in commission of ".

In the case of the illegal practice instanced, the unauthorized payment itself is made in pursuance or in the carrying out of the illegal practice, and brings in fact the illegal practice into existence. It is said that if this were the meaning, the words " in pursuance or in furtherance of the illegal practice " may well have been omitted. One might test this. If the paragraph were written omitting the words " in pursuance or in furtherance of the illegal practice ", it would run as follows, if one confined one's attention to the case of the candidate alone :

> " If the election petition specifically alleges payment of money or other act to have been made or done since the said day by the member whose election is questioned, the petition may be presented at any time within twenty-eight days."

It would be apparent on a reading of this truncated paragraph that the payment of money or other act need have no relation to or connection with the illegal practice upon which the petition may be presented. It is not any payment or act made or done that is intended to enlarge the time for presentation of the petition, but only a payment or act connected with the illegal practice alleged. The words in question have, therefore, been employed, it may be said, for the sake of showing the intimate connection between the payment of money or other act and the illegal practice that is alleged. In fact, the phrase " in pursuance or in furtherance of a corrupt practice " has been understood not in the sense of one act following upon another but merely as the carrying out of the act itself by English Judges.

Lord Coleridge C.J. in *Maude v. Lowely* (supra) dealing with a similar provision uses language which clearly establishes what is the proper meaning to be attached to these words :

> " The enactment is distinct that the petition must be presented within twenty-one days except in the one specified case of an offence (corrupt practice) not discovered since the election but which has taken place since the election, and in such case the petition may be presented at any time within twenty-eight days not after the discovery of the offence *but from the taking place of that which constitutes the offence.*"

It is extremely singular that in England, the home of election law, never has an attempt been made to contend, judging by the dissertations of text books writers or reported cases, that the phrase " in pursuance or in furtherance of a corrupt or illegal practice " must be construed as denoting the conception that one act must be shown to follow upon another.

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I now come to a consideration of paragraph (*a*) of the proviso, which is the provision that governs the present appeal. The language of this paragraph is similar to the language of paragraph (*b*) (ii), and it is difficult to say that a different construction or different approach becomes necessary to construe it. In regard to this paragraph of the proviso, the elements necessary to be established are :

(1) that the petition questions the return upon the ground of a corrupt practice ;

(2) that a specific allegation of payment of money or other act is made therein ;

(3) that the payment or act made or done should have been made or done subsequent to the date of publication of the result of the election ;

(4) that the payment of money or act was made or done in pursuance or in furtherance of such corrupt practice.

If these exist, then a petition may be presented in terms thereof within twenty-eight days after the date of payment or act made or done.

It is not denied that the corrupt practice in regard to the declaration of election expenses consists in making the declaration knowingly and falsely. Can it then be said that the act of making the false declaration knowingly is not in itself the act done in pursuance of or in carrying out the corrupt practice ? Surely not. Indeed, given one act which in itself is a corrupt practice, what need is there for a subsequent act ? The first act is complete in itself as a corrupt practice. No subsequent act can be of the slightest aid in regard to what is already a corrupt practice. In fact, if any subsequent act be done having any connection with the prior corrupt practice, it will in itself be a corrupt practice giving rise to a new right to present another petition. I do not think that some other act than the making of the false declaration is necessary before a petition could be presented under the proviso. Besides, insistence upon such a requirement as is contended for would be to do violence to the plain words of the Order-in-Council. Section 77 expressly states that the election of a member *shall be* declared void on proof of the commission of a corrupt practice in connection with the election. The words " in connection with " are plain in themselves, and mean " in relation to ". Section 58 specifically declares that the making of a false declaration as to election expenses knowingly is a corrupt practice. That such a declaration is made in connection with the election no one will gainsay. Under paragraphs (*a*) and (*b*) of the proviso to section 83 (1), the ground for avoiding an election remains a corrupt or illegal practice even as under a petition presented within twenty-one days under the main provision. But what is further required to be set out under the proviso is the specific act which constitutes the corrupt or illegal practice but which in the case of a petition presented within twenty-one days need not so be set out. It seems to me that the object of the Legislature in

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requiring the specific act to be set out is that there should be an averment in the petition presented under the proviso showing that the petition is presented within the time allowed thereunder. It could not have used the term "corrupt or illegal practice" because both those are generic terms and may include various acts each one of which would amount to a corrupt or illegal practice, and it is conceivable that in a petition presented under the proviso several acts of payment each of which constitutes an act of bribery may all be alleged in the same petition provided all those acts were committed prior to twenty-eight days of the date of presentation of the petition.

Gunasekara J. in *Kunasingham et al. v. Ponnambalam* [1] seems to have thought that the filing of the return and declarations was a separate act done in pursuance or in furtherance of the corrupt practice of making false declarations. Swan J. in *Chelvanayakam v. Natesan* [2] arrived at a view more or less analogous and held that the actual preparation of the false return was the corrupt practice, and the transmission of that return to the election officer was the other act done in pursuance or in furtherance of the corrupt practice. It is obvious that the learned Judges clearly arrived at the results they did, for no one reading the provision can help but arrive at the conclusion that the making of a false declaration knowingly was a corrupt act which the Legislature had intended to declare to be a ground for avoiding a seat. A contrary result would have evoked the remark that the statute had been subjected to a construction which would "suppress the remedy and advance the mischief". I do not think they had the benefit of the arguments advanced before us, and I am satisfied that the true construction is that the phrase "in pursuance or in furtherance of the corrupt practice" merely refers to the carrying out of the act which constitutes the corrupt practice and not that there should be a link or connection between the corrupt practice as an isolated act, and the payment of money or other act, as another isolated act.

It was also suggested that an act done in its entirety subsequent to the election cannot form the subject of a petition presented under the proviso. In support of this proposition reference was made to paragraph (*d*) of section 77, which provides that the engagement of a person as an election agent who had been found guilty of a corrupt practice is a ground for unseating a candidate, and therefore could be made the subject of an election petition presented within twenty-one days ; based on this provision the question has been asked whether the employment of such an election agent after the expiry of twenty-one days of the date of publication of the result for the purpose, say of making the return of election expenses, could be made the subject of the petition under the proviso, and has been answered in the negative, which is the proper answer to it. From this it has been contended next that the making of a false declaration of expenses knowingly cannot similarly form the subject of a petition under the proviso, as the entirety of that act too is performed subsequent to the election. I think it is a clear case of non-

[1] *(1952) 54 N.L.R. 36*

[2] *(1952) 54 N.L.R. 304*

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sequitur. In the former case why an election petition cannot be presented under the proviso is that not because the employment takes place after the election but because the Legislature has not thought it fit to make such an engagement a corrupt or illegal practice, and therefore that act does not fall within the proviso ; but in the latter case the Legislature expressly states that knowingly making a false return is a corrupt practice and the act falls expressly within the terms of the provisions contained in the proviso. The Legislature may have its own reason for not declaring the former case a corrupt or illegal practice, but that is no indication that an act which it declares to fall within the proviso is therefore not to be treated as coming within it. Election petitions have been presented in England to have an election avoided on this very ground of making a false declaration of expenses knowingly. It does not appear ever to have been contended there that the fact that such declaration is made subsequent to the election is a ground for holding that the election cannot be avoided. See the *Oxford* [1] and *Berwick upon Tweed* [2] cases, where the elections were avoided *inter alia* on the ground that the election agent had made a false declaration of expenses.

Another line of argument was advanced based upon paragraph (*c*) of section 77 of the Order-in-Council. It was urged that the return of election expenses was made by the appellant after his election as a member and that therefore the return of election expenses was made by him not as a candidate but as a member, and that he was therefore beyond the pale of this provision, which refers to a candidate and not to a member ; in other words that section 77 (*c*) must be restricted to acts done by a candidate *qua* candidate. This argument was sought to be reinforced by reference to the definition of the term " candidate ". " Candidate " is defined in the interpretation section 3 as meaning a person who is nominated as a candidate at an election or is declared by himself to be or acts as a candidate for election to any seat of the House of Representatives. It is true that this definition does not refer to a person who has been elected as a member, as in the English Act. But does it follow that the definition in the Order-in-Council does not apply to a person who has been elected a member ? Can it be said that on election he divests himself of his character of a person who is nominated as a candidate at election or is declared by himself to be or who acts as a candidate for election to any seat of the House of Representatives ? The obvious answer to the question is " No ". In fact there are other sections in the Order-in-Council where a member after his election has been referred to as a candidate, for instance section 70(3). Unless there is express provision declaring that a candidate on election shall cease to be termed a candidate, the definition continues to apply to a candidate even after his election as member, for he retains all the characteristics of a candidate as set out in definition, but what may, however, be said is that he has since acquired an added qualification in that he has been elected a member, which does not in any way detract from the character of his being a candidate. I do not think, therefore, that there is any substance in this argument.

[1] *7 O' M. & H. 49.*

[2] *7 O' M. & H. 1.*

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An attempt was made to show that the Election Judge has misdirected himself on the facts and that such misdirection amounts to a misdirection in law. But a narration of the facts accepted by the learned Judge establishes most conclusively that his finding that the appellant was guilty of knowingly having made the declaration in regard to election expenses falsely is unassailable.

I therefore arrive at the following results :—

(1) that the appellant did knowingly make a false declaration of election expenses ;

(2) that the making of such declaration is a corrupt practice under section 58 of the Order-in-Council ;

(3) that such corrupt practice is a ground for avoiding the election.

In view of the conclusion I have reached on this charge, I do not think it is necessary or profitable to enter upon a discussion of the arguments submitted in respect of the first charge, which would at this stage be purely of an academic character. Nor do I think it necessary that the appellant should be afforded an opportunity of placing evidence before Court in terms of section 73 (*a*) of the Order-in-Council, for whatever view one may take of the first charge, the appeal as a whole must be dismissed in view of the finding in respect of the second charge. I should, however, wish to make this observation that I am in agreement with the finding of the learned Election Judge even in respect of the first charge.

For the foregoing reasons, I hold the appeal fails. Having regard to the view of the majority, the order is that the appeal is dismissed with costs, which with the concurrence of my brother Pulle J. I fix at five hundred guineas.

GRATIAEN J.—

This appeal was filed on 18th February 1953 against a determination invalidating the appellant's election as a Member of the House of Representatives for the Kandy Electoral District. The grounds of the decision were as follows :—

(1) that he had committed a corrupt practice within the meaning of section 58 (1) (*c*) of the Ceylon (Parliamentary Elections) Order-in-Council 1946 by publishing certain advertisements, handbills, placards and posters relating to the election " which did not bear upon (their) face the names and addresses of (their) printers and publishers " ;

(2) that he had also committed a corrupt practice within the meaning of section 58 (1) (*f*) by " knowingly making the declaration as to his election expenses required by section 70 falsely ".

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He complains that the decision against him on each of these allegations was contrary to law.

As to the alleged contravention of section 58 (1) (*c*), the learned election judge held that the appellant had himself " published " the documents concerned for the purposes of his election campaign, and that none of them bore his name or address as that of its " publisher ". The learned judge did not record a finding that the acts complained of were in any sense committed " corruptly " nor is it suggested that such a finding would have been justified ; he decided, however, that a corrupt intention need not be established as an element of the offence. The appellant challenges the correctness of this interpretation.

There are two additional issues of law which can conveniently be disposed of first. It has been argued that section 58 (1) (*c*) refers only to documents in which the names and addresses of both the " printer " and of the " publisher " are absent, and that there can be no contravention if the name and address of *at least one of them* had been duly inserted. Putting it at the lowest, suggested Mr. H. V. Perera, the words reasonably admit of either construction, so that the appellant is entitled to the " benefit of the obscurity "—*Binns v. Wardale* [1].

I readily accept the proposition that " a man is not to be put in peril upon an ambiguity "—*per* Lord Simonds in *London & N. Eastern Rly. Co. v. Berriman* [2], and *Howell v. Falmouth Boat Construction Co. Ltd.* [3], but, in my opinion, section 58 (1) (*c*) clearly requires the identity of both the " printer " and the " publisher " to be disclosed in printed documents of the description specified. I am also satisfied that, upon the undisputed evidence led at the trial, the appellant was in fact and in law the " publisher " of the documents concerned. When literature of this kind is distributed for promoting an election campaign, prospective voters are entitled to know whether it was released for publication by the candidate personally or by someone else ; and if by someone else, who that person was—*Schofield : Parliamentary Elections* p. 30. The legislature is concerned, for obvious reasons, to discourage election literature from anonymous, pseudonymous or pretended sources. I accordingly reject the further submission that the term " publisher " must be confined in this context to persons professionally engaged in the publishing trade. The language of the section does not justify such a purposeless distinction. Election literature always has a " publisher ".

So far, then, the judgment under appeal is unassailable. But was it correctly decided that " a corrupt practice " within the meaning of section 58 (1) (*c*) can be established without proof that a corrupt intention had accompanied the commission of the acts complained of ? In the present case, the " offending " documents were both genuine and innocuous, so that the allegation against the appellant clearly fails unless the words of the section compel one irresistibly to the conclusion that they are words of absolute prohibition—in which case a person

[1] (1946) *K. B. 451 at 457.* [2] (1946) *A. C. 278.*

[3] (1951) *A. C. 837.*

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commits the prohibited acts at his peril unless (in this country) he can bring himself within the general exceptions prescribed by section 69 or 72 of the Penal Code—*Weerakoon v. Ranhamy* [1].

Before I examine this issue it is necessary to decide whether the law which applies to this appeal has been altered in any relevant respect since the appellant exercised his right to challenge the adverse determination of the learned election judge. On 25th April 1953, the Ceylon (Parliamentary Elections) (Amendment) Act No. 26 of 1953 passed into law. It amends section 58 (1) (*c*) by limiting its scope to prohibited acts committed by candidates and their election agents, and adds the following proviso :—

> " 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 satisfies the judge that the omission of the names and addresses referred to in section 58 (1) (*c*), or any such name and 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."

Section 5 of the amending Act declares :—

> " 5. The amendments made in the principal Order by this Act shall be deemed to have come into force on the first day of January, 1952, and accordingly, but subject to the provisions of sub-section (6) of section 6 of this Act, the principal Order shall—
>
> (*a*) for all purposes be deemed on and after that day to have had effect, and have effect, and
>
> (*b*) be applicable in the case of any legal proceedings pending on the date of the commencement of this Act,
>
> in like manner as though that Order had on that day been amended in the manner provided by this Act ".

Section 6 permits a candidate whose election had previously been set aside for a contravention of section 58 (1) (*c*)—*i.e.*, in its unamended form—to file an appeal or, if he had already done so, an additional appeal against that determination ; and (for the pruposes of that appeal) to lead evidence if he so desires which would have been admissible at the original trial *if section 73A had at that time been on the statute book.* This novel procedure affords the unseated candidate a ground of exoneration which had not previously been available to him.

[1] *(1921) 23 N. L. R. 33.*

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The appellant has in fact taken the precaution of filing a second appeal (under section 6) which need only be considered if his earlier appeal should fail. Admittedly, the special provisions of section 6 have no application to the earlier appeal.

The question immediately arises whether the amending Act (which undoubtedly has retroactive operation in many respects) has any relevancy to the determination of the earlier appeal. To what extent does section 5 give retrospective effect to the provisions of the amending Act ? The new amendments certainly affect proceedings which were pending before election judges or district judges, and I understand that they were in fact applied in one such case. I concede also that the present appeal dated 18th February 1953 cannot (subject to the important issue of relevancy) be excluded from the category of " legal proceedings pending on the date of the commencement of this Act " within the meaning of section 5 (*b*) ; nevertheless, the issue of relevancy must ultimately depend upon the true scope of our appellate functions under the Order-in-Council in relation to appeals filed before the amendment passed into law.

Our jurisdiction under section 82B is " strictly appellate " in its nature—that is to say, the Supreme Court is, for the purposes of an appeal filed under section 82A, empowered only to decide whether the determination of the election judge was right or wrong on matters of law *at the time when he arrived at his decision*. In other words, the Court does not possess the wider jurisdiction which is involved in the disposal of appeals " by way of re-hearing ".

The distinction between the functions of a Court vested with a strictly appellate jurisdiction on the one hand, and of a Court empowered to dispose of appeals " by way of re-hearing " on the other, is of special importance when fresh legislation (*even if it has some retrospective effect*) has been passed after the date of the judgment of the court of first instance but before the appeal against that judgment has been concluded. Jessel M.R. pointed out in *Quilter v. Mapleson* [1] that " on an appeal, strictly so-called, such a judgment can only be given *as ought to have been given at the original hearing* ", so that subsequent legislation, even though retroactive in other respects has, *in the absence of express provision to that effect*, no relevancy at all to the precise issues which arise in determining a pending appeal ; on the other hand, " a court of re-hearing " is empowered " to make such an order *as ought to be made according to the present state of the law* ", that is to say, taking into account all relevant material including the impact of legislation passed after the date of the judgment under appeal. The rule enunciated by Jessel M.R. was followed with approval by the Privy Council in the Ceylon case of *Ponnammah v. Arumugam* [2], where the Board refused to entertain " any appeal other than one strictly so-called, in which the question is whether the order of the Court from which the appeal is brought is right *on the materials which that Court had before it* ". In a more recent judgment, Lord Wright has observed that the rule in *Quilter's case* (*supra*) does not

[1] *(1882) 9 Q. B. D. 672.* [2] *(1905) A. C. 383.*

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generally vest even Courts of re-hearing with power to apply subsequent changes in the law to issues affecting matters of " substantive right " as distinct from mere " matters of procedure or remedies "—*In re a Debtor* [1].

It might be asked whether the words " *shall be deemed to have come into force on the first day of January 1952* " and " *shall be deemed for all purposes on and after that day to have had effect* " in section 5 of the amending Act are sufficiently comprehensive to distinguish the present case from those decisions. A complete answer is to be found in *Ingle v. Farrard* [2], where the House of Lords discussed the implications of identical words appearing in a taxing statute. The issue was whether (in view of the later retroactive enactment) a person could be served with an additional assessment under section 125 of the Income Tax Act, 1918, of England, on the basis that he had been " *undercharged* " in an earlier (but concluded) assessment.

Lord Cave, Lord Shaw, Lord Sumner and Lord Carson (Lord Atkinson alone dissenting) decided in the negative. " Let it be assumed in favour of the Crown," explained Lord Cave, " that for all the purposes of the additional assessment the (subsequent Act) must be applied, and that the (assessee) *ought to be and always ought to have been* assessed to tax in respect of the sum mentioned in that assessment ; *even then you have only got half-way.* You have still to consider whether on that footing there had been an undercharge in the earlier year, and in so doing *you must apply to the assessment of that year the law which obtained when it was made* ".

Similarly, it seems to me that, even after giving the fullest retrospective effect to the provisions of the amending Act, we are still hedged in by the limitations placed by law upon the functions of judges exercising a " strictly appellate jurisdiction " ; for in that capacity we are empowered only to decide whether the learned election judge's interpretation of section 58 (1) (*c*) in his determination dated 13th February 1953 *was right or wrong in law at that date.* The amendments which were not passed until 25th April 1953 did not represent the law which the learned judge was under a duty to apply at any stage of the election trial.

I accordingly proceed to examine the question whether or not the learned election judge was wrong in law in deciding *on 13th February 1953* that a " corrupt intention " was not an ingredient of the " corrupt practice " penalised by section 58 (1) (*c*).

The Parliamentary Elections Act, 1868, The Ballot Act, 1872 and the Corrupt and Illegal Practices Prevention Act, 1883 of England were manifestly used as models by the draftsman of the Ceylon (Parliamentary Elections) Order-in-Council, 1946. Any substantial variation therefore, between a provision in the local enactment and the corresponding provision in the English statute in the same context must have been introduced designedly.

[1] *(1936) 1 Ch. 237.* [2] *(1927) A. C. 417.*

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Section 18 of the English Act of 1883 prohibits the "printing or publishing etc." at an election of "bills, placards, etc." which do not bear upon the face thereof the names and addresses of the "printer and publisher", and provides as follows :—

> "18. Every bill, placard or poster, having reference to an election shall bear upon the face thereof the name and address of the printer and publisher thereof; and any person printing, publishing or posting, or causing to be printed published or posted, any such bill placard or poster as aforesaid, which fails to bear upon the face thereof the name and address of the printer and publisher, shall, if he is a candidate, or the election agent of the candidate, be guilty of *an illegal practice*, and if he is not the candidate, or the election agent of a candidate, shall be liable on summary conviction to a fine not exceeding one hundred pounds."

Section 58 (1) (*c*) of the local enactment, which, be it noted, had no counterpart in the earlier Ceylon (State Council Elections) Order-in-Council, 1931, is to the following effect :—

> "Every person who—
>
> .....
>
> (*c*) 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 . . . .
>
> *shall be guilty of a corrupt practice* . . . ."

It will be at once observed that what in England constitutes only an "illegal practice" (against which relief may be, and according to *Rogers p. 364* "has invariably been granted") was for parliamentary elections in Ceylon declared to be a "corrupt practice". The commission of a "corrupt practice" automatically involves in either country drastic penalties and disqualifications including a prolonged deprivation of important rights of citizenship.

The learned election judge has construed section 58 (1) (*c*) as imposing an absolute prohibition *irrespective of whether the infringement was accompanied by "a wicked mind"*—so much so that a person who, howsoever uncorruptly, distributes at an election a perfectly innocuous placard or pamphlet (but omitting the name and address of its printer or its publisher) must inevitably (*unless he can bring himself within the limited protection afforded by sections 69 and 72 of the Penal Code*) suffer the same consequences of "guilt" as someone who from corrupt motives had interfered with the holding of a fair Parliamentary election. If

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this be the interpretation which inevitably emerges from the words and the spirit of the Order-in-Council, we must of course reluctantly adopt it, however repugnant the result might be to our own notions of what is reasonable and just.

The only previous occasion on which it had become directly necessary for a judge to construe section 58 (1) (*c*) in order to decide whether or not an election should be set aside, was in *Perera v. Jayawardene*[1]. The successful candidate was admittedly answerable for the distribution by an "agent" of a number of election pamphlets each of which bore on its face the name of the "printer", but not of the "publisher". No corrupt intention on the part of either the candidate or his agent accompanied the acts complained of, which (so Windham J. was satisfied) had proceeded from their erroneous interpretation of the actual requirements of the section. Windham J. held that in those circumstances a contravention of section 58 (1) (*c*) was not established. He applied the analogy of similar rulings of the English Courts which construed the definition of the "corrupt practice" of "personation" as involving by necessary implication the special mental element of a "corrupt intention"—*The Gloucester Case*[2], *The Stepney Case*[3] and *The East Kerry Case*[4]. The draftsman of the Ceylon Order-in-Council must be assumed to have been aware of the implications of these authoritative interpretations when he took over in sections 54 and 58 (1) (*a*) of the local enactment the same definition of "personation" as that obtaining in England.

According to the *ratio decidendi* of the English decisions followed with approval by Windham J., the words "a corrupt practice means" or "shall be a corrupt practice" or any similar words are by themselves sufficient to enact that the special mental element of a "corrupt intention" is an ingredient of any "corrupt practice" prohibited by statute in relation to Parliamentary elections. The principle can be very briefly explained. As far as a "corrupt" election malpractice is concerned, that very adjective, and the stigma which it conveys, speaks for itself. In some "corrupt practices", the special mental element is sufficiently particularised in the enactment itself; in others, it must be read into the words of definition by necessary implication.

Mr. Nadesan, in the course of his very able argument, suggested that, if closely examined, these judgments had been misunderstood by Windham J. He pointed out that, according to the classic decisions in *R. v. Prince*[5], *R. v. Tolson*[6], and *Bank of New South Wales v. Piper*[7], penal statutes in England are divided into three distinct categorie :

(1) those in which the definition of an offence specifies (either expressly or by necessary intendment) a particular mental element as one of its ingredients which the prosecution must establish as part of its case ;

[1] *(1948) 49 N. L. R. 241.*
[2] *(1873) 2 O'M. & H. 59.*
[3] *(1886) 4 O'M. & H. 34.*
[4] *(1910) 6 O'M. & H. 58.*
[5] *(1875) 2 C. C. R. 154.*
[6] *(1889) 23 Q. B. D. 168.*
[7] *(1897) A. C. 383.*

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(2) those in which the definition does not specify such a special mental element, and the context clearly indicates that the words of the statute are words which absolutely penalise the prohibited act ;

(3) those in which no mental element is specified as an ingredient of the offence, but the seemingly unqualified words of the statute should be construed as shifting the burden of proof by requiring the accused person to negative criminal intent.

Mr. Nadesan suggested that the offence of " personation " was in truth construed by the English Judges as an instance of the third of these categories ; and that in each of the cases quoted by Windham J. the person " accused " was exonerated only because he had satisfactorily discharged the burden of negativing *mens rea*. I am quite unable to accept this argument. In the *Stepney case* (supra) Denman J. expressly ruled that personation was " an offence which involves corruptness " ; that " it is thoroughly understood election law that unless there be corruption and a bad mind and intention in personating, it is not an offence ", and that " there is to be added to the offence of personation a corrupt intention ". Similarly, Field J. pointed out that " corruptness is the essence of the disqualification under section 36 of the Act of 1883 ", and he regarded the inclusion of personation within the category of " corrupt practices " as tantamount to the addition of the adverb " corruptly " in its definition. This decision was followed with approval by Cave J. and Vaughan Williams J. in *the Finsbury case*[1]. Finally, in *the East Kerry case* (supra), Kenny J. said, " In all charges of personation, there are two matters we should be convinced of before reporting : *first*, that someone not on the register had voted or attempted to vote in the name of a registered voter, and *secondly*, that this was done *wilfully and corruptly* . . . . "

The correctness of these unqualified propositions has never been questioned in England, and it would be very wrong indeed for me to presume at this stage to place a different interpretation upon identical words appearing in an Order-in-Council applicable to Ceylon.

The ruling in *Jayawardene's case* (supra) possesses the special merit of having reached a just and reasonable conclusion without (as far as I can judge) violating any recognised rule prescribed for the interpretation of statutory enactments. It is unfortunate, therefore, that the judgment was not acknowledged as having finally settled the law—leaving it to the legislature to change the language of section 58 (1) (*c*) if it thought that the public interest necessitated a more rigorous interpretation. We should not forget that the Parliament of Ceylon has proved very alert in stepping in whenever election judges have pronounced embarrassing rulings which are considered contrary to the assumed intendment of this particular Order-in-Council. Observe, for instance, the Parliamentary Elections (Amendment) Act, No. 19 of 1948, which was hurriedly passed to confer retrospectively a right of appeal against an election judge's

[1] *(1892) 4 O'M. & H. 171*

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ruling in the *Kayts case—Kulasingham v. Thambiaiah* [1], and (for reasons which to to my mind are more obscure) the amending Act No. 26 of 1953, which came into operation while the present appeal was pending.

At the general election of 1947, not a single successful candidate was unseated for a contravention of section 58 (1) (*c*) on the basis of an interpretation contrary to that given in *Jayawardena's case* (supra); and candidates at the recent general election could not have been blamed for expecting immunity from charges under that section unless they or their agents were proved to have acted corruptly. I consider, therefore, that this was a context which almost clamoured for the application of the rule of *stare decisis*. Nevertheless, the learned election judge rejected the interpretation of Windham J. and considered himself free to follow certain *obiter dicta* of Dias J. in *Saravanamuttu v. de Mel* [2], and of Basnayake J. in *Aluvihare v. Nanayakkara* [3].

In *de Mel's case* (*supra*) one of the grounds for setting aside the impugned election was that various acts of "personation" punishable under section 58 (1) (*a*) had been abetted by the successful candidate or, in some instances, committed by his agents with his knowledge and consent. Dias J. held as a fact that these offences had been committed in pursuance of a conspiracy (to which the candidate was privy) to procure personators to vote for him at the election. Upon that finding, the ingredient of a corrupt intention stipulated by the completely relevant English decisions cited by Windham J. was conclusively established, but Dias J., in making a "passing reference" to *Jayawardene's case* (supra), "doubted" whether Windham J. had not inadvertently ignored an earlier authoritative ruling of this Court in *Weerakoon v. Ranhamy* [4].

In *Nanayakkara's case* (*supra*) the commission of an offence under section 58 (1) (*c*) had been alleged against the successful candidate and his agents, but was not established by the evidence. In the circumstances, the issue of "corruptness" did not arise. Nevertheless, Basnayake J. also pronounced an *obiter dictum* expressing the view that Windham J.'s ruling was in conflict with *Weerakoon v. Ranhamy* (supra).

I have searched in vain for some indication that Windham J. misunderstood or gave expression to any opinion which came into conflict with *Weerakoon v. Ranhamy* (supra). Bertram C.J. had there conceded in his principal judgment that in Ceylon, as in England, "where a particular state of mind is a necessary ingredient of a (statutory) offence the (prosecution) must prove that that state of mind exists" (p. 42); he then proceeded to discuss the extent to which the law of Ceylon departs from the English law relating to an entirely different category of statutory offences—namely, those containing words of "absolute and unqualified prohibition . . . ." (p. 44). The judgment of Windham J. demons-

[1] (*1948*) *49 N. L. R. 505.*
[2] (*1948*) *49 N. L. R. 529.*
[3] (*1948*) *50 N. L. R. 529.*
[4] (*1921*) *23 N. L. R. 33.*

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trably appreciated this distinction, and it was only upon an analysis of "*the intention of the legislature to be collected from the language of the statute itself*" that he declared :

> "The legislature could not have intended, in using the language of section 58 (1) (*c*), to say that the mere fact of doing a thing of this kind was a (corrupt practice) which was followed by such serious consequences".

In other words, he construed the section in relation to its context and according to "the fair, common-sense meaning" of the language which was used.

The view expressed by Windham J. is supported by the *ratio decidendi* of the English "personation" cases ; and it thereby respects the rule that a long-established interpretation placed upon an Imperial statute by the English Courts should be followed in a case where similar words are used in a later statute applicable to Ceylon. This doctrine applies in the Colonies, and we were recently reminded by the Privy Council that it should also be observed by "the Courts of a member of the British Commonwealth of Nations"—*Cooray v. The Queen*[1]. Indeed, the principle is especially compelling when a Ceylon Court is required to construe an enactment which was passed by the Head of the Commonwealth on the advice of the Privy Council. If, therefore, section 58 (1) (*a*) must be read as importing a "corrupt intention" as an essential element of the "corrupt practice "of personation, it is almost facetious to imagine that the legislature could have intended section 58 (1) (*c*) to be interpreted as if it read :

> "Every person who, *whether or not he had any corrupt intention in so doing*, prints, publishes etc. any advertisement etc. which refers to any election and which does not bear upon its face the names of the printer and publisher, *shall be guilty of a corrupt practice*, and shall, on conviction by a District Court, *be liable to a fine not exceeding Rs. 500 or to imprisonment of either description for a term not exceeding 6 months ;* and shall by conviction become *incapable for a period of 7 years of being registered as an elector or of voting at any election or of being elected or appointed as a Senator or Member of Parliament*".

I refuse to believe that the innocent distribution of innocuous election pamphlets was, by the will of His Majesty in Council in 1946, denounced in the same manner and to the same extent as prohibited acts corruptly committed in order to tamper with the purity of a Parliamentary election. The section can reasonably be read, and therefore ought to be read, as involving a corrupt intention—for instance, if a candidate anonymously distributes pamphlets defamatory of his opponent in order to influence the minds of voters ; or if he resorts to otherwise legitimate but anonymous propaganda so as to suppress evidence of excessive expenditure in promoting his election. These examples are not of course exhaustive,

[1] (1953) 54 *N. L. R.* 409 at 415.

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It is perfectly true that, in the interests of public safety, health or morals, behaviour of a certain kind is sometimes prohibited absolutely by statute " not for the purpose of punishing the vicious will but in order to put pressure upon the thoughtless and inefficient to do their whole duty "—*Pound*: *The Spirit of the Common Law* p. 52. But why should we suppose that merely technical infringements of the prohibition contained in section 58 (1)(c) had been intended to be so sternly suppressed that an innocent distributor of an election pamphlet exhibiting only its printer's name must be deprived of his cherished civic rights even though he meant no harm of any kind? The exceptions contained in sections 69 and 72 of the Penal Code would not always suffice to afford a valid defence in such a case; indeed, they would have been inapplicable in *Jayawardene's case* (supra). If the legislature intends that the Judges should administer laws that are manifestly cruel or absurd, it should clothe its intentions in unambiguous language. This enactment is certainly not such an example of wanton legislative cruelty.

Let it even be conceded (although I do not subscribe to the view) that the language of section 58 (1) (c) may be regarded by purists as ambiguous. If that be so, the exercise of a judicial choice is immediately invoked. Where there are two permissible constructions, " the one of which would do great and unnecessary injustice, and the other of which will avoid that injustice, and will keep exactly within the purpose for which the statute was passed, it is the bounden duty of the Court to adopt the latter construction "—*per* Lord Cairns in *Hill v. East & West India Dock Co.* [1] On this footing, we should follow the admissible construction which is " fair and reasonable ", as Windham J. has done, in preference to one which produces " a result which would be repugnant to justice and in many cases cruel and unreasonable in the extreme "—*per* Lord Macnaghten in *Arrow Shipping Co. v. The Tyre Improvement Commissioners* [2]. The language of section 58 (1) (c), in the context in which it appears, does not compel us to assume a legislative decision that the purity of elections demands, as the price of its preservation, an unnecessary sacrifice of persons who, without corrupt intent, bring themselves within the narrower construction. " The dictates of legal reasonableness " permit us to adopt in Ceylon, as in other countries, the civilised rule that the Courts should not be " too acute " to find that a wicked mind is not a constituent element of an election malpractice pronounced by statute to be " corrupt ".

As in the English Acts, our Order-in-Council prescribes appropriate sanctions in order to ensure that the Parliamentary elections should be free from taint. With that object, it declares that persons who resort to techniques of a vicious character (such as " bribery ") shall be guilty of " corrupt practices ", which, because of their wickedness, cannot be tolerated and against which no relief can generally be granted. Such behaviour is branded as " corrupt " because it is " done with an evil mind, with the knowledge that it is wrong, and with evil feelings and evil intention "—*The Bedford Case* (*No. 2*) [3]. In addition, the Order-in-

[1] (*1884*) *9 A. C. 446.*

[2] (*1894*) *A. C. 508.*

[3] *1 O'M. & H. 76.*

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Council prescribes a lesser category of prohibited acts declared to be "illegal practices" not necessarily involving *mens rea* but in respect of which, for that very reason, statutory relief and various grounds of exoneration are available to those who commit them inadvertently or under other mitigating circumstances. The decision of Parliament to include acts of the kind specified in section 58 (1) (*c*) within the group of graver malpractices declared specifically to be "corrupt" carried with it the necessary implication that a corrupt mental element is to be read into their definition. The ruling of Windham J. in *Jayawardene's case* (supra) should not be disturbed because the suggested alternative interpretation is "contrary to every idea of justice or even common fairness"—*Reynolds v. Austin & Sons Ltd.*[1]. If one signpost points the way to a sensible interpretation and another signpost would lead us to a nonsensical result, the choise of route is obvious.

I have already expressed the opinion that the allegation under section 58 (1) (*c*) should be decided *in accordance with the law as it stood before the amending Act No. 26 of 1953 came into operation.* In the absence, therefore, of a decision by the election judge that the acts complained of were committed corruptly, it follows that this charge fails, and we must determine accordingly as a matter of law for the purpose of the present appeal.

I have resisted the temptation to indulge in an *obiter dictum* as to whether, in pending or in future litigation where breaches of section 58 (1) (*c*) are alleged, a corrupt motive must still be regarded as an ingredient of this particular corrupt practice. It would take a good deal, however, to convince me that the subsequent introduction of a proviso can have the effect of altering fundamentally the original meaning of the unamended words of a substantive section. But it is sufficient, for the purposes of the present appeal, to hold that section 58(1) (*c*) did require, at the time of the proceedings before the election judge, proof of a corrupt intention against an alleged offender. The language of the amending Act does not unequivocally deprive a "convicted" person of his accrued right to challenge the validity of his "conviction" at the time when it was entered against him. There is a strong presumption in all civilised countries against an intention on the part of the legislature to enact *ex post facto* criminal laws, and that presumption has not been rebutted by express words appearing in this amending Act. For the reasons which I have given, I would reverse that part of the learned election judge's determination which concerns the allegation that the appellant committed a corrupt practice within the meaning of section 58 (1) (*c*).

I shall now examine the decision that the election was void because, upon the facts as held by the learned judge, the appellant had on 27th June 1952 "knowingly made the declaration as to his election expenses required by section 70 of the Order-in-Council falsely", and thereby committed a corrupt practice under section 58 (1) (*f*).

[1] *(1951) 2 K. B. 135 at 144.*

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This determination has been challenged on two grounds :

(1) that there was no evidence to support the finding that the appellant had committed the corrupt pactice in question ;

(2) that in any event the learned election judge had no jurisdiction to unseat the appellant for the alleged breach of section 58 (1) (*f*).

I have considered with care the arguments addressed to us by Mr. H. V. Perera on the first of these objections. The evidence is no doubt circumstantial in character, but in my opinion, the strictly appellate functions of this Court would make it impossible for us to hold, as a matter of law, that the learned election judge's decision on the facts ought to be disturbed—provided of course that he had jurisdiction to adjudicate upon this charge.

The second ground of objection has caused me considerable difficulty, but I am now completely satisfied that the Order-in-Council makes no provision for the unseating of a successful candidate by an election judge on the ground that a corrupt practice under section 58 (1) (*f*) had been committed *after the expiry of 21 days from the date of publication of the result of the election in the Government Gazette.*

My decision is based on my interpretation of the enactment, and not on my conception of what the election laws of this country ought to be. If the contrary interpretation suggested by Mr. Nadesan had been intended by the legislature, there was really no need to have resorted to such avoidable obscurity in giving expression to an idea capable of being conveyed in very simple language.

The powers of election judges depend exclusively upon the terms of the Order-in-Council which is the foundation of their jurisdiction, and " we are not to invent new principles or new procedure for the purpose of administering (it) ".—per Willes J. in *Stevens v. Tillet* [1]. An election cannot, therefore, be declared void by an election judge in Ceylon unless *inter alia* (1) an election petition had been duly presented (or amended) within the period of time sanctioned by one or other of the provisions of section 83 ; and (2) the particular ground upon which the election had been challenged is of a kind specified by section 77.

Let me recount the relevant history of this litigation. After a contested election held on 24th May 1952, the appellant was declared to be the successful candidate, and the Returning Officer made a return to that effect which was published in a *Gazette* Notification dated 28th May 1952. (sec. 50). On 16th June 1952, *i.e.*, within the 21 days sanctioned by section 83 (1), the respondents to this appeal presented a petition challenging the election on various grounds, and the jurisdiction of the learned election judge to investigate those allegations was beyond dispute. On 27th June 1952—*i.e.*, 11 days after the original petition had been entertained, the respondent, who was his own election agent, forwarded to the returning officer a return and declaration of his election expenses (section 70) ; and on 11th July 1952 a notice to that effect was duly

[1] *(1870) L. R. 6 C. P. 147.*

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published in the *Government Gazette* (sec. 71). The respondents then applied on 24th July 1952 for leave to amend their original petition under section 83 (2) by including, as an additional ground for challenging the election, an allegation that the appellant had also committed a corrupt practice punishable under section 58 (1) (*f*).

The interlocutory application to amend came up before me on 25th July 1952, and the respondents relied on *proviso* (*a*) *to section 83* (*1*) in support of their claim to add this charge against the appellant. I allowed the application but granted liberty to the appellant, if so advised, to move to have my order vacated at a later date. If there was no justification to allow this amendment, it follows that the learned election judge had himself no jurisdiction to set aside the election on the additional ground relied on. A fundamental objection to jurisdiction may (as has arisen in this case) be entertained for the first time in appeal, provided of course that the plea does not depend on uninvestigated issues of fact—*Norwich Corpn. v. Norwich Electric Tramways Co.*[1].

Mr. H. V. Perera's arguments may briefly be summarised as follows :

(*a*) that although the commission of a corrupt practice within the meaning of section 58 (1) (*f*) can properly be the subject of a prosecution in a District Court with the sanction of the Attorney-General, it does not afford a ground for directly setting aside an election under section 77 ;

(*b*) that section 83 (1) proviso (*a*) applies only to corrupt practices *previously committed but implemented subsequently by a payment of money or by the doing of some similar act* ; and that the proviso has no application to corrupt practices committed exclusively after the closing of the poll.

The second argument is in a sense complementary to the first. It primarily involves an objection that the amendment of the respondents' original petition was out of time ; it also seeks to emphasise the submission that the general scheme of the Order-in-Council with respect to proceedings before election judges does not contemplate the investigation of charges that an election (not proved to have been tainted by corruption or illegality at the time that it was held) was liable to be declared void by reason of the subsequent commission of corrupt practices prohibited by the enactment. For any such offence, Mr. Perera submits, the only sanctions are criminal prosecutions and the appropriate disqualifications resulting from conviction. In other words, the proper function of an election judge (*unless his jurisdiction in any particular context is expressly enlarged*) is to determine whether or not the actual election was tainted in some way before the closing of the poll ; the jurisdiction of the criminal Courts, on the other hand, is to punish persons who commit election offences *at any time*. The distinction, if justified by the words of the enactment, is certainly not illogical.

[1] (*1906*) *2 K. B. 119*.

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The Order-in-Council has admittedly been modelled on enactments passed in England, and the history of legislation relating to Parliamentary elections in that country is of some assistance to us in solving the present difficulty. In the background of all the relevant statutes is the intention to ensure as far as possible the freedom of the vote, and to punish in greater or less degree any subversive malpractices committed in connection with the promotion of election campaigns. The common law offences of bribery and corrupt treating, for instance, were subsequently defined and prohibited by statute. As evidence of new techniques emerged from time to time, fresh legislation was introduced to suppress the new mischief. The House of Commons originally exercised its own peculiar jurisdiction in matters relating to its constitution, and took cognisance of bribery and cognate offences committed at elections ; but the jurisdiction was later transferred to the regular Courts of Justice. At the same time it was recognised that, apart from private considerations, the public interest required some reasonable time limit to be placed on a person's right to challenge (before an election judge) the validity of a seat in Parliament.

The Parliamentary Elections Act, 1868, of England is an important landmark in the history of the legislation under consideration. Section 3 defined " corrupt practices " as at that time meaning bribery, treating, undue influence, or any such offences as were defined by statute or " recognised by the common law of Parliament ". (It will be observed that the concepts of " illegal practices " and the introduction of the corrupt practice of " making false declarations of election expenses " were of later origin).

Section 6 (2) prescribes as follows with regard to the period within which a petition may be filed to challenge the election or return of a Member of Parliament :

> " The petition shall be presented within twenty-one days after the return has been made to the Clerk of the Crown in Chancery in England . . . . . of the member to whose election the petition relates, unless it question the return or election upon an allegation of corrupt practices, and specifically alleges a payment of money or other reward to have been made by any member, or on his account, or with his privity, since the time of such return, *in pursuance or in furtherance of such corrupt practices*, in which case the petition may be presented at any time within twenty-eight days after the date of such payment ".

The language of this section has been substantially taken over in the local Order-in-Council—vide section 83 (1) and proviso (*a*)—except that the word " acts " (which is of wider import) has replaced the word " reward ".

Under the Act of 1868, a petition to have a successful candidate unseated must normally, as in Ceylon, be presented within 21 days of the official notification of the result of the election. This time limit was, however, extended in cases where corrupt practices were alleged

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to have been committed "*at the election*"—section 11 (14)—but where a "payment or reward" was subsequently made "*in pursuance or in furtherance of*" them; in that event, a petition may, within 28 days of the specified payment or reward, be presented (or, if previously presented, amended) so as to catch up charges involving the corrupt practices so "pursued" or "furthered".

The decision of this appeal ultimately depends upon the true meaning of the words "in pursuance or in furtherance of" appearing in *proviso (a) of section 83 (1)* of our Order-in-Council, and upon whether these words may legitimately be applied to a "false declaration of election expenses"—that is to say, a corrupt practice (complete in itself) which from its very nature is exclusively committed after an election has been concluded. It is very important to ascertain the precise meaning attaching to this phrase in the context in which it first appeared in an election statute.

At the time when section 6 (2) of the Act of 1868 was first enacted, the only recognised corrupt practices "*in pursuance or in furtherance of*" which "payments" or "rewards" could be made after an election were *bribery* and *treating*. Indeed the language of section 6 (2) was retained in England until 1949, and was eventually taken over (without alteration) in the recently enacted Representation of the People Act, 1949.

The definition of either offence specifically includes a payment or reward corruptly made to a voter in certain circumstances "for having voted". What precisely are those circumstances? Let us first consider the corrupt practice of "post-election treating", because all the English authorities in regard to that offence point in the same direction.

In the *Southampton case*[1], Willes J. said, "what is done after the election can only be material as throwing light upon some transaction before the election, and so leading to the supposition that there was before the election some breach of section 5 of the Corrupt Practices Act of 1854". Similarly, in the *Brecon case*[2], Lush J. said, "The treating which the Act calls 'corrupt' as regards a bygone election must be connected with something which preceded the election; it must be *the complement of something done or existing before and calculated to influence the voter while the vote was in his power*". In other words, there must exist the vital connection between the subsequent hospitality and the sinister "something" that had previously contaminated the voters.

In the *Cork case*[3] Gibson J. dealt with a case of post-election treating which was "largely the system and arrangement". He ruled that the essence of the corrupt practice of treating after an election was that it took place "*in pursuance of an understanding or expectation encouraged beforehand*" or, he added, "*by way of reward*". These last words could not have been intended to include a spontaneous reward given to a voter

[1] *(1869) 1 O'M. & H. 222 at 223.* [2] *(1871) 2 O'M. & H. 43 at 45.*

[3] *(1911) 6 O'M. & H. 318 at 335.*

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who had not been influenced improperly at the time that he actually cast his vote. For, as Lush J. pointed out in the *Brecon case* (supra), such rewards do not "*reflect back and taint the bygone election*"—although, if intended to secure the voter's support on future occasions, they may certainly "*imperil a future election which they were designed to influence*". There is no indication that Gibson J. was disposed, or had any occasion to doubt the correctness of this long-established principle.

We are now in a position to appreciate the meaning of section 6 (2) of the Act of 1868 in so far as it sanctions an extended time-limit for filing petitions alleging that subsequent payments or rewards had been made "in pursuance or in furtherance of" the corrupt practice of "treating". Those words obviously do not refer to post-election treating unconnected with some previously corrupt transaction which had taken place "while the vote was in the voter's power"—because such treating, not being the complement of something that had gone before, is not regarded as a corrupt practice at all *in relation to the bygone election.* On the contrary, this part of section 6 (2) only catches up cases where it is sought to establish that an election had been tainted, and was therefore void, because—

(1) voters had, before they cast their votes, been corruptly influenced by promises (or by calculated encouragement) that they would later receive hospitality for having voted in a particular way ;

(2) this express or implied promise, which had itself constituted *ab initio* a corrupt practice, was subsequently implemented by the actual receipt of the promised (or expected) hospitality.

In such a case, the proof of item (2) generally supplies the most compelling proof of item (1), and it is the corrupt practice established by item (1) which vitiated the bygone election.

In most cases, the "payment or reward" which "furthered" the earlier corrupt practice would no doubt involve the commission of an additional offence complementary to the earlier one. But even then, it is the earlier offence which forms the basis of the attack on the impugned election. There may be instances, however, where the subsequent "payment or reward" may "further" a corrupt practice without itself amounting to a distinct offence. Such a situation arose in the *Kidderminster case* [1] where the facts were as follows :—

> The petitioner alleged and proved (1) that the successful candidate had committed the corrupt practices of treating "by corruptly making divers promises (*during the election*) of meat and drink, provision and other reward *in order to induce voters to vote and to refrain from voting ;* and (2) that (*after the election*) he had made a payment of £1000 to his agent 'in pursuance and furtherance of the said corrupt practice' ".

[1] (*1874*) *2 O'M. & H. 170.*

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The petition was presented within 28 days of the date of the payment above referred to, and the relevant provision of section 6 (2) was accordingly invoked. This payment had been made by the successful candidate to one of his agents with specific instructions to implement the pre-election promise, but the instructions were later withdrawn on legal advice. In the result, the promised hospitality did not take place.

Mellor J. declared the election void because "the (pre-election) promise amounted to a corrupt practice . . . . It was partially carried out and stopped *in medio*; but the £ 1000 which was sent (to the agent) was, *strictly speaking, a sum of money paid in furtherance and in pursuance of the corrupt contract or promise which the* (*candidate*) *had made*". He pointed out that the eventual abandonment of the scheme could not in these circumstances "purge what had been done before".

This decision perfectly illustrates to my mind the true meaning (in the context of election laws) of the phrase "in pursuance and in furtherance of".

With regard to the corrupt practice of "*post-election bribery*", the English statutes, like the local Order-in-Council, include within the definition of that offence a corrupt payment to a voter "on account of his having voted". In the *Stroud case* [1], Baron Bramwell pointed out that bribery must be "*operative on the election*", and in the *Salisbury case* [2] Baron Pollock also held that a subsequent payment to a voter, "unless connected with *some earlier communication which would lead to the inference that it was bribery*" could not avoid an election.

I agree that Lush J. appears, shortly before the decision in the *Salisbury case* (supra), to have expressed the opinion that "post-election bribery" stood on a different footing in this respect to post-election treating—*The Harwich case* [3]. "The payment of money as a reward for having voted", he said, "is corrupt in itself; it tends to be demoralising in its influence on all the parties concerned. These observations, be it noted, did not refer to the case of the successful candidate (who had been acquitted of all the allegations against his election) but were made in reference to recriminatory charges against the unsuccessful candidate who had prayed the seat. The *Harwich case* is more fully reported in *44 Law Times 187*, where it appears from Lush J.'s recorded findings of fact that certain payments had been made to voters "*as a reward for having come at the request of the candidate's agent, to give their votes for him . . . . and the voters no doubt expected to be paid for coming*". Manisty J., in his concurring judgment, explained that the mere payment by a candidate after an election to an absent voter *who had come of his own accord* would not constitute the corrupt practice of bribery but only an illegal payment. "*There must be something plus the mere payment*", he said, "*to make it a corrupt payment, and consequently bribery*".

[1] *(1874) 2 O'M. & H. 181 at 183.* [2] *(1880) 3 O'M. & H. 130.*

[3] *(1880) 3 O'M. & H. 61 at 70.*

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Even if one concedes that Lush J. had taken a view as to " post-election bribery " which was contrary to the earlier decisions, we have not been referred to any decided case in which his opinion was adopted subsequently. On the contrary, in *Caldicott v. Worcester Commissioners* [1], Bingham J. re-affirmed the earlier principle, and ruled that, to support a charge of bribery in reference to a bygone election, it was necessary to have some evidence connecting the subsequent payments with something done before the election, because " one could not procure a vote for a past election by something which was complete and done only after the election ". In the most recent edition of *Russell on Crime* (1950 Ed.) the following passage appears at page 434 :

> " It seems that a payment of money to a voter after the election is over is not bribery *unless there was a corrupt promise before the election to pay him.* "

Our combined researches have not brought to light a single instance of an election which was declared void in England on the ground of subsequent bribery unconnected with an antecedent promise (or expectation influenced by prior encouragement). In any event, Lush J. had no occasion, in dealing with a recriminatory charge, to construe the words " in pursuance or in furtherance of corrupt practices " appearing in section 6 (2) of the Act of 1868.

In the *Bodmin case* [2] Lawrence J. said " In cases of bribery there is always something in the nature of a contract : ' If you give me a sovereign, I will give you a vote ' or some such understanding . . . . "

In other words, the offence necessarily involves some conduct which tainted the vote before it was given—and the offence (although at that stage difficult to prove) is then complete even though the corrupt arrangement still await implementation by payment. The opinions in *Cooper v. Slade* [3] are specially instructive. If a person promises to make a payment to a voter as an inducement to vote in a particular way, he is guilty of bribery because he " created that inducement ". If he subsequently makes a payment " pursuant to " the promise previously made as a reward for the " advantage which the statute means he should not obtain ", the payment is equally corrupt. In such cases, the offence introduces the concept of a scheme whose complete execution might well be spread out over a period of time. I am satisfied, therefore, that the essence of " post-election bribery " is that the payment was made *in exchange for a contemplated advantage previously induced.*

The words of section 6 (2) which correspond to *proviso (a) of section 83 (1)* of the local Order-in-Council have ever since 1868 retained a clear-cut meaning in the lexicon of election law in England, and the intention of the legislature is not difficult to discern. After the closing of the poll, evidence of " payments " or " rewards " often reveals for the first time

[1] *(1907) 21 Cox 404.* [2] *(1906) 5 O'M. & H. 225 at 231.*

[3] *(1857) 6 H. L. C. 746.*

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the sinister character of secret " arrangements " which, at the time of their conception, had " operated on the election ". The subsequent payments or rewards, having been made " in pursuance or in furtherance of " the earlier corrupt transactions, represent the implementation or advancement of the earlier plan or scheme. The detection of such schemes almost invariably requires more time than in cases of open corruption. Section 6 (2) of the English Act, and the corresponding proviso of the Ceylon Order-in-Council, therefore provide a longer period within which an election petition may be presented on the basis of such allegations.

The substitution of the word " act " for " reward " in proviso (*a*) of section 83 (1) of the Order-in-Council certainly enlarges the ambit of the proviso, which thus becomes equally applicable, for instance, to subsequent acts done in furtherance of pre-election threats constituting the corrupt practice of *undue influence*. But the substitution cannot alter the meaning of the unamended phrase " in pursuance or in furtherance of ". Indeed, the proviso is essentially procedural in character ; it does not purport to influence the substantive law relating to corrupt election practices.

The offence of " knowingly making a declaration of expenses falsely " was of later origin in England. It was " *deemed to be* " a corrupt practice by section 33 (7) of the Corrupt and Illegal Practices Prevention Act 1883. By its very nature, it is essentially a post-election offence, and the words " deemed to be " emphasised that it stood in a different category to what may be described as " *corrupt practices proper* " which had in fact corruptly influenced the minds of voters before they cast their votes.

The commission of this new offence has undoubtedly been a ground for setting aside an election in England ever since the Act of 1883 was passed, and there is good reason why this should be so ; because the dishonesty involved in its commission affords most powerful evidence of undetected offences (difficult to particularise) which had previously contaminated the electorate. Accordingly, a special procedure, which did not exist in the earlier framework, was introduced so as to enable such charges to be investigated at election trials. Candidates seldom, if ever, forward their " returns of expenses " within the period of 21 days normally prescribed for the filing of election petitions, and the extension of time granted in cases falling within the later portion of section 6 (2) of the Act of 1868 had no application to such a case. Accordingly, section 40 of the Act of 1883, which also introduced for the first time the category of election offences designated " illegal practices ", provides that petitions based on such charges may be filed :

(*a*) " At any time before the expiration of fourteen days after the day on which the returning officer receives the return and declarations respecting election expenses by the member to whose election the petition relates and his election agent. "

(*b*) " If the election petition specifically alleges a payment of money, or some other act to have been made or done since the said day by the member or an agent of the member, or with the privity

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of the member or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, the petition may be presented at any time within twenty-eight days after the date of such payment or other act."

. . . . . .

(3) "This section shall apply in the case of an offence relating to the return and declarations respecting election expenses in like manner as if it were an illegal practice, and also shall apply notwithstanding that the act constituting the alleged illegal practice amounted to a corrupt practice."

One immediately observes the manner in which special provision is made for challenging an election within an extended period of time, on the ground of this new post-election "corrupt practice": it was equated for procedural purposes to an illegal practice. By virtue of Section 40 (3), the entire scheme becomes demonstrably complete. As far as I had been able to trace the English authorities, every election petition challenging an election upon an allegation of this offence has been presented under Section 40 (3) read with section 40 (1) (*a*).

Let us examine by way of contrast the corresponding procedural provisions of the Ceylon Order-in-Council:—

A. Section 83 (1) (*b*) (i) corresponds precisely to section 40 (1) (*a*) of the English Act.

B. Section 83 (1) (*b*) (ii) corresponds precisely to section 40 (1) (*b*) of the English Act.

C. *Section 40 (3) of the English Act has no counterpart in the Order-in-Council.*

We are thus confronted with a clear illustration of "scissors and paste legislation" in which, designedly or otherwise, a special provision for the inclusion of charges relating to an exclusively post-election "corrupt practice" has been left out. If the omission was deliberate, it indicates that charges under section 58 (1) (*f*) were intended to be initiated only by way of criminal prosecution unless such offences were committed within the 21 days limit prescribed by Section 83 (1); even if (which I dare not assume) it was accidental, the same result follows, because judges are powerless to fill in the gaps in legislative enactments by inventing fundamentally new procedures.

Mr. Perera has also relied on the significance of section 77 (*c*), by which the election of a "candidate" as a Member may be declared void on

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the ground of corrupt practices only if they were "*committed in connection with the election*". He argued that those latter words necessarily exclude transactions exclusively initiated and executed *after* the election was over. That refined distinction does not convince me, but I am more disturbed by the circumstance that the Order-in-Council defines a "candidate" as meaning, "unless the context otherwise requires", a person who "is nominated as a candidate at an election or is declared by himself to be or acts as a candidate for election" (sec. 3)—*whereas in England the term is defined so as also to include "any person elected to serve in Parliament"*. This variation from the English model cannot properly be assumed to have been unintentional.

But let us assume that post-election corrupt practices punishable under section 58 (1) (*f*) are (as I believe) "committed in connection with the election" within the meaning of section 77 (*c*) ; let us also assume that the context of section 77 (*c*) "requires" the word "candidate" to be given a meaning wider than that which it has primarily received in the interpretation clause of the enactment. Even then, section 83 (1) would only permit the inclusion of such an allegation in an election petition *in those very rare cases in which a successful candidate makes his "declaration of expenses" under section 70 "within 21 days of the publication of the result of the election"*. If, instead, he postpones the making of his declaration until a later permissible date, the language of the proviso (*a*) to section 83 (1) is inadequate because it cannot apply at all to charges under section 58 (1) (*f*). In the result, the successful candidate's seat in Parliament is safe *unless the same result can be achieved by virtue of the disqualification proceeding from his conviction for that offence—section 58 (2)*.

As against this view Mr. Nadesan relies strongly on the ruling in *Kunasingham v. Ponnambalam* [1] which was followed with approval in *Chelvanayakam v. Natesan* [2]. It was decided in both these cases that the language of proviso (*a*) to section 83 (1) is wide enough to cover a charge under section 58 (1) (*f*) because "the act . . . . to be specifically alleged *may be an act that is involved in the corrupt practice itself and need not be a separate and distinct act . . . . Even otherwise, the filing of the return and declarations was a separate act done in pursuance or in furtherance of the corrupt practice* of making false declarations . . . . . ".

Having had the advantage of much fuller argument upon this question than my brothers Gunasekara J. and Swan J. had on the interlocutory applications which came before them, I respectfully disagree with this proposition. An act may be done "in pursuance of" an executory contract or agreement; it may also be done "in furtherance of" a *scheme or plan* which (though it involves even in its inchoate form the commission of an election offence) nevertheless requires (as a scheme) further implementation to achieve complete fulfilment. But, with respect, I do not see how an *act* can "further" something which, *regarded as an "offence"* already completely committed, needs nothing more to

[1] *(1952) 54 N. L. R. 36.* [2] *(1952) 54 N. L. R. 304.*

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further its execution. *A fortiori*, we would be straining unduly the meaning of a phrase (which has long since acquired a well-recognised meaning in the language of election laws) if we regard the *return of election expenses* as having taken place " in pursuance or in furtherance of " *the act or acts involved in making a false declaration before a person authorised to administer an oath or an affirmation.* I did not understand Mr. Nadesan to press this part of his argument very strenuously.

I appreciate that, in the English language, the phrase " *in furtherance of* " may " apply equally to mean the advancement of things before they come into existence and after they have begun ". *R. v. Tearse* [1]. But, as Wrottesley J. pointed out, the meaning of a phrase, in a particular statutory context, may be *controlled by its " history "*. The Court of Criminal Appeal in England accordingly decided that, in legal enactments relating to trade disputes, the words " acts in furtherance of a strike " presuppose the existence of a strike. For precisely the same reason, I would say that the language of Section 83 (1) (*a*) presupposes the prior commission of a corrupt practice which was intended to be advanced or further implemented by a later " payment " or " act ". In any event, it is manifest to my mind that the words cannot be applied to an " act " which is identifiable with the offence itself (whether already committed or not). If that had been the intention of the Legislature, I see no reason at all why the proviso should not have been enacted so as to read :

Provided that—

(*a*) an election petition questioning the return on election or return upon the ground of a corrupt practice *alleged to have been committed after the date of such return or election* by the member whose election is questioned or by an agent of the member or with the privity of the member or his election agent may, so far as respects such corrupt practice, be presented at any time *within 28 days after the* date of the commission of such corrupt practice.

The complicated concept of *an act which is done in pursuance or in furtherance of itself* (*or of something that at least includes itself*) introduces problems to which I have tried in vain to accommodate my mind.

I agree that an election may in certain circumstances be declared void on the ground that some prohibited act was committed after the date of the election. As Gunasekara J. points out in *Ponnambalam's case* (supra), the combined effect of Sections 59 (4) and 77 (*d*) might well invalidate an election if a disqualified person should be engaged as the election agent of the successful candidates " after the election". But here again, it will be observed, the procedural machinery of the Order-in-Council does not provide for every such contingency. Let us consider,

[1] (*1945*) *K. B. 1.*

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for instance, the appointment of a disqualified election agent *22 days after the result of the election has been gazetted.* In that event, it would be just too late to present a petition under Section 83 (1); nor would any of the provisos be applicable, because the Order-in-Council has not declared what is prohibited by Section 59 (4) to be either a "corrupt" or an "illegal" practice. And yet, this hypothetical situation is certainly not beyond the realms of possibility, because the services of an election agent may still be required to perform various functions allocated to him by law after the expiry of the time limit prescribed by Section 83 (1), e.g. the obligations laid down in Section 70. It is therefore quite wrong to assume that the machinery of the Order-in-Council is devoid of gaps. The remedy lies with the Legislature and not with us.

Mr. Nadesan has submitted that certain observations made by Lord Coleridge C.J. in *Maude v. Lowley*[1] and by Lord Halsbury in *Cremer v. Lowles*[2] support the case of the respondents. *Maude v. Lowley* (supra) was concerned with an election petition presented under the Corrupt Practices (Municipal Elections) Act 1872 which contains provisions similar to those prescribed in Section 83 of our Order-in-Council. The petitioner sought, after the 21 days limit had expired, to amend his petition by adding an allegation of a distinct offence which had been committed before the date of the election. The Court held that there was no jurisdiction to allow the proposed amendment. In the course of his judgment Lord Coleridge incidentally said :—

> "The enactment is distinct, and the petition must be presented within 21 days, except in the one specified case of an offence, not discovered since the election but which has taken place since the election ; and in such case the petition may be presented at any time not after the discovery of the offence, but after the taking place of that which constitutes the offence."

Similarly, Keating J. said that the section of the English Act corresponding to section 83 (1) proviso (*a*) provided for "the excepted case of *bribery since the election*". The judgments also appear in *43 L. J. C. P. 105* where the observations of Lord Coleridge (as I have reported) are less capable of supporting Mr. Nadesan's argument. Be that as it may, I cannot imagine that the *dicta* quoted by me were intended to imply that "bribery since the election" could vitiate a bygone election unless it was the complement of something which had previously influenced the minds of voters.

In *Cremer v. Lowles* (supra), the Court rules that, where a Parliamentary election petition alleging bribery, treating and undue influence had not been amended within the prescribed time limited for amendment, the petitioner could not be permitted to tender evidence of an illegal practice committed after the date of the petition. Lord Halsbury decided that it was "monstrous to suggest that on an unamended petition

[1] *(1874) L. R. 9 C. P. 165 at 173.* [2] *(1896) 1 Q. B. 504 at 507.*

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brought in August evidence could be given of matters which occurred several months afterwards ". He then proceeded to make the following observations :—

> " It is said that the result of our decision is that offences committed subsequently to the presentation of the petition will escape without punishment, but this is incorrect. Any such offence may, under 46 and 47 Vict. c. 51. s. 40 be the subject of a charge against a member, which may be brought either by amendment of the petition within the time limited for amendment, or by a petition filed within the prescribed time after the offence was committed: if, for example, a petition was presented in August, and the respondent committed an illegal practice by payment of money in October, the petition could be amended and proceeded with."

Here again, this part of the judgment is somewhat differently worded in *65 L.J.Q.B. at p. 291 :*

> " Then it is said that, if that be so, the alleged offences may go altogether unpunished. But *this is not necessarily so*, because an amendment might be made *within the proper limit of time*, or a new petition may be brought."

Assuming that the earlier report is more authentic, it is quite unsafe to regard these *dicta* as purporting authoritatively to interpret the words " in pursuance or in furtherance of " in relation to a corrupt practice under section 6 (2) of the Act of 1868 or in relation to an illegal practice under section 40 (1) (*b*) of the Act of 1883. The evidence expressly rejected by the Court in *Cremer v. Lowles* involved an allegation of " illegal practices respecting the return and declaration of election expenses " for which *section 40* (*1*) (*a*) and 40 (3) of the 1883 Act introduce a special procedure which the petitioner had not invoked within the period specified. In regard to a further allegation, however, as to " the procuring of prohibited persons to vote, and providing money for prohibited payments " the Court of Appeal made no order, but sent the case back for Lawrence J. to decide in chambers after hearing further argument.[1] It is in regard to the latter kind of charge that a considered judgment would have assisted us, because that allegation necessarily implied that " the procuring of prohibited persons to vote " had taken place before the election. If, therefore, the " prohibited payments " were allegedly made *after* the election " in furtherance of " the earlier offence, I do not doubt that an application to amend the petition within the prescribed time would have been allowed under either section 6 (2) of the Act of 1868 or section 40 (1) (*b*) of the Act of 1883.

Having considered all the arguments raised and all the authorities cited before us by learned counsel (for whose invaluable assistance we are very much indebted) I have arrived, though not without regret, at the following conclusions :

A. the words " in pursuance or in furtherance of such corrupt practice " appearing in *section 83* (*1*) *proviso* (*a*) do not possess a meaning which permits of their legitimate application to a payment

[1] *(1896) 1 Q. B. at 505 footnote 1* and *65 L. J. Q. B. at 290.*

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or act unconnected with a corrupt practice previously committed; according to the true meaning of those words, the proviso applies only to some payment or act which is alleged to have subsequently implemented a corrupt practice committed before the election with a view to influencing improperly the mind of a voter;

B. an allegation that a corrupt practice has been committed in contravention of section 58 (1) (*f*) is not under any circumstances covered by *section 83 (1) (a)*.

In the result, the amendment dated 25th July 1952 of the respondents' original petition dated 16th June 1952 was made out of time, and I am therefore compelled to admit that I had no jurisdiction, even provisionally, to allow that amendment. Accordingly, the learned election judge had himself no jurisdiction to unseat the appellant upon the basis of that allegation. If, as the learned judge has held, the appellant did in fact commit a corrupt practice on 27th June 1952 punishable under section 58 (1) (*f*), the only remedy open to the respondents was (and still is) to institute a prosecution against the appellant after having first obtained the sanction of the Attorney-General under section 58 (3). It is because this remedy is still available that I consider it imprudent to cause any possible embarrassment by analysing in detail the evidence which Mr. Nadesan submitted to be conclusive proof of the appellant's guilt (but which Mr. Perera on the other hand contended to be inconclusive).

I do not accept without qualification the argument of Mr. H. V. Perera that a corrupt practice exclusively conceived and consummated after the date of an election can never form the basis of an election petition. This proposition is, in my opinion, perfectly correct with respect to what I have previously described as *corrupt practices proper* (such as bribery, treating and undue influence). Offences of that kind from their very nature involve an element of corruption which was "operative on the election", even though they were fully implemented at a later date; because the mischief had already contaminated the votes of persons who had come under its influence. Section 77 (*c*) by itself does not in my opinion preclude statutory corrupt practices of a different kind—such as offences under section 58 (1) (*f*)—from forming the basis of an election petition if committed after the election. The right to include such charges in election petitions ultimately depends, however, on whether the procedural provisions of the enactment are wide enough to catch up the particular case. It is at this point that the scheme of the Order-in-Council seems to have broken down, and we are not vested with jurisdiction to invent a procedure to deal with a *casus omissus*.

I have not considered it necessary to consider very closely, for the purposes of this appeal, provisos (*b*) (1) and (*b*) (2) of Section 83 (1) which apply to petitions questioning a return or election upon allegations of illegal practices. Suffice it to say that proviso (*b*) (1) is in my judgment applicable to illegal practices committed before or after an election,

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but within the time limit therein prescribed. With regard to proviso (*b*) (2), the words " in pursuance or in furtherance of " must necessarily have the same meaning as in proviso (*a*)—and would therefore catch up any illegal practice committed before the date of publication of the notice required by Section 71, provided that it was " pursued " or " furthered " *after that date* by a subsequent " payment " or " act ".

I would reverse the determination of the learned election judge, because in my opinion

(1) the decision against the appellant under section 58 (1) (*c*) was contrary to law ; and

(2) there was no jurisdiction to adjudicate upon the allegation that the appellant had committed a corrupt practice under section 58 (1) (*f*) on 27th June 1952—i.e. after the last date for presenting petitions under Section 83 (1) had expired.

In this view of the matter, I would decide that, upon the material which was properly before the learned Judge, the appellant was duly returned and elected as a Member of the House of Representatives on 24th May, 1952.

I have prepared my judgment while on circuit, and have been deprived of the opportunity of reading the judgments of my Lord the acting Chief Justice or of my brother Pulle. I understand, however, that they do not share my views as to the inapplicability of Section 83 (1) proviso (*a*) to corrupt practices punishable under Section 58 (1) (*b*). The Order-in-Council certainly presents many difficulties, and it is not perhaps surprising that " though we have entered the labyrinth together, we have unfortunately found exit by different paths ", per Lord Buckmaster in *Great Western Railway Co. v. Bater*[1]. In view of the decision of the majority of the Court, it follows that the order of the learned Judge invalidating the appellant's election must be upheld.

PULLE J.—

For the reasons set out in the judgment of Gratiaen J. I am of opinion that the finding against the appellant that he was guilty of a corrupt practice under section 58 (1) (*c*) cannot be sustained. During the course of the argument I gathered that the case of *Weerakoon v. Ranhamy*[2] was cited to Windham J. at the hearing of *Perera v. Jayawardene*[3]. In the view that Windham J. took of what constituted the essential elements of the offence it was not necessary for him to refer in his judgment to *Weerakoon v. Ranhamy* (supra) and it could not, therefore, be said that he reached a decision without regard to a relevant and binding

[1] *(1922) 2 A. C. 1 at p. 11.*

[2] *(1921) 23 N. L. R. 33.*

[3] *(1948) 49 N. L. R. 241.*

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authority. It may well be, as Mr. Nadesan argued, that in England where the mental element of dishonesty or corruptness is not specifically stated in the statutory description of the offence the burden rests on the respondent to show that his action was not tainted. This shifting of the burden left unaffected the question as to what the Judge had ultimately to find, namely, whether the acts expressly prohibited were done or not done with the intention of corruptly influencing the vote.

As section 58 (1) (*c*) stood before it was amended by Act No. 26 of 1953, not only a candidate or his election agent but every person printing, publishing, distributing or posting up any advertisement, handbill, placard or poster which refers to any election and which did not bear upon its face the names and addresses of its printer and publisher was guilty of a " corrupt " practice. Now, if the words of section 58 (1) (*c*) were intended to penalise any act howsoever innocent then there is no alternative but to give effect to the intention of the Legislature. The court would not then be concerned with the seriousness of the penal consequences. I do not, however, assent to the proposition that a scale of heavy penalties provided for the breach of the provisions of a statute should be disregarded in ascertaining the proper meaning of the statute. One can visualise a number of acts coming strictly within the letter of section 58 (1) (*c*) which are irreproachable by any ethical standard. Before saying that the commission of any such act involves the forfeiture of a seat in Parliament and the deprivation of civic rights for a number of years one must examine besides the language of the provision the back ground of the law from which we derive the very concept of a corrupt practice. The expression " corrupt practice " as used, at least in reference to the acts done before and during an election, has been interpreted in England to mean the doing of such acts with a corrupt mind. I consider it perfectly legitimate to construe section 58 (1) (*c*) as Windham J. did in *Perera v. Jayawardene* (supra) by applying the ratio of the decision in the *Stepney case*[1] in which the element of corruptness was said to form part of the offence of personation, although the words " corruptly or wilfully " or " corruptly or knowingly " did not appear in the definition of the offence.

It is not necessary to elaborate the remaining topics arising out of the charge under section 58 (1) (*c*) because I am in agreement with what Gratiaen J. has said about them. The provisions of the amending Act No. 26 of 1953 could not alter the meaning of the words in section 58 (1) (*c*) as they fell to be interpreted by the learned election judge. The construction placed by Parliament on these words in 1953, if it is at all possible to ascertain what that construction is on a reading of the Act of 1953, would be irrelevant in the judicial determination of the true meaning and scope of section 58 (1) (*c*). The retrospective operation of the Act of 1953 could not give a new and retrospective meaning to section 58 (1) (*c*). How section 58 (1) (*c*) read in conjunction with the Act of 1953 should be interpreted does not in my opinion arise for determination because the success of the appellant in the first appeal on the first charge renders it unnecessary to consider the second appeal.

[1] *(1886) 4 O'M. & H. p. 34.*

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On the second charge that the appellant knowingly made the declaration as to election expenses required by section 70 falsely the learned election judge came to a finding against the appellant, which he was entitled to, on the evidence placed before him. Our appellate functions limited to correcting errors in law preclude us from disturbing this finding.

The next question whether the corrupt practice is caught up by section 83 (1) (*a*) is not free from difficulties but having given the most anxious consideration to all the arguments so powerfully urged on behalf of the appellant I do not feel that the difficulties are of such a magnitude as to convince me that the offence of knowingly making a false return of election expenses cannot be brought within section 83 (1) (*a*). I would certainly hesitate to dissent from the considered opinions of two Judges of this court in *S. V. Kunasingham et al. v. G. G. Ponnambalam* [1] and *S. J. V. Chelvanayakam v. S. Natesan* [2], unless I was satisfied that they were clearly wrong.

I need not recapitulate the history of the legislation in England which rendered it possible after the passing of The Corrupt and Illegal Practices Act, 1883, (46 and 47 Vict. C. 51) to challenge an election by a petition alleging an offencc relating to the return and declarations respecting election expenses. I find it fully set out in the judgment of Gratiaen J. One fact is undoubtedly obvious that both in the Ceylon (State Council Elections) Order in Council, 1931, and the Ceylon (Parliamentary Elections) Order in Council, 1946, there is no provision in terms similar to section 40 (3) of the Act of 1883. One of the questions raised at the argument was whether the omission to reproduce in terms section 40 (3) in our Orders in Council, be the omission accidental or deliberate, has resulted in there being made no provision for challenging an election on the ground of making a false return of expenses. While the omission to make express provision is a circumstance to be borne in mind, ultimately the question which has to be decided on this part of the appeal turns on whether upon a reasonable interpretation of sections 77 (*c*) and 83 (1)(*a*) the corrupt practice in question is brought within their ambit. I confess that if it can be brought I would not be shocked at the result.

In regard to the application of section 77 (*c*) I am satisfied that the corrupt practice of making a false return of expenses can be said to be one committed "in connection with the election". Making a return is a necessary adjunct of an election. Section 70 (3) renders a member who fails to transmit a return within the prescribed time liable to penalties, if he sits or votes in the House of Representatives and he is further guilty of an illegal practice under sub-section 6 which ought to be a ground for avoiding the election. It has been argued that the word "candidate" in section 77 (*c*) read with the words "was committed" point to the limitation of the jurisdiction of election courts to investigate charges of corrupt or illegal practices committed when the member was only a candidate and that, therefore, the corrupt or illegal practices must be those committed prior to the publication of the result of the election

[1] *(1952) 54 N. L. R. 36.* [2] *(1952) 54 N. L. R. 304.*

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under section 50. Reliance is placed on the definition of the word " candidate " in section 3 (1). In my opinion the word " candidate " means the candidate elected as a member. I do not think I need say more than that in many places in the Order in Council the words " candidate " and " member " are interchangeable. It is also unlikely that the framers of the Order in Council intended to leave out of the purview of section 77 (*c*) those illegal practices like payments of money after the prescribed time in meeting liabilities justly and properly incurred. In other words, I find it difficult to reconcile myself with an interpretation which would divide corrupt and illegal practices into two classes, those which can be the basis of an election petition and those in which a prosecution of the member would be the only way of vindicating the law. I am strengthened in the view I hold by the opinion which Gratiaen J. appears to favour that if a false return is made within twenty-one days of the declaration of the result of the election, a petition challenging the election under section 77 (*c*) could be maintained.

I come now to section 83 (1) (*a*). *Prime facie* the " corrupt practice " referred to in that paragraph would include the offence of knowingly sending a false return of expenses. Can it be said that the act of making the declaration was an act done " in pursuance or in furtherance " of that corrupt practice ? A large part of the argument was devoted to the comparison of section 83 with the corresponding provisions of section 6 (2) of the Parliamentary Elections Act, 1868, and section 40 of the Corrupt and Illegal Practices Prevention Act, 1883. Section 83 had its exact counterpart in Article 80 of the Order in Council of 1931. Corrupt practices in 1931 were limited to personation, treating, undue influence, bribery and false declaration as to election expenses. It is manifest that when the draftsman of 1931 modelled himself on the English Acts he purposely omitted to make express provision similar to that in section 40 (3) of the 1883 Act. In regard to " illegal " practices being the ground for challenging an election by a petition filed after twenty-one days substantially the whole of the English provision was taken over. There was a departure in the language so far as corrupt practices went. Whereas section 6 (2) of the Act of 1868 read " and specifically alleges a payment of money or *other reward* to have been made by any member." Article 80 (2) (*a*) of the Order in Council of 1931 stated " and specifically alleging a payment of money or *other act* to have been made or done since the date aforesaid by the member ". The variation in the language was obviously intentional. Whereas section 6 (2) of the Act of 1868 envisaged only the corrupt practices of bribery and treating the Orders in Council of 1931 and 1946 (Article 80 and section 83) were intended to embrace a larger class of corrupt practices. The only question is whether this intention has been frustrated, so far as false returns as to election expenses are concerned, on the ground that the language used in section 83 (1) (*a*) (and in the corresponding Article 80) is inapt. In the absence of authority defining comprehensively the expressions " in pursuance " and " in furtherance " one is entitled to give to them one of the dictionary meanings sensible in the context. One of the simplest meanings of

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either expression would be the " prosecution " or the " promotion " of the thing. Referring to a person acting " in furtherance of a strike " the Court of Criminal Appeal in England said in *Rex v. Tearse* [1], " If these words fell to be construed apart from the consideration of previous legislation and pronouncements on that legislation, it might be difficult to suggest that any restriction should be placed on the meaning of the word 'furtherance'. In English literature it is found applied equally to mean the advancement of things before they come into existence and after they have been begun, but the words 'in furtherance of a trade dispute' have a history." . In *Tearse's case* a restricted meaning was given to the phrase " in furtherance of " because in an earlier case, *Conway v. Wade* [2], which went up to the House of Lords where the words " an act done in contemplation or furtherance of a trade dispute " had to be construed, two of their Lordships stated in the particular context in which the words occurred that " an act done in contemplation " meant an act done before the dispute arose and " an act done in furtherance " meant an act done when the dispute had come into existence. It would thus be seen that the phrase " in furtherance " was given a restricted meaning because it was associated with and preceded by the words " in contemplation of ". I have not been convinced that the phrases in section 83 (1) (*a*) or, for that matter, the same phrases in section 83 (1) (*b*) (ii) should be given a restricted meaning. It is true that in England in cases falling under section 6 (2) of the Act of 1868 the phrases have been held to describe the implementation after the election of a corrupt pre-election promise to treat or a promise to give a voter a money reward or its equivalent. Such cases are obvious examples of acts done " in pursuance " or " in furtherance " of corrupt practices. Does it, however, follow *by logical necessity* that there is no scope for the application of either phrase to the corrupt practice of making a false return ? I am constrained to say " No ". This corrupt practice is one which by its nature can be committed only after the declaration of the result of the election. I see, therefore, no compelling reason why the idea of a nexus between a pre-election promise and its implementation should affect the approach to what is an independent problem, namely, whether the act of making a declaration for the purposes of section 70 of the Order in Council is an act done in pursuance or in furtherance of the corrupt practice penalised by section 58 (1) (*f*).

In the final result I hold that the appeal from the finding under section 58 (1) (*c*) succeeds and that the learned election judge had jurisdiction, by reason of the provisions in section 83 (1) (*a*), to try the charge of corrupt practice of making a false return as to election expenses.

I agree with my Lord, the Acting Chief Justice, as to the final order which would result from the conclusions at which we have arrived.

Appeal dismissed.

[1] (*1945*) *1 K. B. 1* (*at p. 5.*)

[2] (*1909*) *A. C. 506.*

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1953 *Present :* **Rose C.J.**

G. G. APPUHAMY, Appellant, *and* J. A. GREGORY, Respondent

S. C. 158—C. R. Colombo, 35,008

International Law—Diplomatic immunity from judicial process—Scope.

Under the rules of international comity, diplomatic immunity from judicial process is extended not only to a Minister or Ambassador but also to his family, suite and servants. An assistant to a military or naval attaché, if he in fact works in an Embassy, is covered by the immunity.

APPEAL from a judgment of the Court of Requests, Colombo.

A. C. Nadarajah, for the plaintiff appellant.

E. B. Vannitamby, for the defendant respondent.

October 8, 1953. ROSE C.J.—

In this case the appellant sues the respondent for the recovery of a sum of Rs. 300 in respect of wages which he alleges were due to him for services rendered as personal boy. The respondent at the trial raised the issue that he is a member of the staff of the American Embassy in Ceylon and is therefore immune from the jurisdiction of the Court of Requests. The test which appears to have been applied in the English cases and which I agree with the learned Commissioner would seem to be applicable to the position now existing in Ceylon is that immunity from judicial process is extended not only to the person of the Minister or Ambassador but to his family, suite and servants. That was stated by McCardie J. in the case of *Assurantie Compagnie Excelsior v. Smith*[1]. On appeal Scrutton L.J. in the same case said, "The Court must observe the rules of international comity which gave diplomatic immunity from judicial process and must hold that the defendant was entitled to the immunity which he claimed on the ground that he was on the official staff of the Embassy carrying out official duties".

Mr. Nadarajah contends that there would seem to be logical reasons for holding that a military or naval attaché should not be covered by this rule in that he is not one of the Ambassador's staff. That matter, however, appears to be decided by authority and in the case of *Hemeleers-Shenley v. The Amazone, Re the Amazone*[2], Slesser L.J. held that an assistant military attaché to the Belgian Embassy was entitled to the same immunity as a member of the Ambassador's staff, the test apparently being whether the attaché in question was performing duties in the Embassy to assist the Ambassador. If, therefore, in principle a military or

[1] *(1923) 40 Times L. R. 105.* [2] *(1940) 1 A. E. R. 269.*

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naval attaché can be regarded as covered by the immunity, it seems to me that the same rule should apply to an assistant to an attaché provided that he in fact works in the Embassy.

Now, the respondent, Mr. James Ashley Gregory, gave evidence, and there was no evidence called by the appellant in the lower court to the contrary, that he is a clerk and assistant to the Naval Attaché in the American Embassy, Colombo. He stated that he is an American citizen on the staff of the American Embassy. In cross-examination he said " I came to Ceylon on the 6th of November, 1950, and since then I have been attached to the American Embassy. I am a clerk and also assistant to the Naval Attaché in the U. S. Embassy. I am paid by the U. S. Navy." It seems to me that the fact that an attaché, or an assistant attaché or a clerk to an attaché, is not paid by the Embassy but is paid in fact by the United States Navy in whose employ he is does not remove him from the immunity, if in fact he is doing work on behalf of the Ambassador and is working in the Embassy.

The learned Commissioner accepts the evidence of Mr. Gregory and comes to the conclusion that having regard to his position in the Embassy he is immune from civil process. I agree with that view. That being so, the appeal is dismissed with costs.

Appeal dismissed.

1953 *Present :* **Nagalingam A.C.J.**

SETUN BIBEE *et al.*, Appellants, and ABUSALLY MARIKAR, Respondent

S. C. 129—C. R. Kegalle, 13,669

Partition action—Minority of defendants—Summons served on them personally—Minors not legally represented—Effect on proceedings—Civil Procedure Code, s. 480.

Some of the defendants in a partition action were minors. No appointment of a guardian *ad litem* had been made in respect of them, and service of summons was made on them personally. After final decree was entered they moved under section 480 of the Civil Procedure Code to have the decree set aside.

Held, that the final decree could be set aside for the reasons (1) that as the defendants were minors, the service of summons on them personally was ineffective, and (2) that section 480 of the Civil Procedure Code, which declares that an order made in an action in which a minor is a party without such minor being represented by a guardian *ad litem* may be discharged on application made for the purpose, is not inapplicable to actions filed under the Partition Ordinance.

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APPEAL from a judgment of the Court of Requests, Kegalle.

A. L. M. Hashim, for the defendants appellants.

S. J. V. Chelvanayakam, Q.C., with *K. S. Rajah*, for the plaintiffs respondents.

Cur. adv. vult.

October 2, 1953. NAGALINGAM A.C.J.—

This is an appeal from an order refusing to set aside a final decree entered under the Partition Ordinance. The application to set aside the decree was made to Court on the ground that the 2nd to the 5th defendants-appellants were minors at the date of the institution of the action and that no appointment of a guardian *ad litem* had been made in respect of them and that the final decree too was entered without any representation of the minors having been made. None of the minors appeared in Court during the course of the proceedings, nor did even the sole major defendant appear. As to why the major defendant did not appear there is no explanation, but in the result the case was adjudicated upon *ex parte* on the testimony of the plaintiff in the absence of any of the defendants.

There is no evidence to show whether the plaintiff stood in any relationship to the defendants or not, but whatever that may be the alleged service of summons on the minor defendants cannot be regarded as a true report. Two of the defendants, namely the 4th and the 5th, were stated in 1950 to be fifteen and fourteen years of age respectively. The action was filed in 1940, so that at the date the summons was reported to have been served on these two defendants they were to say the least five and four years old. The 2nd and 3rd defendants must have been older, but it is obvious that no effective service of summons could have been effected on them too.

The learned Commissioner held, relying upon the cases of *Randeni v. Allis Appu* [1] and *Fernando v. Fernando* [2], that even though some of the defendants may have been minors the final decree entered under the Partition Ordinance was binding on them, and that their remedy lay under the other provisions of the Partition Ordinance. This view, however prevailed at a time when the final decree under the Partition Ordinance was regarded as sacrosanct and inviolable ; but that view has since been departed from.

In the case of *Jayawardene v. Weerasekera* [3] de Sampayo J. held that where the proceedings had not been conducted in conformity with the essential provisions prescribed by the Partition Ordinance, a decree entered thereunder acquired no immunity against its being declared null and void. In the case of *Caldera v. Santiago Pillai* [4] a final decree

[1] *(1900) 1 Br. 284.*
[2] *(1905) 9 N. L. R. 241.*
[3] *(1917) 4 C. W. R. 406.*
[4] *(1920) 22 N. L. R. 155.*

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entered was set aside on the ground that service of summons on the defendant had not been duly effected. To the same effect is the more recent case of *Pablis v. Euginahamy*[1].

Once the barrier of the sacrosanct character of a final decree is broken through, the reasoning underlying the case of *Randeni v. Allis Appu* and *Fernando v. Fernando* (supra) for holding that the decree cannot be set aside fails, and one is free to consider what the effect of minority of defendants is on proceedings in a partition action, where they have not been legally represented.

One aspect of the question discloses the existence of reasons identical with those given for setting aside a decree on the ground that summons was not duly served on the defendant. Where the defendants are minors, no effective service of summons can be made on them personally. In this case, as pointed out earlier, two of the minors in any event were five and four years of age. It is difficult to understand the argument that the service alleged to have been made on those two infants, if the service was made at all, must be regarded as satisfactory. The true position, to my mind, is that no service of summons was effected on them and that there was a non-compliance with one of the essential steps that had to be taken under the Partition Ordinance before a valid decree could have been entered under it. This view would be directly based upon the cases of *Jayawardene v. Weerasekera*, *Caldera v. Santiago Pillai* and *Pablis v. Euginahamy* (supra).

The other aspect of the question is one that arises upon a consideration of section 480 of the Civil Procedure Code, which declares that an order made in an action to which a minor is a party without such minor being represented by a guardian *ad litem* may be discharged on application made for the purpose. In this case the minors have made the necessary application and they are entitled to the relief provided by the section. I do not think it sound to say, as contended for by respondent's counsel, that section 480 has no application to actions filed under the Partition Ordinance. The Civil Procedure Code governs the procedure to be followed in all the Civil Courts of the Island subject to any special provision to be found in any particular enactment. The Partition Ordinance makes no provision with regard to service of summons or for the appearance of minors and the provisions of the Civil Procedure Code indeed do apply to Partition actions as well in regard to such service or appearance.

The appellants have made out their case and their appeal is entitled to succeed.

I therefore set aside the order of the learned Commissioner and vacate the decrees entered in the action and set aside all proceedings in the action subsequent to the order for the issue of summons. Summons will be taken out by the plaintiff on the 2nd to the 5th defendants and served on them or their guardian *ad litem* and the action will thereafter proceed in the ordinary way. The appellants will be entitled to the costs of appeal and of the proceedings had in the lower Court.

Appeal allowed.

[1] *(1948) 50 N. L. R. 346.*

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1953 *Present :* **Swan J.**

C. A. SAMARAKOON, Appellant, *and* A. H. K. JAYAWARDENA, Respondent

S. C. 182—C. R. Colombo, 40,122

Rent Restriction Act, No. 29 of 1948—Area of operation—Section 2—Interpretation.

Where the limits of an area which was within the operation of the Rent Restriction Ordinance, No. 60 of 1942, are extended subsequent to the date of proclamation of the Rent Restriction Act, No. 29 of 1948, the latter Act is not applicable to premises situated within the extended area until such area is brought within the operation of the Act by means of notification under section 2 (*b*) of the Act.

APPEAL from a judgment of the Court of Requests, Colombo.

H. W. Tambiah, with *S. Ambalavanar*, for the plaintiff appellant.

Vernon Wijetunge, for the defendant respondent.

Cur. adv. vult.

December 14, 1953. SWAN J.—

In this case the appellant sued the respondent for ejectment from the house and premises called and known as " Ediston Lodge " situated at Udahamulla. The respondent in his answer said that the appellant was not entitled to eject him inasmuch as the premises were situated in an area which was within the operation of the Rent Restriction Act, No. 29 of 1948.

There were only two issues raised at the trial, namely, (1) does the Rent Restriction Act apply to the premises in suit ; (2) if not, is the appellant entitled to a decree in ejectment. The learned Commissioner answered the first issue in the affirmative. In the result the action was dismissed with costs.

Mr. Thambiah appearing for the appellant contends that the Rent Restriction Act does not apply. The area in which the premises are situated was brought within the limits of the U. C., Kotte, in 1951. It was conceded at the trial that prior to 1951 the premises in suit were outside the U. C. limits.

In order to ascertain whether the Rent Restriction Act of 1948 applies we have to look at Section 2 which provides as follows :—

" This act shall apply :—

(*a*) in every area in which the Rent Restriction Ordinance, No. 60 of 1942, was, by virtue of any Proclamation under Section 2 of that Ordinance, in force immediately prior to the date appointed by the Minister under Section 1 of this Act ; and

(*b*) in every other area for the time being declared by the Minister by notification published in the *Gazette*, to be an area in which this Act shall be in operation. "

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It is not suggested that there was a notification at any time published in the *Gazette* whereby the Minister declared the Rent Restriction Act to apply to the area brought within the limits of the U. C., Kotte, in 1951. We have therefore to interpret the meaning of Section 1 (*a*). The *appointed date* referred to in this Section is 1st January, 1949. The simple question is whether the area in which the premises were situated came within the operation of the Rent Restriction Ordinance, No. 60 of 1942, by virtue of any Proclamation under Section 2 of that Ordinance.

By notification in *Government Gazette* No. 9,084 of the 12th February, 1943, the area within the administrative limits of the U. C., Kotte, was brought within the operation of the Rent Restriction Ordinance, No. 60 of 1942. By notification published in *Gazette* No. 9,773 of the 10th July, 1947, the notification in *Gazette* 9,084 was cancelled and a new list of the areas brought within the operation of the Rent Restriction Act was published. In that list we once again find reference to the area within the administrative limits of the U. C., Kotte. *Gazette* No. 7,910 of the 4th March, 1932, published a list and gave the boundaries of the areas in which Urban Councils were established. There we have reference to the administrative limits of the Kotte U. C. which are described by physical metes and bounds. In my opinion there can be no question that the area brought within the operation of the Rent Restriction Act of 1948 by virtue of Section 2 (*a*) was the area within the boundaries mentioned in the notification in *Gazette* No. 7,910. Perhaps it was a *casus omissus* on the part of the authorities not to have notified that the Rent Restriction Act of 1948 would apply to the administrative limits of the U. C., Kotte, as extended from the beginning of 1951. But upon an interpretation of Section 2 (*a*) of the Rent Restriction Act I have come to the conclusion that in the absence of a notification under Section 2 (*b*) the Rent Restriction Act does not apply to the extended limits. In the result the appellant is entitled to succeed. I would therefore allow the appeal with costs and enter judgment for the appellant as prayed for with costs in the lower court which I fix at Rs. 31·50. I think it only fair to allow the respondent time to find another house. I would therefore make order as follows :—

If the respondent pays all rent and damages up to 31st December, 1953, the costs of appeal and costs in the lower court which I have fixed at Rs. 31.50 on or before the 29th December, 1953, and thereafter pays each month's damages on or before the 15th of such month commencing from 15th January, 1954, writ of ejectment will not be executed till 30th June, 1954. In default both writs may issue.

Appeal allowed.

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1953 *Present :* **Gratiaen J. and H. A. de Silva J.**

T. H. I. DE SILVA, Appellant, *and* TRUST CO., LTD., Respondent

S. C., 229—D. C. Colombo, 23,098

Delict—Master and servant—Distinction between " servant " and " independent contractor "—Servant vested with discretion as to how he should carry out his duties—Negligence—Scope of master's liability—" Course of employment ".

An employer cannot escape liability for his servant's torts by pleading that he had vested in the servant a discretion as to how he should carry out his duties. In distinguishing between a servant and an independent contractor, " the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done ".

The owner of a vehicle may be responsible for the consequences of the negligence of a person who was driving it if the owner had an interest in the journey being undertaken, i.e., if the vehicle was " being used wholly or partly on the owner's business or for the owner's purposes ".

Plaintiff, when he was travelling in a motor car belonging to the defendant insurance Company, was seriously injured when the car went off the road in consequence of the negligent driving of one of the occupants of the car. There was evidence that the car had been placed by the Company at the disposal of an employee under a " contract of loan " but that, at the time of the accident, the employee was travelling in the car together with the plaintiff on the Company's business. There was also evidence that the Company had vested in the employee a discretion as to how he should carry out his duties.

Held, that the defendant Company was liable to compensate the plaintiff for the injuries which he sustained in the accident.

APPEAL from a judgment of the District Court, Colombo.

N. E. Weerasooria, Q.C., with *H. W. Jayewardene* and *D. R. P. Goonetilleke*, for the plaintiff, appellant.

H. V. Perera, Q.C., with *P. Navaratnarajah* and *W. D. Gunasekera*, for the defendant, respondent.

Cur. adv. vult.

October 29, 1953. GRATIAEN J.—

The plaintiff is a medical practitioner. On 27th April, 1950, he was travelling from Colombo to Jaffna in a Ford motor-car belonging to the defendant Company which does business in life insurance. The other occupants of the car were J. A. Pereira (an employee of the Company performing the duties of a " field-officer "), E. Holsinger (a free-lance insurance " canvasser ") and a chauffeur directly employed by Pereira. Pereira, Holsinger and the chauffeur took turns at driving and, shortly

2——J, N. B 32804-1,590 (1/54

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before the car reached Anuradhapura, when Holsinger was driving, it suddenly went off the road and the plaintiff was seriously injured. Holsinger had apparently fallen asleep at the wheel.

It is no longer disputed that Holsinger's negligence was the effective cause of the accident. The learned District Judge assessed the damages payable to the plaintiff (in the event of the Company being held liable) at Rs. 50,000, and no complaint has been made against this assessment. The only issue which therefore calls for our decision is whether or not, in the circumstances of this case, the Company is vicariously responsible for the consequences of Holsinger's negligence.

The plaintiff had since about November, 1949, been engaged from time to time to examine persons proposing to take out policies of life insurance with the Company. He was paid a fee of Rs. 15 by the Company for each case, and as a general rule the examinations were carried out in his own place of business.

The plaintiff alleged in his plaint that the Company had "*engaged (his) services to proceed to Jaffna to examine certain prospective (clients)*" and that the accident occurred while he was being conveyed in the Company's motor-car for that purpose. The Company in its answer admitted "that the plaintiff went to Jaffna on the day in question for the purpose of examining certain prospective (clients) in the Northern Province for the defendant Company", but denied liability. In particular, it pleaded that the car belonged in truth to J. A. Pereira who was "in control and possession of it" at the relevant time and that the driver (i.e., Holsinger) was "under the employ of Pereira". With regard to the terms on which the plaintiff was engaged to examine the Company's proposed clients, the Company alleged that "the plaintiff *had to proceed to their residences at his own cost and expense*", and that on this particular occasion "Pereira had *lent the car to him, together with a driver, in order that the plaintiff's travelling expenses might be reduced as much as possible*".

The vital issues on which the parties went to trial on the question as to the disputed liability of the Company were as follows :

"4. Was the defendant Company the owner of the car on the day in question ?

2 (*a*) Was the said car at the time being driven by an employee of the defendant Company ?

2 (*b*) (as eventually amended). Was the said employee acting in the course of and within the scope of his employment and for the benefit of the said Company ?"

The learned District Judge answered these issues against the plaintiff upon the evidence placed before him, and took the view that the case was on all fours with that which came before the Court of Appeal of South Africa in *Colonial Mutual Life Insurance Co. v. Macdonald* [1]. The plaintiff's action was accordingly dismissed with costs.

[1] (*1931*) *S. A. A. D. 412.*

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The version of each party as to the circumstances in which the plaintiff happened to be a passenger in the motor-car, and as to the relationship between the Company, Pereira and Holsinger in regard to the driving of the motor-car, was placed before the trial Judge, and it is implicit in his judgment that Holsinger's evidence has been rejected wherever it came into conflict with that of the plaintiff. Pereira himself, although available as a witness, was not called to support the plea that he had lent the car to the plaintiff for the purposes of the journey.

Certain questions immediately call for an answer. For instance, what was the precise relationship between the Company on the one hand and Pereira and Holsinger respectively on the other ? What were the circumstances in which the Company's car was placed at the disposal of Pereira ? And what were the circumstances in which the plaintiff was a passenger in the car at the time of the mishap ? It is conceded that Pereira had authorised Holsinger to drive the car. Did he do so in circumstances which rendered the Company liable to compensate the plaintiff for the injuries which he sustained in the accident ?

The Secretary of the Company has explained how its business affairs were conducted during the relevant period. There was a Board of Directors, but no Managing Director. The Secretary supervised the work in the office, and the " field work " was entrusted to three persons designated " field officers ", one of whom was Pereira. These " field officers " were salaried employees, and each of them received as additional remuneration an " over-riding commission " on the amount of business introduced by him. They were " answerable to the Secretary " in a general way, but were given " complete discretion as to the manner in which they set about bringing in business, and . . . . complete discretion to employ canvassers on a commission basis ". Holsinger was one of the canvassers whom Pereira had engaged in the exercise of this authority. Among the duties of a " field officer " was that of " supervising and controlling " the work of canvassers engaged by him.

A medical certificate was required in the case of every person proposing to insure his life with the Company, and, explained the Secretary, " field officers were told that they should select doctors who would examine carefully in the interests of the Company ". The plaintiff was one of the doctors selected by Pereira and Holsinger to examine cases introduced by them, and, whenever he was professionally engaged by them for any particular case, he was brought into contractual relationship with the Company for that occasion.

It is clear enough, I think, that Holsinger could not, *in relation to his functions as a canvasser*, be regarded as a servant of the Company. Although he was liable, in a certain sense, to be " supervised and controlled " by Pereira, he was nevertheless his own master. He was in truth an independent contractor, so that the Company could not, under normal circumstances, be held responsible for any torts committed by him *qua canvasser*. His position was similar to that of the commercial traveller in *Eggington v. Reader* [1].

[1] *(1936) 52 T. L. R. 212.*

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The learned District Judge took the view that " even Pereira was not a servant of the Company in the sense in which that term is used in order to fix liability upon the master ". The reason given for this conclusion was that " no instructions were given to field officers as to where the proponent is to be examined and who the doctor to be employed is ; that was entirely within their discretion ". The judgment proceeds as follows on this issue :

> " . . . . it is quite clear that all that the Company was concerned with was the results of Pereira's efforts. They had no control over the manner in which he set about his employment or the means by which he accomplished the results obtained. "

With respect, I do not accept this line of reasoning. An employer cannot escape liability for his servant's torts by pleading that he had vested in the servant a discretion as to how he should carry out his duties—*Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd.* [1]. " It is true ", said Lord Porter, " that in most cases no orders as to how a job should be done are given or required : the man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but *who is entitled to give the orders as to how the work should be done* ". Applying this test, I would hold that the functions of Pereira, *qua* " field agent " of the Company, were those of a servant under a " contract of service " as distinguished from those of an independent contractor under a " contract for services ". He was answerable to the Secretary of the Company, and the unlimited discretion or authority which he was given as to how he should perform his " field duties " for the benefit of his employer could have been withdrawn or curtailed at any moment. It has not even been suggested that the Company had contracted itself out of its right to give him particular directions (if it so desired) as to how he should discharge his duties in the future. In my opinion, the learned Judge misdirected himself as to the true relationship between Pereira and the Company.

I shall now examine the circumstances in which the Company's motor-car was made available to Pereira. The Secretary admitted, and it is obvious, that " a field officer cannot function efficiently without a car ". Accordingly, the Company purchased this particular vehicle and " loaned " it to Pereira " with a view to helping him to discharge his obligations (as a field officer) "—*vide* the formal agreement D2 dated 30th July, 1948, in terms of which Pereira was handed possession of the car.

The question at once arises whether the Company could under any circumstances have been held responsible for the negligence of a person driving the vehicle at a time when it was in Pereira's possession under the " contract of loan " D2. The learned Judge seems to have thought that no such liability could ever attach because " the control . . . . remained with Pereira and to all intents and purposes Pereira was the owner ". In my opinion, this proposition goes too far. The authorities

[1] *(1947) A. C. 1.*

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indicate that, in certain instances, the Company might well be liable for the negligence of the driver of the car because of the special relationship subsisting between Pereira and the Company. The judgment of the Privy Council in *Canadian Pacific Railway Co. v. Lockhart* [1] establishes that, if the motor-car had been negligently driven on any occasion in the course of a journey "*for the purposes of, and as a means of execution of the work of*" *Pereira as an employee of the Company*, the Company would have been liable to compensate a third party injured by reason of that negligence. Pereira's general duties as a field officer necessitated and involved his presence as the Company's representative in many places, and if he was travelling in the car in order to perform any of these duties, "the means of transport used by him was clearly incidental to the execution of that which he was employed to do". In *Lockhart's case*, the car belonged to the servant and not to the employer. In addition the servant had been expressly forbidden to use a vehicle which was not insured against third-party risks. Nevertheless, the employer was held responsible for the servant's negligence while driving an uninsured vehicle in the course of and for the purposes of his employment, because "the prohibition did not limit the sphere of his employment". How much stronger would be a situation in which Pereira was engaged in travelling on the Company's business in a motor-car which had primarily been placed at his disposal for that very purpose ?

A recent decision of Devlin J. in *Ormrod v. Crossville Motor Services Ltd. et al.* [2], which was upheld by the Court of Appeal—(*1953*) *2 A. E. R. 753*—illustrates that the owner of a vehicle may be responsible for the negligence of a person who was driving it if the owner had (or even shared with that other person) *an interest in the journey being undertaken*—or, as Denning L.J. put it, if the vehicle was "being used wholly or partly on the owner's business or for the owner's purposes".

I concede that Pereira was not precluded by the terms of the "contract of loan" from using the vehicle for his private purposes if he so desired. If, therefore, the car were negligently driven while Pereira was travelling to his golf-club, the Company could not have been held responsible. But if, on the other hand, an accident occurred while he was engaged on the Company's business in the performance of his legitimate duties as the Company's employee, the position would have been entirely different.

Let me now examine the circumstances in which the plaintiff happened to be travelling in the motor-car at the time of the accident. On that issue, the trial Judge had before him only the conflicting versions of the plaintiff and Holsinger. Pereira's exclusion from the witness-box is significant, and it is not unreasonable to presume that if the Company had chosen to call him as a witness, he could not have truthfully carried the defence any further. The difficult questions which the learned Judge was called upon to resolve would not have arisen at all if he believed that the plaintiff had merely borrowed the car for his own exclusive benefit in order to fulfil an undertaking to travel to Jaffna at his own cost and expense. Indeed, Mr. H. V. Perera conceded that the acceptance

[1] (*1942*) *A. C. 591.*

[2] (*1953*) *1 W. L. R. 409.*

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of the plaintiff's evidence on this aspect of the case is implicit in the judgment under appeal. I shall therefore summarise this evidence, which is to the following effect :

On earlier occasions, Pereira and Holsinger had (except in one instance) taken the plaintiff in this identical car to the proposed client's residence if it was not convenient to bring the client to the plaintiff's place of business. The arrangement arrived at with Holsinger, *in the presence and with the approval of Pereira*, was " for the Company to provide the transport ". With regard to the particular journey with which this case is concerned, Holsinger who had previously gone to Jaffna with Pereira on a canvassing tour, wrote a letter P 2 dated 19th April, 1950, on business note paper belonging to the Company, saying " We are at present working at Jaffna, and as promised we are going to give you all the business up here, which would be a very large number of exams. You will have to spend four days with us as the volume of work is going to be large ". In due course, Holsinger and Pereira arrived at the plaintiff's house and took him away in the car. It was in the course of this journey that the accident occurred by reason of Holsinger's negligence.

The plaintiff expressly denied that he had " borrowed " the car from Pereira for the purposes of the trip, and explained that, if he had undertaken to provide his own transport (which he did not) he could very well have used his private motor-car. On the contrary, he said, he had made it clear that he would not go unless he was provided with transport " because it was not worth while to go in my car "—the distance involved being 248 miles each way.

It seems to me that, upon the facts as I have set them out, the Company's liability has been clearly established. The resemblance between the present case and that which was considered in *Colonial Mutual Life Insurance Co. v. Macdonald* (*supra*) is only superficial, and disappears when one appreciates (*a*) the true relationship between Pereira and the Company, and (*b*) the responsible part which Pereira had himself played in the transaction. He had a discretion as to the selection of the doctor who was to examine the cases in Jaffna ; he exercised that discretion in favour of the plaintiff. He was a party to the negotiated arrangement that, as a term of the plaintiff's engagement to examine the cases in Jaffna, he should be provided with transport ; and he did in fact provide the transport. He had a right to select the person who should drive the car during any stage of the journey ; he selected Holsinger. He had the right to decide whether or not, in the Company's interests, no less than in his own, he should accompany Holsinger and the plaintiff on the trip ; and he accompanied them.

At no relevant stage had Pereira divested himself of his character as a servant authorised by the Company to act on its behalf. Throughout the journey, therefore, the car was, through Pereira's instrumentality, being used *on the Company's business*. If through Holsinger's negligence, a pedestrian had been injured during the course of the trip, the Company would have been liable. For, in addition to the contractual arrangement to convey the plaintiff to Jaffna, the car was without doubt being used

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as " a means of transport which was clearly incidental to the execution of that which (Pereira) was employed to do ". He was engaged *on the Company's business* while he was travelling to Jaffna.

The duty which was owed to the plaintiff as a passenger in the car cannot logically be placed on a lower plane. He had stipulated that he should be conveyed to Jaffna by the Company, which, through its accredited representative, had engaged him to undertake professional work on its behalf at the other end. Even if that accredited representative, i.e., Pereira, had (unknown to the plaintiff) been prohibited expressly from agreeing to provide such transport, it would have made no difference whatsoever, because a master is responsible for the " unauthorised act of a servant done in the course of an authorised employment "—*Citizens Life Association Co. v. Brown* [1].

In my opinion the judgment under appeal should be set aside. It has not been argued that the learned Judge's estimate on the issue of damages is excessive. I would therefore enter a decree in favour of the plaintiff for Rs. 50,000 with costs in both Courts.

H. A. DE SILVA J.—I agree.

Appeal allowed.

1953 *Present :* **Rose C.J. and Swan J.**

D. D. SOMAPALA, Appellant, *and* MURIEL SIRR, Respondent

S. C. 56—D. C. Colombo, 21,681

Seduction—Corroborative evidence.

In an action for damages for seduction, a false denial by the defendant of more than the barest acquaintance with the plaintiff at the material time may properly be considered to lend some corroboration to the woman's story.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *N. M. de Silva*, for the defendant appellant.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the plaintiff respondent.

Cur. adv. vult.

[1] *(1904) A. C. 423 at 428.*

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September 30, 1953. ROSE C.J.—

This is an appeal from a judgment of the District Court, Colombo, entering judgment in favour of the plaintiff for Rs. 2,000 and costs in respect of an action for damages for alleged seduction.

The case for the plaintiff, briefly stated, is that the plaintiff and the defendant, who were neighbours, became acquainted with each other, that the acquaintance ripened to affection and that upon the night of 8th May, 1949, the plaintiff, who was a virgin at the time, was seduced by the defendant. The plaintiff kept the episode from her parents until she herself was aware of her pregnancy and until her parents discovered her condition. There is evidence, which the learned District Judge apparently accepted, that subsequent to the discovery of the plaintiff's condition, conversations took place between the defendant and the plaintiff's parents which resulted in the defendant promising to marry the plaintiff in due course. Later, the question of finance was discussed and the defendant apparently being dissatisfied with the provision that was proposed to be made by the plaintiff's parents, withdrew from the arrangement.

The principal point taken by the appellant was that there was no substantial corroboration of the plaintiff's story of the seduction. Moreover, it was further contended that the contradictions in the story told by the plaintiff and by her principal witnesses were of such a nature that the learned Judge should have rejected the plaintiff's version of the facts.

The principal item of corroboration relied upon was the discovery of the plaintiff and the defendant in a compromising position by the invalid elder sister of the plaintiff. It appears that the 8th of May was the final day of a two weeks Pirith Pinkama in the village temple. The 8th May was the "Dorakadasna" night, on which the practice evidently is for almost all the people in the village to gather at the temple. In fact, the plaintiff's parents went to the temple at about 7.30 p.m. and did not return to their house until late at night; the suggestion of the plaintiff, of course, being that the defendant was aware that the plaintiff would be alone in the house, apart from her invalid sister. According to the evidence of the sister, she rebuked the defendant for being in the house alone with the plaintiff so late at night, and thereupon the defendant left. Moreover, the subsequent conduct of the defendant, as depicted by the plaintiff's witnesses, would tend to corroborate her (the plaintiff's) story of the seduction.

Counsel for the appellant has drawn our attention to a number of contradictions in the story of the plaintiff herself and to certain points in which it conflicts with the story as told by her mother and sister. While it is no doubt true that criticism can rightly be directed to these aspects of the matter, it seems to me that the learned District Judge has sufficiently considered these matters and has formed the opinion that, in spite of them, he still prefers the plaintiff's story. Moreover, as was pointed out by learned counsel for the respondent, this would seem to

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be one of those cases in which, as is pointed out in *Poggenpoel v. Morris* [1], any false denial by the defendant may properly be considered to lend some corroboration to the woman's story. I would add that the above case has been approved by this Court in *Vedin Singho v. Mency Nona* [2].

In the present case, the defendant denied more than the barest acquaintance with the plaintiff at the material time, which denial the learned District Judge has found—and I have no reason to doubt the correctness of his finding—to be untrue.

Taking the case as a whole, and after a careful perusal of the evidence, I have come to the conclusion that the learned District Judge has adequately considered both the facts and the law applicable to them, and that his decision in favour of the plaintiff is one with which it would not be proper for this Court to interfere.

There was no argument on the question of damages and, having regard to the fact that the plaintiff was a school teacher and that her career must have been injured by this episode, I see no reason to conclude that the damages are excessive.

For these reasons the appeal is dismissed with costs.

SWAN J.—I agree.

Appeal dismissed.

1953 *Present :* **Gratiaen J. and Weerasooriya J.**

WAHARAKA SOBITHA UNNANSE *et al.*, Appellants,
and AMUNUGAMA PIYARATANA UNNANSE *et al.*,
Respondents

S. C. 329—Application for revision in D. C. Kandy, 2,154L

Appeal—Stay of execution pending appeal—Quantum of security that should be furnished by judgment debtor—Civil Procedure Code, s. 761.

Where application is made under section 761 of the Civil Procedure Code for stay of execution of a decree pending an appeal, the security ordered to be furnished by the judgment-debtor should not be unduly excessive. The amount of security should be such as would reasonably safeguard the interests of the judgment-creditor in the event of the judgment appealed from being eventually affirmed in appeal.

[1] *S. A. Law Reports, Cape Province Division (1938), p. 90.*
[2] *(1949) 51 N. L. R. 209.*

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APPLICATION to revise an order of the District Court, Kandy.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the 1st and 2nd defendants petitioners.

E. B. Wikramanayake, Q.C., with *H. W. Jayewardene*, for the plaintiffs respondents.

Cur. adv. vult.

September 16, 1953. GRATIAEN J.—

The parties to this application, and to the action in the Court below, are Buddhist priests. On 29th June, 1953, the learned Judge entered judgment in favour of the 1st and 2nd respondents against the petitioners and the 3rd, 4th and 5th respondents, declaring the property in dispute (consisting of houses and lands situated partly within the Municipality of Kandy) to be comprised in a charitable trust of which the 1st and 2nd respondents were entitled to receive the income and profits. The decree also directed the judgment debtors to be ejected from the property and to pay to the 1st and 2nd respondents damages at the rate of Rs. 2,000 per annum from the year 1945 until the property is restored to them.

The property was valued by the 1st and 2nd respondents in their plaint at Rs. 30,000, and has admittedly been continuously in the possession of the judgment debtors since the year 1932.

On 6th July 1953, the petitioners filed an appeal to this Court, which is still pending, against the judgment and decree passed against them and the 3rd, 4th and 5th respondents. In the meantime they had filed an application on 29th June— i.e., on the date on which judgment was pronounced against them—under section 761 of the Civil Procedure Code for a stay of execution of the decree (which had not yet been formally drawn up and signed under section 188) pending the determination of their proposed appeal. A few hours later, the decree having been duly passed, the 1st and 2nd respondents initiated execution proceedings against the judgment debtors.

On 7th July, 1953, after the petition of appeal had been filed, the learned District Judge proceeded to inquire into both applications under Chapter 59 of the Code—that is to say, the application of the judgment debtors for stay of execution pending the hearing of the appeal, and the counter-application of the judgment creditors for execution notwithstanding the pendency of the appeal.

With regard to the application of the judgment debtors, the Court granted a stay of execution provided that, on or before the 21st July, 1953, they furnished security (*a*) in a sum of Rs. 50,000 by the hypothecation of immovable property, and (*b*) in a sum of Rs. 15,000 in cash. He further directed that, in default of due compliance by the judgment debtors with these conditions, the execution of the decree should proceed unconditionally.

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The petitioners complain that the terms imposed on them in regard to their application for stay of execution are unduly oppressive and that, as the security ordered bears "no relation to the facts of the case", the decision of the learned Judge is tantamount to a summary refusal of their application.

The provisions of proviso (*c*) to section 761 make it clear that the amount of security which a Judge may in his discretion fix as a condition of a stay of execution pending appeal should be such as would reasonably safeguard the interests of the judgment creditor in the event of the judgment appealed from being eventually affirmed by this Court. If one considers the effect of the learned Judge's order from this point of view, it seems to me that the security ordered to be furnished by the judgment debtors is manifestly excessive.

The decree under appeal directs the judgment debtors (*a*) to hand over immovable property which the judgment creditors themselves have valued at Rs. 30,000 and the annual rental value of which has been assessed by the Court at Rs. 2,000, (*b*) to pay damages which had, at the date of the decree, amounted to approximately Rs. 16,000 and (*c*) to pay continuing damages, until restoration of the property, at the rate of Rs. 2,000 per annum. There is no evidence of any substantial risk that the condition of the property will deteriorate pending the appeal, and I find it difficult to discover any cogent reason for ordering the judgment debtors to furnish, in addition to a sum equivalent to the damages already accrued, security in a sum of Rs. 50,000. In my opinion, the ends of justice would be met by substituting for the learned Judge's order an order that execution be stayed pending the hearing of the appeal on condition, that the petitioners and/or the 3rd, 4th and 5th respondents

(*a*) hypothecate with the Secretary of the District Court of Kandy on or before the 31st October, 1953, a sum of Rs. 15,000 in cash as security for the due performance of such decree or order as may ultimately be binding upon them in these proceedings, and

(*b*) also hypothecate with the Secretary of the District Court on or before the 30th April, 1954, a further sum of Rs. 5,000 as security as aforesaid. (The purpose of this part of the order is to safeguard the interests of the judgment creditors in respect of accruing damages payable in terms of the judgment under appeal.)

In the event of the security ordered as aforesaid not being furnished on or before the due dates, I would direct that the application of the 1st and 2nd respondents for execution of the decree under appeal be granted upon the condition that they hypothecate with the Secretary of the District Court of Kandy a sum of Rs. 20,000 as security in terms of section 763 of the Civil Procedure Code.

I would make no order as to the costs of this application or of the inquiry in the Court below.

WEERASOORIYA J.—I agree.

Order varied.

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[COURT OF CRIMINAL APPEAL]

1952 *Present :* **Gunasekara J. (President), Pulle J. and L. M. D. de Silva J.**

L. H. SOYSA, Appellant, *and* THE QUEEN, Respondent

APPEAL 61 WITH APPLICATION 89 OF 1952

S. C. 30—M. C. Kurunegala, 5,687

Charge of murder—Plea of self-defence—Right of private defence exceeded—Proper direction to jury—Penal Code, s. 294, Exception 2—Jury's rider recommending mercy—Effect on reasonableness of verdict.

Appellant, who was convicted of murder, gave evidence at the trial stating that he had killed the deceased in self-defence. As regards the second exception to section 294 of the Penal Code, the presiding Judge directe l the jury that if the accused exceeded the right of private defence he was guilty of culpable homicide not amounting to murder. It was contended for the appellant that the jury should also have been directed to consider whether the appellant had acted without any intention of doing more harm than was necessary for the purpose of such defence, and that the omission of such a direction made the direction that was given a misdirection.

Held, that there was no misdirection. On the contrary the direction was unduly favourable to the appellant.

R. v. Kirinel's (1946) 47 N. L. R. 443, distinguished.

Held further, that a jury's rider recommending mercy cannot be assumed to involve a view of the facts that is inconsistent with the verdict.

APPEAL, with application for leave to appeal, against a conviction in a trial before a Judge and Jury.

E. B. Sattrukulasinghe, for the accused appellant.

Boyd Jayasuriya, Crown Counsel, for the Crown.

Cur. adv. vult.

October 21, 1952. GUNASEKARA J.—

The appellant was convicted of murder. The statement that he made before the committing magistrate in answer to the charge had been "I am guilty". At the trial he pleaded not guilty and he gave evidence to the effect that he had killed the deceased in self-defence. Referring to this evidence the presiding judge said in his summing-up :

"You know the story he related in the witness-box and you know the submission made by counsel for the defence. Counsel for the defence said that the one and only verdict that you can bring in this case, if you accept the evidence of the accused, was that of culpable homicide not amounting to murder on the ground that the accused was defending himself and exceeded that right."

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The main ground of appeal was that the learned judge had misdirected the jury in regard to the second exception to section 294 of the Penal Code upon which this plea was based. The exception reads :

> " Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence ."

The learned judge explained to the jury the right of private defence and its limits and directed them that if the appellant had acted in self-defence and " within the ambit of the right given to him by law " he was guilty of no offence. As regards the exception in question he said :

> " But if you think he was defending himself but that he exceeded the right of private defence your verdict will be culpable homicide not amounting to murder."

It was contended for the appellant that the jury should also have been directed to consider whether the appellant had acted without any intention of doing more harm than was necessary for the purpose of such defence, and that the omission of such a direction made the direction that was given a misdirection. We were referred to the judgment of this court in the case of *R. v. Kirinelis* [1] and it was contended, in the words of that judgment, that " the jury were not given the opportunity of considering the special kind of *intention* contained in section 294, exception 2, and they could well have had the impression from the charge that, if they found *in fact* that more harm was done than was necessary for the purpose of defence, the proper verdict was that of murder and not culpable homicide not amounting to murder ".

The present case, however, is clearly distinguishable from *R. v. Kirinelis*. In that case the jury had been directed that if the accused had done no more harm than was necessary for the purpose of defence he was guilty of culpable homicide not amounting to murder, and that if he had done more harm than was necessary he was guilty of murder. The trial judge had said in his summing-up :

> " Secondly, if you prefer to consider his case under the plea of self-defence, in order to find culpable homicide not amounting to murder you must be satisfied that an occasion arose for him to defend himself and that in defending himself in the way he did defend himself he cannot reasonably be said to have done more harm than was necessary to have defended himself . . . . You will find him guilty of murder if you are satisfied that he caused the death of the deceased with the intention of causing death . . . . and that there wasn't either of these mitigating circumstances, that is to say, that there was nothing that could reasonably be said to amount to grave and sudden provocation sufficient to deprive a man of ordinary temper

[1] *(1946) 47 N. L. R. 443.*

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to use (lose ?) his power of self-control or that there was no occasion for the accused to defend himself at all, or that if there was such an occasion to defend himself, that he inflicted more harm than was necessary to inflict . . . . " .

This court held that from the language used by the trial judge the jury " may have understood that if the accused in fact exceeded the right of private defence he was to be convicted of the offence of murder,— and they would never have applied their minds to the question whether the accused had an *intention* to do more harm than was necessary for the purpose of defence " ; and observed that this intention was a special intention, and it had not been explained to the jury.

The summing-up in the present case could not lead the jury to a similar view, for they were expressly directed that if the appellant had exceeded the right of private defence he must be convicted of culpable homicide not amounting to murder. In the circumstances of this case, therefore, unlike in *R. v. Kirinelis*, no prejudice was caused to the appellant by the learned judge's omission to direct the jury to consider whether the appellant had acted without any intention of doing more harm than was necessary for the purpose of defence. On the contrary this omission rendered the direction on the exception unduly favourable to the appellant.

It was also contended for the appellant that the verdict was unreasonable. This contention was based mainly on contradictions in the prosecution evidence and a rider recommending mercy that the jury added to their verdict. It was submitted that the only possible justification for the rider was a view that the appellant acted in self-defence and it must therefore be inferred that the jury took that view but held that the appellant had exceeded the power given to him by law.

The jury gave no indication of the grounds upon which the recommendation to mercy was based, and the argument that was addressed to us presupposes that they are necessarily ascertainable from the evidence in the case. We are unable to accept this view. A jury is never directed that there are only certain grounds and no others upon which they may recommend a prisoner to mercy, for that is not the law. Therefore it cannot be assumed that a recommendation to mercy involves a view of the facts that is inconsistent with the verdict merely because the evidence may not disclose what may seem to us to be a proper ground for mercy if the verdict is correct : the recommendation may well be based on some consideration outside the evidence in the case, or the jury may have taken a different view from ours as to what facts disclosed by the evidence can be a proper ground for such a recommendation.

We were unable to accept the contention that the learned judge had misdirected the jury or the contention that the verdict was unreasonable and we accordingly dismissed the appeal.

Appeal dismissed.

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[ASSIZE COURT]

1953 *Present :* **Gratiaen J.**

THE QUEEN *v.* M. SATHASIVAM

S. C. 1 Western Circuit—M. C. Colombo South, 38,682

Evidence Ordinance—Sections 8 (1), (2), 11 and 32 (1)—Statements made by a deceased person—Admissibility—Motive—Conduct—Evidence of trifling weight but gravely prejudicial to accused—Propriety of excluding it.

Accused was charged with murdering his wife. The prosecution sought to produce as part of its case a letter which the deceased had, in anticipation of the accused's return to Ceylon from abroad, written to a third party. The letter, however, amounted at best to mere general expressions indicating fear or suspicion of the accused and not directly related to the occasion of the death of the deceased.

Held, (i) that the letter was not admissible under section 32 (1) of the Evidence Ordinance.

(ii) that the letter was not admissible to prove motive for the crime, under section 8 (1) of the Evidence Ordinance, or to prove conduct on the part of the deceased, under section 8 (2) read with section 11, unless, in the former case, there was independent evidence that the allegations in the letter had induced resentment in the accused's mind against the deceased, and, in the latter case, there was independent evidence to support the suggestion that the deceased was apprehensive of danger to her safety after the accused had returned to Ceylon.

Held further, that evidence of trifling weight affecting an accused person, even though technically admissible, ought to be excluded if the potential prejudice which its reception is almost certain to produce will be out of proportion to its true evidential value.

RULING on the admissibility of certain evidence tendered by the Crown in a trial before the Supreme Court.

T. S. Fernando, Solicitor-General, with *Douglas Jansze*, *Ananda Pereira* and *Vincent Thamotheram*, Crown Counsel, for the Crown.

Colvin R. de Silva, with *T. W. Rajaratnam* and *Ananda de Silva*, for the accused.

Cur. adv. vult.

March 24, 1953. GRATIAEN J.—

In this case the prisoner is charged with having murdered his wife on the morning of 9th October, 1951, at her residence in Colombo. The prisoner had been away in England, while the deceased and their children remained behind in Ceylon, for some months prior to September, 1951. He sailed from London in ss. "Himalaya" which vessel was expected

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to arrive, and did in fact arrive, in Colombo on or about 21st September, 1951. Earlier in that month, the deceased had instituted proceedings against him in the District Court of Colombo, for divorce on the ground of malicious desertion.

The direct evidence tendered against the prisoner on the charge of murder will be that of a servant boy named William who claims to have witnessed and in fact assisted in the commission of the crime. Other evidence of a circumstantial nature will be tendered by the Crown to corroborate William whose testimony is necessarily that of a self-confessed accomplice.

The Crown proposes to prove as part of its case that on 17th September, 1951, the deceased, in anticipation of the prisoner's return to Ceylon, wrote the letter (marked P24 in the Court below) to a Police Officer in the following terms :

" ' Jayamangalam ',
7 St. Alban's Place,
Bambalapitiya.
17th September, 1951.

C. C. Dissanayake, Esqr.,
Supdt. of Police, Colombo.

Dear Sir,

I am writing to you, as requested over the telephone, to inform you that I have filed an action in the Colombo District Court asking for a divorce from my husband Mr. M. Sathasivam on the ground of desertion. He has been away in England and the summons though issued has not yet been served. He will be arriving in Colombo per ss. Himalaya on the 21st instant, and I understand from his attorney that he intends to come to this house (which is mine) with his mother and reside here. In view of the pending divorce action this cannot be allowed, and I have been advised to refuse him admittance.

But, from my knowledge and experience of my husband, I have reason to fear that he may attempt to force his way into the house and use violence and cause a breach of the peace.

In this situation I need protection and I therefore request that you will instruct the Bambalapitiya Police to afford me the same if I telephone to them. I have a telephone in the house and the Police Station is close by.

I may mention that I have my four young children in the house with me and I am also apprehensive on their account.

Yours faithfully,
Ananda Sathasivam. "

It is also proposed to call certain witnesses to speak to statements of a similar nature which the deceased is alleged to have made to them before the prisoner arrived in Colombo.

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The defence has strongly objected to the reception of the letter P24 or of the explanatory oral evidence as part of the case of the Crown.

The learned Solicitor-General at first claimed that these statements are relevant and admissible under Sec. 32 (1) of the Evidence Ordinance. In addition, he argued that they were relevant at least (1) to establish a suggested motive for the crime under Sec. 8 (1), and/or (2) to prove conduct on the part of the deceased lady under Sec. 8 (2) read with Sec. 11.

Can it be said that, in the facts of this particular case, P24 contains any statements "as to the circumstances of the transaction which resulted in" the deceased's death on 9th October, 1951? Even if one gives those statements a meaning which is most favourable to the Crown, they amount at best to mere "general expressions indicating fear or suspicion of (the prisoner) and not directly related to the occasion of (her) death". Evidence of that kind has expressly been ruled to be inadmissible by Lord Atkin in the course of his judgment in *Narayana Swami v. Emperor*[1] where the Judicial Committee of the Privy Council had occasion to make an authoritative pronouncement as to the limits within which the application of Sec. 32 (1) of the Evidence Ordinance must be confined. The circumstances to which the deceased's statements relate must, said Lord Atkin, "have some proximate relation to the actual occurrence". Following this principle, I am satisfied that the reception of the proposed evidence under Sec. 32 (1) would not be justified. It is but fair to place on record that the learned Solicitor-General, at the closing stages of his argument, very properly withdrew his application to have the evidence admitted under the provisions of this section.

The Crown contends, nevertheless, that the proposed evidence is relevant under sec. 8 (1) and also, or at any rate in the alternative, under sec. 8 (2). It is therefore necessary to consider each of these submissions. The learned Solicitor-General was content, he said, to place this evidence before the Jury on the clear understanding that the truth of the allegedly incriminating statements contained in P24 should not be assumed.

With regard to sec. 8 (1), evidence of a motive for the commission of the alleged crime would without doubt be relevant, but, if it be alleged, it must be strictly proved. The learned Solicitor-General has indicated the position of the Crown on this part of its case against the prisoner. The evidence for the prosecution, he suggests, will prove that, after the prisoner returned to Ceylon, he came to know of the contents of P24 at some unspecified point of time before the alleged murder was committed; this knowledge led, so it is suggested, to strong resentment; and the ensuing resentment provided the motive for the crime. By this means, it is proposed to place before the Jury not merely the bare fact that P24 was written to a police officer but also the general expressions of fear contained in it.

It will be essential for the Crown, if it relies on this suggested motive, to prove that the prisoner had in fact resented the allegations made against him. I therefore enquired whether there was any independent evidence which, if believed, would justify a finding by the Jury that the

[1] *A.I.R. 1939 P.C. 47 at 50.*

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prisoner did bear or even give expression to his alleged resentment. I understood the learned Solicitor-General to reply that he could not at this stage undertake to lead such independent evidence at the trial; he suggested, however, that the Jury might well infer that a man would in all probability have resented allegations of the kind contained in P24, and especially so if they were untrue; he therefore argued that, upon the basis of such assumed resentment, the Jury could properly proceed to consider whether or not, in their opinion, there was sufficient proof of a motive for the murder. With great respect, this line of reasoning is unacceptable to me. Had there been evidence, independent of any statements made by the deceased lady, which would prove that her allegations had induced resentment in the prisoner's mind against her, the position might well have been different. In *R. v. Buckley* [1], for instance, a man was charged with the murder of a police officer who had shortly before given evidence against him on a charge of larceny. *After his conviction for larceny, he was heard to mutter threats of vengeance against the constable over the part taken by him in the earlier prosecution.* In those circumstances, the evidence given by the constable at the earlier trial was admitted at the subsequent trial to prove motive for the alleged murder.

Should evidence of this kind be forthcoming during the progress of the present trial, the Crown may, if it so desires, renew its application to tender P24 for the purpose of establishing a link in the chain of the evidence on the issue of motive. For the time being, I must assume that no such independent evidence will be available. I, therefore, rule that P24 and the oral evidence connected with it cannot at this stage be received in evidence against the prisoner.

It is important to realise in this connection that, on the one hand, the evidential value, if any, of P24 standing by itself is slender, whereas the prejudicial effect which its reception might have on the minds of the jurors would potentially be so substantial as seriously to impair the fairness of the trial. I confess that this is a circumstance which weighs very considerably with me. *Vide* the observations of Lord Moulton in *D. P. P. v. Ritchie* (1914) A.C. 545.

The relevance of P24 as evidence of the deceased lady's "conduct" under sec. 8 (2) seems to me to be even more remote. The suggestion is that her request for so-called "police-protection" constituted conduct on her part which was influenced by a state of fear, and that this alleged state of fear has some bearing on the evidence which indicates that the deceased and the prisoner, notwithstanding the pendency of the divorce proceedings, were apparently on terms of intimacy up to the moment of her death. The suggestion, as I understand it, is that the appearance of cordiality on her part was feigned, having been influenced by her fear of the man. But here again, apart from all other considerations, is there any independent evidence to support the suggestion that she was apprehensive of danger to her safety *after the prisoner returned to Ceylon?* Until such evidence is forthcoming, the question whether sec. 8 (2) applies will not arise. I remind myself in this connection that the Crown concedes

[1] *13 Cox. 293.*

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that the truth of the allegations contained in P24 cannot be assumed. I rule P24 out for the present, but subject once again to any fresh application which the Crown may hereafter make for its reception at a later stage.

The Crown has relied strongly on a decision of the Indian Courts in *Golak Behari Takal v. The Emperor* [1]. In that case a number of persons were convicted of conspiracy to murder the deceased during the period August to October, 1935 ; the indictment also alleged that the murder was in fact committed in pursuance of that conspiracy. The Appellate Court ruled that the contents of a petition addressed by the deceased to some official source on 23rd September, 1935—the date is important—were properly admitted at the trial. McNair J. took the view that sec. 32 applied. I must therefore presume that the document, though not quoted in the judgment, did contain statements relating to certain circumstances of a transaction which, in the ultimate result, led to his death ; and I note in particular that his complaint was made during the crucial period when the alleged conspiracy was still in progress.

McNair J. also ruled that in any event the contents of the petition were admissible under sec. 8 (2) of the Evidence Act as evidence of the deceased's conduct which had been influenced by his fear of injury at the hands of the conspirators. McNair J. states as follows in this connection :

> " The complaint to the Police is the conduct, and the reference to section 32 in illustrations (*j*) and (*k*) to section 8 make it clear that such conduct may be proved, whether the person whose conduct is alleged to be proved is alive or dead."

I have examined the illustrations referred to by the learned Judge, and I find that in each case the complaint which was held to be admissible in evidence was a complaint *that the particular crime under investigation had been committed.* In this respect, the present case can readily be distinguished.

In considering the proposed reception of evidence of this kind, I conceive it to be my duty as presiding Judge to bear in mind the fundamental rule of judicial practice in criminal cases referred to by Lord Du Parcq in *Noor Mohamed v. The King* [2].

> " 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] *42 C.W.N. 129.* [2] *(1949) A.C. 182 at 192.*

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These observations were quoted with unqualified approval by Viscount Simon very recently in *Harris v. D. P. P.* [1], where he said :

> " This proposition flows from the duty of the Judge when trying a charge of crime *to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused.* If such a case arose the Judge may indicate to the prosecution that *evidence affecting the accused, though admissible, should not be pressed because its probable effect would be out of proportion to its true evidential value.*"

I do not doubt that the learned Solicitor-General, for whose sense of fairness I entertain so much respect, will bear these considerations in mind before he decides whether or not to renew his application for the reception of P24 as evidence at the present trial. Once it is conceded, as it has been, that the truth of what was said in this document must be proved by independent evidence, justice requires that there should be very cogent reasons for admitting the document in its entirety for some remotely relevant purpose which is disproportionate to the potential prejudice which its reception is almost certain to produce.

Objection as to the reception of certain evidence upheld.

1954 *Present :* **Pulle J. and K. D. de Silva J.**

KANNAMMAH, Appellant, *and* T. SANMUGALINGAM *et al.*, Respondents

S. C. 120—D. C. (Inty.) Jaffna, 999

Thesavalamai—*Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), s. 20*—Thediatheddam—*Vesting of title to it—Retrospective effect of amending Ordinance No. 58 of 1947.*

Under section 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance, before it was amended on 3rd July, 1947, by Ordinance No. 58 of 1947, title to half of *thediatheddam* property acquired by a husband vested in his wife immediately upon the acquisition of the property. Such immediate vesting of title in the wife was not inconsistent with the husband's right to sell or mortgage the property.

The amending Ordinance, No. 58 of 1947, does not operate so as to affect title to property which had already vested in a spouse prior to the date of amendment.

APPEAL from a judgment of the District Court, Jaffna.

H. V. Perera, Q.C., with *H. W. Tambiah*, for the appellant.

No appearance for the respondents.

Cur. adv. vult.

January 19, 1954. PULLE J.—

The appellant in this case is the widow of one Muttukrishnar Thambiappah who died on the 13th May, 1948, leaving a last will dated 14th

[1] *1952 A.C. 694 at 707.*

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April, 1948, now admitted to probate, made jointly with the appellant. Prior to 3rd July, 1947, the date on which the Jaffna Matrimonial Rights and Inheritance Amendment Ordinance, No. 58 of 1947, came into operation and after the year 1926 the deceased purchased interests in several immovable properties. As executrix the widow has sought to administer only a half share of the interests referred to on the footing that at the time of her husband's death she was entitled to the remaining half share by the operation of section 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48). Consequent on two reports made by the Secretary of the Court the learned District Judge, after hearing counsel for the widow, has made order that the entirety of the properties bought by the deceased be administered and that a fresh declaration be sent to the Commissioner of Estate Duty and Stamp Duty recovered on that footing. The appeal is from this order. Learned counsel for the appellant stated that the Commissioner of Estate Duty does not contest the appellant's claim.

The submission on behalf of the appellant is that as the deceased acquired each property a title to a half was immediately vested in her and that in the absence of any alienation by the deceased, by right of management under the Tesawalamai, the title to her share continued to be vested in her and that that share did not form part of the estate of the deceased. It was further submitted on the authority of *Kandavanam v. Nagammah et al.*[1] and *Akilandanayaki v. Sothinagaratnam et al.*[2] that the amending Ordinance of 1947 did not operate so as to affect the title vested in her. I have not been able to extract from the judgment under appeal a convincing reply to this argument. From the questions addressed by the Judge to counsel he appears to have taken the view that an immediate vesting of title in a wife upon the acquisition of property by a husband was not possible because such vesting was inconsistent with his right to sell or mortgage the property. This view is contrary to the decision in the case of *Iya Mattayer v. Kanapathipillai*[3] in which Dalton J. sets out the position clearly as to the vesting of title at pages 307 to 309. The power which the husband has to sell or mortgage *tediatetam* property is no more inconsistent with a prior vesting of title than, as was pointed at the argument before us,the sale of property by an administrator is inconsistent with a vesting of title in the heirs immediately on the death of an intestate. See also the case of *Ponnachchy v. Vallipuram et al.*[4] followed by Dalton J. in *Iya Mattayer's case*[5].

The next question is whether any event had occurred between the acquisition of the properties and the death of the deceased which resulted in the wife losing her title to a half share of the properties. The learned Judge after citing the last paragraph at p. 105 of *46 C. L. W.* from the judgment of Gratiaen J. in *Kandavanam v. Nagammah et al.* stated—

"I hold that the amending Ordinance governs the devolution of the deceased's estate and the entirety of the deceased's *tediatetam* passed on his death according to the amended section 20."

[1] *(1952) 46 C. L. W. 104.*
[2] *1952) 53 N. L. R. 385.*
[3] *(1928) 29 N. L. R. 301.*
[4] *(1925) 25 N. L. R. 151.*
[5] *(1928) 29 N. L. R. 301.*

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I may observe with respect that the passage at p. 105 does not support the conclusion reached by the District Judge. On the contrary the concluding sentence at p. 105 which reads,

"*In any event*, the vested rights of either spouse in respect of *tediatetam* property acquired prior to 3rd July, 1947, by the other spouse remain totally unaffected by the subsequent repeal of section 20 (1) of the principal Ordinance. The repealing Ordinance does not purport to forfeit the vested rights of either the living or the dead." must be taken to qualify the general words of the earlier sentence to the effect that should death occur after 3rd July, 1947, the new section substituted by the amending Ordinance would govern the case.

I would set aside the order appealed from and declare that the appellant is not bound to administer more than a half share of the properties acquired by her husband prior to 3rd July, 1947. There will be no costs of appeal.

K. D. DE SILVA J.—I agree.

Order set aside.

1953 *Present:* **Swan J.**

G. B. MIDDLETON, Appellant, *and* A. G. MANUEL (Labour Inspector), Respondent

S. C. 1,012—M. C. Ratnapura, 28,121

Wages Boards Ordinance, No. 27 of 1941—Section 44—Prosecution for dismissal of worker—Implied condition that dismissal should be wrongful.

An employer cannot be prosecuted under section 44 (1) of the Wages Boards Ordinance for dismissing a worker for any of the reasons set out in that section if the dismissal was at the same time otherwise lawful and can be justified on the grounds, for instance, of due payment of wages in lieu of notice or insubordination or irregularity of attendance and absence from work without lawful excuse.

APPEAL from a judgment of the Magistrate's Court, Ratnapura.

G. E. Chitty, with *P. Somatilakam* and *Robert Silva*, for the accused appellant.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 21, 1953. SWAN J.—

The appellant in this case was charged under section 44 (1) of the Wages Boards Ordinance, No. 27 of 1941, with having dismissed one

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P. Marimuttu *by reason merely of the fact* that Marimuttu had given information to the Labour Authorities with regard to a certain matter under the Ordinance, an offence punishable with a fine not exceeding Rs. 1,000 or imprisonment of either description for a term not exceeding 6 months or both such fine and imprisonment.

Sub-section 2 of section 44 reads as follows :—

> "In every prosecution of an employer for an offence under sub-section 1 the burden of proof that the worker was dismissed by reason of some fact other than the fact mentioned in that sub-section shall be upon that employer."

The facts briefly stated are as follows : the appellant was the Superintendent of Houpe Estate, Kahawatta. Marimuttu was employed on the estate. The provisions of the Wages Boards Ordinance have been proclaimed to be applicable to the tea-growing and manufacturing trade as well as the rubber-growing and manufacturing trade. Houpe Estate is planted with both tea and rubber. The workers on the estate had formed themselves into a trade union. P. Marimuttu was the leader of that union. It was one of his duties to entertain complaints of other members of the union. A complaint was made to Marimuttu that certain labourers were not paid according to the Wages Board rates of payment for days on which they brought less than 5 pounds of rubber latex and 1 pound of scrap. This practice was undoubtedly contrary to the provisions of the Wages Boards Ordinance. Marimuttu's evidence is that he made a note of the complaint he received in the minute-book and handed it over to the appellant, but that the appellant had done nothing to remedy it. Marimuttu thereupon informed one Mr. Punniam who was the representative of the Ceylon Workers' Congress Union to which the Houpe Estate Union was affiliated. Punniam wanted substantial evidence of this practice before he made representations to the Labour Authorities. Marimuttu therefore convened a meeting of the union at which it transpired that in addition to the usual Check Roll a Pocket Check Roll was maintained which would supply the necessary evidence. Another Marimuttu stealthily removed that Pocket Check Roll and handed it over to P. Marimuttu. With this Pocket Check Roll P. Marimuttu went to Mr. Thirunavakarasu, the Assistant Commissioner of Labour, accompanied by Punniam. Labour Inspector Manuel who was in the office at that time was sent for by Mr. Thirunavakarasu and Marimuttu explained the system of under-payment to Inspector Manuel. The Assistant Commissioner ordered Inspector Manuel to make a routine inspection and inquire into this complaint. Mr. Thirunavakarasu advised Marimuttu to replace the book and this apparently was done. Inspector Manuel went on 25.6.51 for the routine inspection, having previously informed the appellant by letter D 12. During the course of that inspection Manuel appears to have told the appellant that something must be wrong in the estate office as a Check Roll Register of the estate had been produced by Marimuttu at the Labour Office.

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As regards the under-payment it would appear that the explanation of the appellant was that he was merely carrying out what was done by the previous Superintendent and that the rates of payment were agreed upon by the workers themselves. However, the appellant was prepared to make good the under-payments, and so far as the Labour Authorities were concerned the matter ended there.

There happened to be three Marimuttus working on the estate and the appellant wanted Manuel to identify the particular Marimuttu who had gone to the Labour Office. Only one Marimuttu was on the spot and Manuel said he was not the person who made the complaint. Thereafter the appellant tried to find out from the Labour Office whether it was P. Marimuttu who had gone there with the Pocket Check Roll. He had apparently fixed the identity of P. Marimuttu as the complainant because of the three Marimuttus one had been already identified by Manuel as not the person who went to the Labour Office and of the remaining two Marimuttus only P. Marimuttu had not worked on the estate on the day the Pocket Check Roll was alleged to have been taken to the Labour Office.

On 29.8.51 P. Marimuttu was dismissed from the estate. In P3 the reasons for his dismissal are stated to be (1) failure to report at the office on 11.8.51 although instructed to do so, and (2) irregularity of out-turn, that is, working 17½ days in June, 1 day in July and 4½ days in August up to the date of dismissal.

Mr. Chitty appearing for the appellant contends that it is implicit in section 44 (1) that the dismissal should be wrongful. With that contention I agree because if Marimuttu was lawfully dismissed I do not think the section would apply. In this particular case according to the evidence, quite apart from any legal presumption, P. Marimuttu's contract of service was from month to month. In the course of his evidence he stated : " I was under the impression that I should give one month's notice. Similarly if the estate had to dismiss me they had to give me one month's notice. This is what I understood right through. There was nothing to prevent me at any time leaving this estate and joining another estate by giving a month's notice." Marimuttu also admitted that on the day he was dismissed he was paid a month's wages in lieu of notice. This admission in my opinion concludes the matter. Under the contract of service Marimuttu was entitled to either one month's notice or one month's salary in lieu of notice. His dismissal therefore was not wrongful, and in my opinion section 44 has no application.

Even assuming that Marimuttu had not been paid one month's salary in lieu of notice but was summarily dismissed, one of the reasons for his dismissal being his action in reporting certain irregularities to the Labour Authorities the evidence satisfies me that the appellant had other good grounds for dismissing Marimuttu, namely (1) insubordination, and (2) irregularity of attendance and absence from work without lawful excuse.

I set aside the conviction and acquit the appellant.

Appeal allowed.

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1953 *Present:* **Nagalingam A.C.J., Pulle J. and K. D. de Silva J.**

J. C. W. MUNASINGHE, Appellant, *and* S. C. S. COREA, Respondent

ELECTION PETITION APPEAL

Election Petition No. 11 of 1952 (Chilaw)

Election Petition—Impersonated and tendered votes—Scrutiny—Addition of tendered votes—Striking out of corresponding impersonated votes necessary first—"Particular elector"—Missing ballot papers—Absence of evidence as to how they were lost—Non-compliance with the provisions of the Order in Council relating to elections—Effect on validity of election—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 45, 49, 51 (1), 77 (b), 85 (1) (c) and (3).

Sub-paragraph (*c*) of paragraph (1) of section 85 of the Parliamentary Elections Order in Council of 1946 should be construed as the complement of paragraph (3) of the same section. On a scrutiny, therefore, at the trial of an election petition, the election judge is not entitled to add a tendered vote unless he is in a position to strike out the corresponding impersonated vote.

Before a person can be issued a tendered ballot paper under section 45 of the Order in Council, that person must show that he is "a particular elector named in the register". Where there are two or more voters with identical names in the register and the address given is not distinctive enough to identify any one of such voters with one or other of the entries, it is not possible for any one of them to prove that he is a "particular elector" within the meaning of the section.

Where certain ballot papers that had been issued are found missing and there is no evidence as to how they were lost, it is not possible to attribute to any officer charged with the conduct of elections non-compliance with the provisions of the Order in Council within the meaning of section 77 (*b*).

Thirty-two out of 26,054 ballot papers that had been issued were not taken into account in counting the votes cast in favour of any of the candidates, the Returning Officer having rejected them in terms of section 49 as they were not stamped or perforated with the official mark. The failure to perforate was due to the omission on the part of the election officers, but the omission was not due to any deliberate fraud or dishonesty on their part. The successful candidate defeated the runner-up by a majority of eight votes only.

Held, that the omission of the officers entrusted with the conduct of the election to perforate duly the 32 ballot papers was not a non-compliance with the provisions of the Parliamentary Elections Order in Council within the meaning of section 77 (*b*). To invalidate an election under section 77 (*b*), there should be a violation of the *principles* underlying the conduct of the election ; the non-compliance should be of such degree and magnitude that it could reasonably be said that as a result of such non-compliance the electorate had not been given a fair opportunity of electing the candidate of its choice. The fact that out of 26,054 ballot papers, only 32 had no perforations, was the most satisfying proof that the election had been conducted in accordance with the principles laid down in that behalf in the provisions of the Order in Council. To ascertain whether or not the election was conducted in accordance with the principles laid down in the Order in Council it was entirely unjustifiable to take into consideration whether the number of ballot papers unperforated was greater than the majority by which the successful candidate was declared duly elected.

2——J. N. B 32805–1,592 (1/54)

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APPEAL from the order of the Election Judge in Chilaw Election Petition No. 11 of 1952.

S. J. V. Chelvanayakam, Q.C., with *A. C. Nadarajah, S. Thangarajah, C. V. Munasinghe* and *A. Mututantri*, for the petitioner appellant.

S. Nadesan, with *A. H. C. de Silva, A. B. Perera, G. T. Samarawickreme* and *A. K. Premadasa*, for the respondent.

Cur. adv. vult.

December 18, 1953. NAGALINGAM A.C.J.—

Upon an election petition presented by the appellant who was himself one of the candidates seeking election, the appellant sought to have the respondent unseated upon various grounds, two of which only need be noticed for the purposes of this appeal, firstly that there had been a non-compliance with the provisions relating to elections of the Order-in-Council within the meaning of section 77 (*b*) thereof, secondly that the return of the respondent was undue. I think it would be more convenient to take up the second ground first.

The learned Judge after scrutiny reduced the majority of the respondent over the petitioner from fifty-four to eight. That majority was arrived at on a hypothetical basis, namely, that every vote which the learned Judge held had been impersonated and every tendered vote which he regarded as a valid vote were assumed to have been cast against the respondent without making an inspection however to ascertain how the voting on those ballot papers went.

On behalf of the appellant, although objections were raised in appeal to several other cases of of impersonations which had not been upheld by the Election Judge, ultimately the argument was confined to eleven cases. In each of these eleven cases there were at least two voters bearing identical names and who had been registered as electors entitled to vote at one and the same polling booth. It is common ground that in these cases two or more persons had voted under those identical names and so completely exhausted the votes of all such persons. To take one case, the register of voters entitled to vote at a particular polling booth contained the name of Weerasinghe Mudiyanselage Menikhamy twice over. Two persons each of whom claimed to be Weerasinghe Mudiyanselage Menikhamy had appeared at the polling booth, obtained ballot papers and cast their votes ; their names had been ticked off on the register, showing that the two voters bearing the name of Weerasinghe Mudiyanselage Menikhamy had been issued ballot papers. Thereafter a person claiming to be one of the voters registered under the name of Weerasinghe Mudiyanselage Menikhamy, whom I shall hereinafter refer to as the third Menikhamy, appeared before the Presiding Officer and claimed a ballot paper. The Presiding Officer having ascertained that two Menikhamys had already voted in that name took proceedings to have a declaration signed by the third Menikhamy and then issued to him a tendered ballot paper.

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At the election inquiry the third Menikhamy appeared and gave evidence to the effect that he bore the name of Weerasinghe Mudiyanselage Menikhamy and that he lived at Maiyawa, that he went to vote but that he was told that some other person had already been issued a ballot paper, that thereupon he signed a declaration which contained a reference to the number on the register, which had been arbitrarily placed by the Presiding Officer, and that thereafter he voted on a tendered ballot paper.

Counsel for the petitioner contends that as the learned Election Judge has held that the third Menikhamy who appeared before him is one of the two voters registered under that name the finding of the learned Judge amounted to a declaration that the tendered vote on which the third Menikhamy had voted was a valid vote and that it had to be added to the poll in terms of paragraph (3) of section 85 of the Order-in-Council. It is conceded, however, by the petitioner's counsel that the Judge could not possibly have struck out the impersonated vote in terms of sub-paragraph (*c*) of paragraph (1) of the same section, for he admits it is not possible to identify which of the two persons who had earlier voted under the name of Weerasinghe Mudiyanselage Menikhamy had in fact impersonated the third Menikhamy. The view the learned Judge took, however, was that before he could add a tendered vote he must be in a position to strike out the corresponding impersonated vote. Mr. Chelvanayakam, however, submits that the addition of a tendered vote to the poll is not dependent upon striking out any or an alleged corresponding impersonated vote.

The true solution to this problem is to be found in section 45 of the Order-in-Council which prescribes the limitations subject to which a tendered ballot paper could be issued to a voter. The section expressly enacts that before a person could be issued a tendered ballot paper that person must represent himself to be "*a particular elector named in the register*". Mr. Chelvanayakam would read these words as meaning "a voter whose name appears on the register". I think to attach such a meaning to the words is not to give full effect to each and every one of the words used in the phrase. What is the significance of using the qualifying epithet "particular" in regard to the elector? If no special meaning is to be attached then that word may have been omitted and the section could have merely referred to a person representing himself to be a person whose name appears in the register. But that does not appear to have been the intention, for some meaning has to be given to the term "particular elector". The meaning to be attached to it becomes plain if one takes the generality of cases where the name of an elector in a city or town is placed on the register. Not only would the name of the elector appear but also his address, the address giving reference to the street and assessment or rating number assigned to the dwelling house of the voter. If there were two voters having the same name, if one excepts the very exceptional case of two persons bearing identical names living at the same premises, their separate addresses will determine whether he is the one voter or the other though the names of the two be the same. Even in the exceptional case referred to, if father and son bore the same name, then it may be possible to identify the

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earlier entry as that relating to the father and the latter as that of the son, if there is evidence that the names were given in that order at the time of the compilation of the registers. Now, if one of the two persons or both bearing the identical names but having different addresses had been impersonated, it would be possible on the real voter appearing at the polling booth and giving his address, and if that address tallied with one of the addresses given in the register, then to conclude that it was the elector whose name was registered at that address that had been impersonated. In such a case, there cannot be the least difficulty in the case of the voter who had been impersonated, from establishing that he was the particular elector named in the register and bearing a particular number who had been impersonated. The number itself, there can be little doubt, is assigned to the name for the sake of convenience and to facilitate reference to the particular voter, but nevertheless when once a number has been assigned to an entry relating to a particular elector, the number, to all intents and purposes, becomes a special or distinguishing mark of the particular elector whose name has been registered against that number, and one might almost say that the number is a compendious description of the name and residence of the particular elector.

It is to be observed in this connection that the mode of identification of the voter to whom a ballot paper has been issued with the voter whose name has been placed on the register is by means of the number, for it is the number alone that is marked on the counterfoil of the ballot paper that is issued. It is manifest therefore that although two or more names may be identical, where the addresses are different the identification of any particular entry as that relating to a particular elector is simple enough. Of course, the difficulty that has arisen in all the eleven cases that have been challenged arises from the circumstance that the addresses are not in themselves distinctive and are devoid of any special feature enabling the identification of one entry in the register as that relating to one elector and the other entry as that of the other elector. The reason for this is that the voters all hail from the same village where there are neither street names nor assessment or other numbers assigned to the houses, and therefore the address is merely that of the village and that address applies equally to all the persons bearing identical names and living in that village. But does it follow from this that the mere circumstance that a perusal of the register does not enable one to identify any particular entry as that relating to any one of several persons bearing the identical name, even when section 45 requires that a person claiming to have been impersonated should expressly represent himself to be a *particular elector*, that the provision is not to apply to him solely because it is not possible to identify him with any one of the several identical names on the register?

Mr. Chelvanayakam contended that because of this difficulty and what is more, according to him, it would not even be possible in view of the manner in which the registers are prepared to show which of several individuals bearing the same name and having a colourless address (so far as they are collectively concerned) had his name registered against a particular number, that section 45 should be so construed as to give

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it what he called a workable interpretation so that it should only be regarded as incumbent on a voter in such circumstances to prove that he is a voter whose name appears on the register without being called upon at the same time to establish his identity with a particular entry in the register. I do not think a statute which is perfectly plain and clear in regard to its language should receive a mutilated interpretation for the reason that in a particular case the ordinary meaning of the language places a party at a disadvantage as the nature of proof required of relevant facts under the meaning so placed becomes difficult or even impossible in the circumstances.

It is true that by so holding impersonation of one or more voters who bear the same name cannot be righted although it may be obvious that the true voters have not voted ; it is said further it will open the door wide to fraudulent impersonations because such impersonations cannot be remedied thereafter. That, no doubt, is a serious consequence that flows from the proper interpretation to be placed on the section, but that problem is one for the legislature to direct and require that when two or more identical names appear in the register relating to a particular village, and where the address is not distinctive enough to identify the voters with one or other of the entries, then a description either by way of occupation or by reference to name of the father or other special feature should be set out against the names in the registers with a view to identify the particular voter registered against a particular entry.

Mr. Chelvanayakam, however, conceded that neither he nor any of the eleven persons who claimed to be the true voters and who gave evidence could say which entry in the registers related to any one of them. In these circumstances it must follow that there was no proof that the person who has been termed the true voter is a *particular voter named in the register.*

Besides, in the absence of proof that a person is a particular elector he is not entitled to receive a tendered ballot paper, for a tendered ballot paper is issued to him because the ballot paper which had been issued to the impersonator does not record an effective vote. But where the voter who has been impersonated can identify the entry relating to him in the register, then it is obvious that the impersonated vote can be struck out of the poll, for the ballot paper voted on by the impersonator can be identified ; but where the person impersonated cannot identify his name with a particular entry in the Register, then the non-effective vote cannot be struck out, and if one permitted the addition of the tendered ballot paper the result would be to increase artificially the poll and unreal situations can arise. It has, however, been said that the unsatisfactory state of the poll that would arise after addition of the tendered votes without striking out corresponding impersonated voters would be due not to the addition of the tendered votes but in reality to the fact that impersonated votes have already been included in the poll. This, no doubt, in a sense is true, but this much may be said that the impersonated votes do not artificially increase the number of electors who polled, but on the other

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hand the addition of tendered votes without striking out a corresponding number would be to give an unreal picture of the number of voters who had gone to the polls.

I think, therefore, that the learned Judge was correct in construing sub-paragraph (*c*) of paragraph (1) of section 85 as the complement of paragraph (3) of the same section.

It is true that there were three tendered votes which were added without any corresponding votes being struck out. These were cases where although no person had previously voted in the names of three voters they were issued, due, no doubt, to what must be regarded as carelessness on the part of the election officers, tendered ballot papers on the supposition that other persons had in fact been issued the relative ballot papers, while in truth not one had been issued a ballot paper. At the argument Mr. Nadesan for the respondent in justification of the order directing the three new votes to be added to the poll referred to section 86 of the Order-in-Council and conceded that the three tendered votes were valid ones, and I shall therefore say nothing further about them. I should, however, wish to observe that I reserve my opinion on this point till I have heard argument on it.

I am therefore of opinion that the learned Election Judge was right in refusing to add to the poll the eleven votes complained of, and I shall assume that the majority of the respondent has in the light of the learned Judge's findings been reduced to eight.

I next proceed to consider the first ground, namely, that there has been a non-compliance with the provisions relating to elections in the Order-in-Council. The appellant's case under this head is said to be based on and to relate to two categories of ballot papers—(*a*) thirty two ballot papers admitted to be genuine but issued without an official mark or perforation thereon, and (*b*) eight missing ballot papers.

The assertion that eight ballot papers, although issued, were missing, is dependent upon, according to the petitioner, a simple arithmetical process, namely by a count of the number of counterfoils left in the books of ballot papers, which would indicate the number of foils or ballot papers that had been issued, and deducting from the number so found the number of ballot papers deposited in the ballot boxes found by counting them. For the respondent it has been contended that this process is unwarranted, for it is said that ballot papers spoilt either in the process of issuing or in the marking thereof by a voter would all be bundled and kept separately, and unless these were taken into the reckoning the difference arrived at by adopting the petitioner's method would not be a true indication of whether any, and if so the number of, ballot papers which were missing.

Besides, it is contended that there is no evidence as to how the eight or any smaller number of ballot papers have been lost. It is common ground that nothing improper can be said to have been done by the officers connected with the election to which the loss could be attributed. The Returning Officer who gave evidence, however, expressed the opinion that possibly some of the voters to whom ballot papers had been issued

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had surreptitiously removed them without putting them into the ballot boxes. This is purely a matter of conjecture. On the assumption that the opinion expressed by the Returning Officer is the only explanation for the papers missing, it has been urged that such loss reveals non-compliance on the part of the election officers with the provisions of the Order-in-Council which require that the ballot paper should, after being marked by a voter, be then folded up so as to show the official mark on it, and the voter should after showing the official mark to the Presiding Officer put the ballot paper into the box.

It is further pointed out that the removal of a ballot paper from the polling booth is in itself an offence apart from other offences of a like nature created in regard to similar matters in relation to ballot papers found outside the polling booth. Assuming that the loss of eight ballot papers was due to the circumstance alleged by the petitioner, I do not think it follows that the ground enunciated in section 77 (*b*) is established for the reasons I shall set out when I deal with the argument in regard to the unperforated thirty-two ballot papers. But I think, so far as the eight missing ballot papers are concerned, the true position appears to be that there is no evidence of any kind whatsoever as to how they were lost, and in the absence of any evidence it is not possible to attribute to any officer charged with the conduct of elections non-compliance with the provisions of the Order-in-Council, nor even to charge a voter with having carried away a ballot paper in contravention of the provisions of the Order-in-Council.

I do not therefore think that the basis upon which the loss of eight ballot papers was sought to be made a ground for the non-compliance alleged under section 77 (*b*) has been established.

The thirty-two ballot papers stand on a different footing. The case was presented on the uncontroverted allegation that the thirty-two ballot papers were genuine ballot papers in the sense that they had come from the books from which ballot papers had been issued by the election officers at the time of the poll. It is agreed that the thirty-two ballot papers were not taken into account in counting the votes cast in favour of any of the candidates and that the Returning Officer properly, in terms of section 49, rejected them as they were not stamped or perforated with the official mark. That the non-perforation was due to the omission on the part of the election officers is not disputed, but such omission, however, has not been characterised as being the outcome of any deliberate fraud or dishonesty on their part. It is, however, contended on behalf of the petitioner that it is sufficient if he proves a non-compliance with the provisions of the Order-in-Council, which requires that the election officers should before issuing a ballot paper duly perforate it so as to make it an effective ballot paper at the count, and that if a ballot becomes non-effective by reason of the lack of the official mark, that result is due entirely to a non-compliance with the provisions of the Order-in-Council by the officers entrusted with the conduct of the election.

If the matter stood there, there can be little doubt that the petitioner can be said to have established his case ; but paragraph (*b*) of section 77

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requires something more. It provides that the non-compliance with the provisions of the Order-in-Council would be a ground for declaring an election void " if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election ". Much to the same effect but viewing the provision from the opposite angle is paragraph (1) of section 51, which runs as follows :—

> " No election shall be invalid by reason of any failure to comply with any provision of this Order relating to elections, if it appears that the election was conducted in accordance with the principles laid down in such provisions and that such failure did not affect the result of the election. "

This language, to my mind, draws a sharp distinction between a failure to comply with the provisions of the Order-in-Council in regard to elections and a failure to conduct an election *in accordance with the principles laid down in such provisions.*

Every non-compliance with the provisions of the Order-in-Council does not afford a ground for declaring an election void, but it must further be established (apart from any other requirement) that the non-compliance with the provisions was of such a kind or character that it could be said that the election had not been conducted in accordance with the *principles* underlying those provisions. Are the " principles laid down in the provisions " of the Order-in-Council different from the provisions themselves ? Unless they were, no adequate reason can be assigned for the draftsman using the language he has used. The difference, I think, consists not so much in the nature of the non-compliance as in the degree of that non-compliance ; it consists not in a bare non-compliance but in the magnitude or extent of the non-compliance.

If, for instance, instead of there being thirty-two, there were five thousand unperforated ballot papers, I should take the view in those circumstances that not only was there a non-compliance with the provisions of the Order-in-Council but that the election itself had not been conducted in accordance with the principles laid down in such provisions, because in such a case the principle underlying elections that would be violated would be that by the non-observance by the officers conducting the elections the votes of a large section of the electors had been rendered ineffective and such large scale non-compliance would lead to the inference that there had not been a fair election. In such a case it may be suggested that election officers had taken sides by issuing unperforated ballot papers to persons who they had reason to believe were voting on the side of the candidate whose candidature they did not favour. But in this case the facts are that there are thirty-two ballot papers that have not been perforated. It is admitted that there were twenty polling booths. Striking out an average, it may be said that less than two ballot papers had been issued at each of the polling stations without perforation marks. The total number of ballot papers issued was a little more than twenty six thousand. Again, working out an average, one thousand three hundred ballot papers could be assumed to have been issued from each of the

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polling stations, so that two ballot papers out of every one thousand three hundred have escaped the attention or passed the vigilance of the issuing officers, resulting in their not being perforated. Can it be said that there has been a violation of the principles underlying the conduct of the election ? However careful, however diligent the officers may have been, nevertheless it is impossible to prevent an occasional slip, especially during what has been termed the rush periods of voting. I would not put down the omission to perforate these ballot papers to carelessness, and much less to negligence, but rather to human fallibility, to the imperfection of the human machine, to what is sometimes termed the human element. The fact that out of 26,054 ballot papers thirty-two had no perforations, in other words that over 26,000 had been duly perforated, is the most satisfying proof that the election had been conducted at the various polling booths in accordance with the principles laid down in that behalf in the provisions of the Order-in-Council. To hold otherwise would be not merely to set at naught elections in general but to render entirely unworkable the democratic machinery. It is impossible to avoid an occasional slip or two taking place when such large numbers of ballot papers are issued, and to say that every trivial transgression is a ground of non-compliance for setting aside an election is a proposition I find difficult to accede to. The non-compliance should be of such degree and magnitude that it could reasonably be said that as a result of such non-compliance the electorate had not been given a fair opportunity of electing the candidate of its choice.

It was, however, urged that the test determining the proportion of the number of unperforated ballot papers to the perforated ones is a fallacious one ; it was suggested that the true test was to ascertain the number of ballot papers not bearing the official mark in relation to the margin of majority which the successful candidate has secured against the runner up. I think this suggestion bears more properly on the second limb of the provision of section 77 (*b*), which requires that it should also be established that such non-compliance affected the result of the election. On this question I can quite see it has an all important bearing. But to find out whether the election was or was not conducted in accordance with the principles laid down in the Order-in-Council it seems to me entirely unjustifiable to take into consideration whether the number of ballot papers unperforated was greater than the majority by which the successful candidate was declared duly elected.

It is true that if the thirty-two ballot papers had been taken intof computation and if the majority of those ballot papers were in favour of the petitioner, the ultimate result of the election may have been that the petitioner would have been declared duly elected. But that will only mean that the non-compliance with the provisions of the Order-in-Council has affected the result of the election ; it does not help to solve the question whether the non-compliance was such as to lead to the inference that the election had not been conducted in accordance with the principles laid down in the Order-in-Council. It is important, in this connection, to guard against the fallacy of arguing that the degree or magnitude of non-compliance is to be gauged by the effect a particular non-compliance has

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on the result of the election. The degree and magnitude of non-compliance has to be determined, as I see it, not by reference to its incidence on the candidates as on the electorate.

I am of opinion that the non-perforation of thirty two ballot papers out of 26,000 odd does not in the slightest degree establish that the election had not been conducted in accordance with the principles of election laid down in the Order-in-Council.

Having regard to these reasons I reached the conclusion that the appeal should be dismissed with costs.

PULLE J.—I agree.

K. D. DE SILVA J.—I agree.

Appeal dismissed.

1953 *Present :* **Rose C.J. and Pulle J.**

G. DON ABRAHAM, Appellant, *and* C. C. D. SAMARAKKODY, Respondent

S. C. 168—D. C. (Inty.) Colombo, 3,997

Servitude—Emphyteusis—*Proof.*

The servitude of *emphyteusis* is, as a rule, evidenced by a document. The absence, however, of such a document is not an insuperable objection.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *Christie Fernando*, for the defendants appellants.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the plaintiff respondent.

Cur. adv. vult.

October 6, 1953. ROSE C.J.—

The plaintiff respondent filed an action for a partition of a field called Induruwiladeniya. The defendant appellants intervened claiming a $\frac{1}{3}$rd share of the land. While perhaps their position was not put before the learned District Judge in that form, their contention now is that they are entitled to a $\frac{1}{3}$rd share on the basis that their ancestors and they had acquired a servitude of emphyteusis.

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So far as the decided cases go it would seem, as was pointed out by learned counsel for the respondent, that an emphyteusis is, as a rule, evidenced by a document, although the absence of such a document should not, in theory at least, be regarded as an insuperable objection.

The practical difficulty however in the way of a party seeking to establish an emphyteusis in the absence of a document is the difficulty of proving it, and so far as this particular case is concerned, in which the appellants do not rely upon a document as a starting point, it is in my opinion unnecessary to say more than that on the evidence adduced before the learned District Judge it would not be proper for this court to hold that an emphyteusis had been established.

That being so, the appeal is dismissed with costs.

PULLE J.—I agree.

Appeal dismissed.

1953 *Present :* **Gratiaen J. and K. D. de Silva J.**

JUSTIN FERNANDO *et al.*, Appellants, *and* ABDUL RAHUMAN, Respondent

*S. C. 95—D. C. Colombo, 6,375*L

Landlord and tenant—Sub-letting—Sub-tenant's possession is not that of a trespasser.

A sub-tenant cannot be said to be in wrongful occupation of the leased premises if the landlord, after obtaining a decree of ejectment against the tenant, has since revived the contract of tenancy by continuing regularly to receive rent from the tenant. In such a case, a *rei vindicatio* action cannot be instituted by the landlord against the sub-tenant.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the defendants appellants.

H. V. Perera, Q.C., with *C. Renganathan*, for the plaintiff respondent.

Cur. adv. vult.

October 12, 1953. GRATIAEN J.—

This is a *rei vindicatio* action instituted by the plaintiff, who is the admitted owner of premises No. 97, Chatham Street, Colombo, against the defendants whom he alleges to have been in wrongful occupation since 31st July, 1945.

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It is common ground that the plaintiff had originally let these premises, together with the adjoining premises Nos. 93 and 95, Chatham Street, to a man named Robert Silva who, while personally occupying Nos. 93 and 95, had lawfully sub-let premises No. 97 to the 1st defendant.

The plaintiff terminated the original contract of tenancy between himself and Robert Silva in respect of all these premises with effect from 31st July, 1945, and in due course sued him for ejectment in an action to which the 1st defendant was not a party. On 13th May, 1946, a consent decree was entered of record whereby Robert Silva (*a*) was permitted to continue in occupation of premises Nos. 93 and 95 upon certain conditions with which we are not concerned in these proceedings, and (*b*) was to be ejected from premises No. 97. It follows that on 13th May, 1946, the 1st defendant's right to continue in occupation as a sub-tenant ceased, and that he therefore became liable to eviction by the plaintiff in properly constituted proceedings—*Ibrahim Saibo v. Mansoor* [1].

The present action was thereafter instituted by the plaintiff on 27th September, 1951, and it is manifest that the 1st defendant and his servant the 2nd defendant would have had no defence to the plaintiff's claim unless they could establish that, *by reason of events occurring since 13th May, 1946*, their rights of occupation (which had become extinguished on that date) have subsequently revived. The learned District Judge took the view that no such events had taken place, and accordingly entered judgment for the plaintiff as prayed for.

It seems to me that, upon the unqualified admissions which the plaintiff has himself made in the course of his evidence at the trial, he had no cause of action against the defendants at the time when these proceedings were instituted. He conceded, for instance, that, although he had obtained a decree to eject Robert Silva from No. 97, Chatham Street, he continued regularly thereafter to receive rent from him in respect of these very premises. "As far as I was concerned" he said, "*even after the decree was entered, I looked upon Robert Silva as my tenant and the person responsible for my rents* for the premises Nos. 93, 95 *and 97*". It has also been established beyond doubt that, in the same way, the 1st defendant continued to pay the rents due by him to Robert Silva in terms of their subsisting contract of sub-tenancy.

Upon these facts, it is perfectly apparent that the 1st defendant was not in wrongful occupation of the premises at the time when these proceedings commenced. The plaintiff must be held, at some stage or other, to have renewed, as between himself and Robert Silva, the contractual relationship of landlord and tenant in respect of the premises, and the 1st defendant's occupation (as a sub-tenant under Robert Silva) was therefore not that of a trespasser at any relevant date. I would therefore set aside the judgment under appeal and dismiss the plaintiff's action with costs both here and in the Court below.

K. D. DE SILVA J.—I agree.

Appeal allowed.

[1] (*1953*) *54 N. L. R. 217.*

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1954 *Present :* **Pulle J. and Swan J.**

W. HEENATIGALA, Appellant, *and* L. G. BIRD, Respondent

*S. C. 377—D. C. Colombo, 6,531*L

Rent Restriction Act, No. 29 of 1948—Section 13—Letting of co-owned premises—Partition sale thereafter—Effect of such sale on the tenancy agreement.

Per PULLE J.—Where premises which are owned in common are let under a contract of tenancy and, subsequently, one of the co-owners purchases the premises at a partition sale, the certificate of sale has the effect of terminating the relationship of landlord and tenant and of constituting the purchaser an independent title holder to whom the restriction contained in section 13 of the Rent Restriction Act cannot apply. The certificate confers a title which is not subject to the tenancy agreement.

APPEAL from a judgment of the District Court, Colombo.

Sir Lalita Rajapakse, Q.C., with *Kingsley Herat* and *H. R. Gunawardene*, for the plaintiff appellant.—The purchaser, even if he be a co-owner and the former landlord, gets a new title, which is created by the partition decree which is a decree *in rem—Bernard v. Fernando* [1], *Seedin v. Thedia* [2]. The trial Judge is wrong on the question of fact that there has been a fresh attornment after the sale. Even if he was right, the co-ownership continued till the issue of the certificate of title and it is only after the issue of the certificate that the co-ownership terminates and the purchaser gets the new title.

The old contractual relationship of landlord and tenant between plaintiff and defendant ceased the moment the certificate of title was issued—*Khan Bhai v. Perera* [3].

The partition decree gives a title paramount and the Rent Restriction Act does not come into operation unless there was a fresh attornment of a tenancy after the certificate of sale. The position will be the same if the premises had been acquired under the Land Acquisition Act 9 of 1950. See *Megarry* (7th edition) pp. 21–22.

E. R. S. R. Coomaraswamy, with *E. W. Wimalachandra*, for the defendant respondent.—Even if the decree for sale created a new title and the purchaser at the sale obtained it, there is a finding of the Judge that there was an attornment after such sale, though none after the issue of the certificate of title. The Rent Restriction Acts operate *in rem*

[1] *(1913) 16 N. L. R. 438.* [2] *(1951) 53 N. L. R. 63.*
[3] *(1924) 26 N. L. R 205 at 208.*

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and not *in personam*. The Act imposes a *status* on the house which binds both landlord and the tenant. It operates *in rem*. See *Megarry*, page 16.

If the partition decree is permitted to override the provisions of the Rent Restriction Act it will enable a co-owner of premises to file a partition action to enable him to eject the tenant.

[PULLE J.—One is permitted to evade the provisions of a statute, so long as one acts within the law, as in Income Tax evasions.]

Cur. adv. vult.

February 11, 1954. SWAN J.—

In this case the appellant sued the respondent for declaration of title to and ejectment from premises No. 246, Skinner's Road North, Colombo. The appellant had purchased these premises at a partition sale in case No. 5,744/D. C. Colombo. The appellant was the plaintiff in that action. He claimed and was declared entitled to $\frac{1}{4}$ share of the premises in question along with the premises on either side of No. 246, namely Nos. 244 and 248. The decree for sale was entered on 6th July, 1950. The sale took place on 12th October, 1950. It was confirmed on 30th January, 1952. Certificate of sale was issued on 5th February, 1952.

The respondent was occupying the premises in question both before and after the sale as the tenant of Mr. S. E. A. Perera who collected the rents of all three houses and distributed the amount among the co-owners. The respondent's case was that shortly after the sale the appellant came and told him that he had purchased the premises and that he was the " new landlord ". That was sometime in October, 1950. The respondent therefore took the rent for November to the plaintiff. He says that the plaintiff requested him to hand it to his Proctor. The Proctor however would not accept it and he deposited it, and further rents, with the Rent Control Board.

Upon this evidence the learned District Judge held that there was a contractual relationship of landlord and tenant between the appellant and the respondent. Assuming that the appellant cannot rely upon the strength of his certificate of title to eject his own tenant, I shall examine the evidence carefully in order to see whether this finding of the learned District Judge can be supported. It is unfortunate that the statement of the respondent that the appellant requested him to send the rent for November to his Proctor was made in answer to the following question put by the learned District Judge himself :—

Q.—He requested you to send it to his Proctor, S. Kanagarajah ?

A.—Yes.

When the respondent wrote letter D3 to Mr. Kanagarajah enclosing a money order in payment of the rent for November the latter promptly

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replied by D4 that he could not accept the money as he had already written to the respondent requesting him to leave the premises and surrender possession to his client. The last sentence of that letter is significant. "I presume", says Mr. Kanagarajah, "that your letter of the 6th instant is a sequel to my letter to you of the 20th ultimo."

The learned Judge has entirely lost sight of the fact that when the respondent wrote D3 to Mr. Kanagarajah he was already under notice to surrender possession of the premises. In these circumstances the most that one can infer from the conversation between the appellant and the respondent on the occasion of the appellant's visit after the sale is an intimation that the respondent could make any arrangement he cared to make with the appellant's Proctor. There could not have been a concluded contract of tenancy at that time because if the appellant was willing to accept the respondent as his tenant there was hardly any need to refer him to his Proctor. The evidence discloses that one of the tenants upon receipt of notice to surrender possession from Mr. Kanagarajah obtained time to leave and did in fact surrender possession before this case came up for trial.

The only other point to consider is whether the respondent could claim protection from ejectment by reason of the Rent Restriction Act. When it was pointed out to learned counsel for the respondent that even on the assumption that there existed a contractual relationship of landlord and tenant between the appellant and the respondent by reason of the fact that Mr. S. E. A. Perera collected the appellant's share of the rent from the respondent the alleged tenancy could only be with regard to a quarter share of the premises he did not think it worthwhile to pursue the matter and stated that his client was willing to surrender possession if he was given time.

The appeal is allowed with costs. Judgment will be entered for the appellant declaring him entitled to the premises, for ejectment and for damages at Rs. 29·58 per mensem from 5th February, 1952, until recovery of possession and for costs of action. In order to mitigate the hardship of immediate ejectment we direct that if the respondent pays all damages up to 31st January, 1954, the damages for February, 1954, together with costs of appeal on or before 20th March, 1954, the damages for March and April, 1954, together with costs of action on or before 20th April, 1954, and thereafter the damages for each month on or before the 20th of such month writ of ejectment will not be executed before 30th June, 1954. In default both writs to issue forthwith without notice to the respondent.

PULLE J.—

I agree that the appeal should be allowed and time granted to the tenant to vacate the premises on the conditions set out by my brother. Even accepting the finding of the learned District Judge that there was a

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new contract of tenancy entered into between the plaintiff and the defendant shortly after the sale on the 12th October, 1950, the certificate of sale issued on the 5th February, 1952, had the effect of terminating the relationship of landlord and tenant and of constituting the plaintiff an independent title holder to whom the restriction contained in section 13 of the Rent Restriction Act, No. 29 of 1948, could not apply because the certificate conferred a title which was not subject to the tenancy agreement.

Appeal allowed.

1953 *Present :* **Pulle J. and Weerasooriya J.**

NAGALINGAM, Appellant, *and* LEDCHUMIPILLAI, Respondent

S. C. 77—D. C. (Inty.) Anuradhapura, 3,313

Appeal—Dismissal for want of appearance—Effect of such dismissal—Res judicata—*Extension of principle to points decided previously in same suit—Arbitration—Objections to validity of award—Same objection cannot be raised twice—Civil Procedure Code, ss. 687, 692 (1).*

When an appeal is dismissed, there being no appearance for the appellant, the dismissal of the appeal must be regarded as involving a rejection of all the arguments which might have been raised at the hearing of the appeal. The absent party must bear the consequence of his own *laches.*

A decision in a civil suit or other proceeding in regard to any point operates as a bar to a fresh decision on that point in all subsequent stages of that suit or proceeding. In arbitration proceedings, therefore, the requirement in section 692 (1) of the Civil Procedure Code that the parties should be notified of the day on which judgment will be given does not entitle a party to raise on the day fixed for judgment an objection to an award which he had previously raised and was the subject of an adjudication which is binding on him.

APPEAL from a judgment of the District Court, Anuradhapura.

C. E. S. Perera, Q.C., with *C. Shanmuganayagam*, for the defendant appellant.

S. J. Kadirgamar, with *S. T. K. Mahadeva*, for the plaintiff respondent.

Cur. adv. vult.

November 30, 1953. WEERASOORIYA J.—

During the pendency of this action, which was brought by the plaintiff-respondent against the defendant-appellant, the matters in dispute were by consent of the parties referred to arbitration, purportedly under

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the provisions of sections 676–678 of the Civil Procedure Code. The award of the arbitrators holding that the plaintiff-respondent was entitled to a sum representing the major portion of the amount claimed by her in the plaint was in due course filed in Court and notice thereof was given to the defendant-appellant on the 18th April, 1952 ; and on the 8th May, 1952, he filed an application containing certain objections to the award and praying *inter alia* that the award be set aside and that the case be fixed for trial before the Court. The inquiry into this application was held on the 12th June, 1952, when Counsel for the plaintiff-respondent took the objection that the application to set aside the award had not been made within the time specified in s. 687 of the Civil Procedure Code. Counsel for the defendant appellant, while not contending that the application had been made within time, raised an entirely new objection on the ground that the award was a nullity in that " the reference to arbitration is illegal " and he also moved to amend the objections already filed by adding this new ground. Mr. Perera, who appeared for the defendant-appellant at the hearing of the present appeal, amplified this new ground of objection by stating that the application to Court for an order of reference to arbitration was not in writing, as required by s. 676 (2) of the Civil Procedure Code, and that the consequent arbitration proceedings as well as the award were void and of no effect in law, and he submitted further that an objection to an award on the ground that it was void need not be taken within the time specified in s. 687 of the Civil Procedure Code.

The learned District Judge refused to entertain the new ground of objection or to grant leave to amend the objections by the addition of that ground, and he dismissed the defendant-appellant's application to set aside the award, holding that the application had not been made within time.

The legal position that resulted from the dismissal of this application was that there was before Court an award according to which the Court was required under s. 692 (1) of the Civil Procedure Code to give judgment after notice to the parties. If the defendant-appellant wished to be relieved from the legal consequences of the award the only remedy he had, it seems to me, was to appeal against the learned District Judge's order. That the defendant appellant's legal advisers correctly apprehended the legal position is seen from the fact that an appeal was duly filed against the order of the learned District Judge. Para 9 (*b*) of the grounds in the petition of appeal specifically sets out that the application for reference to arbitration was not in writing as required by s. 676 of the Civil Procedure Code, that the reference was therefore illegal and that the award was " illegal and void and therefore should be set aside ".

This appeal duly came up for hearing before this Court and was dismissed with costs, there being no appearance for the defendant-appellant. The defendant-appellant cannot, however, be allowed to take advantage of his absence on that occasion in order to re-open any question which might have been raised and determined on that appeal. To adopt (with necessary modifications) the observations of the Judicial Committee of the

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Privy Council in the case of *Juggodumba Dossee v. Tarakaut Bannerjee* [1] in considering the effect of a decision in appeal before the Committee which was heard *ex-parte* (the respondents not being represented at the appeal) the dismissal of the plaintiff-appellant's appeal must stand as if all the arguments which he, if present, could have raised upon the case had been addressed to Court. The absent party must bear the consequence of his own *laches*.

The dismissal of the defendant-appellant's appeal must, therefore, be regarded as involving a rejection of his contention that the award is void, either on the argument set out in paragraph 9 (*b*) of his petition in the first appeal or on any other argument which might have been raised at the hearing of that appeal.

One would have thought that with the dismissal of that appeal no further impediment would be placed in the way of the plaintiff-respondent obtaining the benefit of the award in her favour. But the subsequent events proved that the defendant-appellant had not yet exhausted his resourcefulness. The receipt by him of a notice from Court of the date on which judgment was to be entered according to the award served as a fresh incentive for the making of another application to have the award declared null and void and that the trial be proceeded with on the issues that had been framed before the reference to arbitration was made. Two grounds were raised in support of this application, the second of which was, however, not pressed by his counsel at the hearing of the present appeal. The first ground was the same as set out in para 9 (*b*) of the petition in the appeal which was dismissed. This application was refused by the learned District Judge and the present appeal has been taken against that order.

It is clear that what the defendant-appellant seeks to establish in the present appeal is the same contention which he sought to establish at the hearing of his original application, namely, that there is no valid award before the Court. Hukum Chand in his treatise on Res Judicata [2] refers to a principle analagous to that of *res judicata* under which a decision in a civil suit or other proceeding in regard to any point is held to be a bar to a fresh decision on that point in all subsequent stages of that suit or proceeding. In the case of *Ram Kirpal Shukul v. Rup Kuari* [3], the question arose whether a previous decision of a Judge in the course of execution proceedings that the decree sought to be executed, according to its true construction, awarded future mesne profits (no appeal having been taken against that decision by the judgment debtor) could in a later stage of the same proceedings be set aside at the instance of the judgment debtor and future mesne profits disallowed. The Judge before whom this question was raised considered himself bound by the previous decision and he disallowed the judgment-debtor's objection in respect of mesne profits. The High Court, however, reversed this order and held that the execution

[1] (*1880*) *VI Calcutta Law Reports 121 at 127.*
[2] *Hukum Chand on Res Judicata* (*1894 Ed.*) *p. 759.*
[3] (*1883–4*) *I. L. R. 11 Indian Appeals 37.*

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of the decree for mesne profits should be disallowed. On an appeal filed against the order of the High Court, the Judicial Committee of the Privy Council held that the High Court had erred in deciding that the decree did not award mesne profits because the Judge who had construed the terms of the decree as awarding mesne profits had jurisdiction to decide that question and his decision, whether right or wrong, not having been appealed from, was final and binding on the parties and those claiming under them. " If " stated Their Lordships " the subordinate Judges and the Judge were bound by the order of Mr. Probyn in proceedings between the same parties on the same judgment, the High Court were bound by it, and so also are Their Lordships in adjudicating between the same parties."

In the case of *Bani Ram et al. v. Nanhu Mal* [1] it was held by the Judicial Committee of the Privy Council that where a Judge had decided in the course of execution proceedings that a decree according to its true construction provided for payment of interest during a certain period, and such decision had not been appealed from, it was not open to the High Court at a later stage of the execution proceedings to set aside that order and disallow interest for part of that period.

In my opinion the order of the learned District Judge refusing the first application made by the defendant-appellant that the award be set aside, and the dismissal of the appeal filed against that order, preclude the defendant-appellant from again raising the question of the validity of the award. Mr. Perera for the defendant-appellant referred us to the case of *Menichamy v. Muniweera et al.*[2] as authority for his submission that it is open to his client, in the present appeal, to attack the award on the ground advanced by him notwithstanding that, as conceded by him, the same ground formed the basis of the previous appeal. In that case the widow of a deceased defendant in a partition action made an application to this Court by way of *restitutio in integrum* to have set aside the interlocutory decree which had been entered after the death of the deceased defendant and before the substitution of his widow and children as parties in the case. Notwithstanding that an appeal had been filed by some of the parties against the interlocutory decree and the interlocutory decree had been affirmed in appeal, this Court granted the relief claimed and set aside the interlocutory decree and remitted the case to the District Court for steps to be taken to have the heirs of the deceased defendant substituted as parties in his place and for an adjudication on their title to the land sought to be partitioned. It is to be noted, however, that in that case the heirs of the deceased defendant were not bound by the interlocutory decree, and no final decree had been entered which would have been conclusive against all persons including the heirs of the deceased defendant. I do not think that the defendant-appellant is helped very much by the decision in that case.

The appeal is accordingly dismissed with costs. The case is remitted to the lower Court so that judgment may be pronounced according to the

[1] *(1883–4) I. L. R. 11 Indian Appeals 181.*
[2] *(1950) 52 N. L. R. 409.*

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award on a day of which notice has been given to the parties in terms of s. 692 (1) of the Civil Procedure Code. While I do not wish to be understood as expressing the view that in no case would it be open to a party to raise on the day fixed for the giving of judgment an objection to an award which had not previously been taken within the time specified in s. 687 of the Civil Procedure Code, I would observe that the requirement in s. 692 (1) that the parties should be notified of the day on which judgment will be given is in accordance with the general rule that judgment should be pronounced in the presence of the parties or their Proctors, or on a day of which they have been given notice—vide s. 184 (1) of the Civil Procedure Code ; and that requirement does not in any way imply that a party is free to raise on the day fixed for judgment an objection to an award which he had previously raised and was the subject of an adjudication which is binding on him.

PULLE J.—I agree.

Appeal dismissed.

1953 *Present :* **Pulle J.**

S. THAMBIPILLAI, Appellant, *and* MANMUNAI SOUTH AND ERUVIL CO-OPERATIVE AGRICULTURAL PRODUCTION AND SALES SOCIETY, LTD., Respondent.

S. C. 1,399—M. C. Batticaloa, 13,398

Co-operative Societies Ordinance (Cap. 107) as amended by Co-operative Societies (Amendment) Act, No. 21 of 1949—Section 50A—Money due to Co-operative Society—Procedure for recovering it—Sentence of imprisonment cannot be imposed on defaulting debtor.

When the Registrar of Co-operative Societies orders a person to repay money due to a co-operative society, section 50A (2) of the Co-operative Societies Ordinance as amended by the Co-operative Societies (Amendment) Act, which provides machinery for the recovery of the money under section 312 (2) of the Criminal Procedure Code, does not empower a Magistrate to sentence the debtor to a term of imprisonment if he makes default in payment.

APPEAL from a judgment of the Magistrate's Court, Batticaloa.

Appellant in person.

Ananda Pereira, Crown Counsel, as *amicus curiae*.

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December 2, 1953. PULLE J.—

The appellant was the storekeeper of a Co-operative Agricultural Production and Sales Society. By a writing dated the 6th June, 1951, the Registrar of Co-operative Societies made an order under section 50A of the Co-operative Societies Ordinance, No. 16 of 1936 (Cap. 107) as amended by the Co-operative Societies (Amendment) Act, No. 21 of 1949, requiring the appellant to pay a sum of Rs. 12,798 being the value of 1,422 bushels of paddy found to be short while in the custody of the appellant. The order further stated that if the sum was not paid by the 8th July, 1951, " it may be recovered as a fine of the Magistrate's Court as provided in section 50A of the Ordinance referred to above ".

On the 14th August, 1951, the liquidator of the Society filed the order and moved that the amount be recovered as a fine in terms of section 50A (2) of the Ordinance. On the same day, however, a summons was issued requiring the appellant to answer to the complaint that by his failure to pay the money he had committed an offence punishable under section 50A (2).

The only point taken on behalf of the appellant before the learned Magistrate was that the order of the Registrar was *ultra vires*. This submission was not accepted and the appellant was sentenced to six months' imprisonment.

The appellant argued his case in person and I am indebted to Mr. Ananda Pereira, Crown Counsel, for assisting me as *amicus curiae*. In my opinion section 50A (2) merely provides the machinery for the recovery of the money under section 312 (2) of the Criminal Procedure Code and does not empower a Magistrate to sentence a person against whom an order is made by the Registrar and who has made default in payment to a term of imprisonment. If reference is made to analogous provisions in other statutes one finds that the legislature expressly provides for imposing a term of imprisonment upon a failure to pay. See section 8 of the Maintenance Ordinance and section 80 (1) of the Income Tax Ordinance.

Section 50A (2) corresponds in substance to section 50 of the Stamps Ordinance. Dealing with the latter section Ennis J. said in the Divisional Bench case of *Gunawardene v. Gunasekera*[1]: " The contention of the appellant that the appellant was liable to imprisonment under the procedure prescribed in section 50 and is, therefore, entitled to appeal is not, in my opinion, tenable, as imprisonment in default of payment is quite distinct from the procedure for the recovery of a fine. It is a substitution of one form of punishment for another which section 50 does not contemplate."

For the reasons stated above I have already made order quashing the sentence of imprisonment.

Sentence of imprisonment quashed.

[1] *(1922) 1 T. C. L. R. 90.*

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1954 *Present :* **Swan J.**

P. K. M. PODI APPUHAMY, Appellant, *and* H. A. PERERA (Inspector of Police), Respondent

S. C. 1,419—M. C. Negombo, 3,635

Motor Traffic Act, No. 14 of 1951—Section 239, Regulation 17—Stop light—Not a basic requirement of every motor vehicle.

Regulation 17 of the Regulations framed under section 239 of the Motor Traffic Act does not lay down that every motor vehicle should have a stop light.

APPEAL from a judgment of the Magistrate's Court, Negombo.

M. L. S. Jayasekera, for the accused appellant.

A. E. Keuneman, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 21, 1954. SWAN J.—

The appellant in this case was charged with having on 21.8.53 driven lorry CL 3425 on a public highway without a stop light fitted to the rear of the vehicle. Admittedly the lorry did not have a stop light. It was contended on behalf of the prosecution that regulation 17 of the Regulations framed under section 239 of the Motor Traffic Act, No. 14 of 1951, required every motor vehicle to be fitted with a stop light. In the lower Court as well as in this Court the contention of the defence was that rule 17 does not lay down that every motor vehicle should have a stop light. Regulation 17 reads as follows :—

" Every stop light fitted to a motor vehicle must be placed at the rear of the vehicle and not to the left of the centre thereof and when in operation must show a red or amber light. A duplicate stop light may also be fitted to the left or near side so that it comes into operation at the same time as the other stop light."

The learned Magistrate looking at regulation 18 appears to have taken the view that a stop light is a basic requirement of every motor vehicle. With that view I cannot agree. Mr. Jayasekera appearing for the appellant pointed out the different wording of regulations 9 and 10 on the one hand and of regulation 17 on the other. Learned Crown Counsel however, referred me to regulation 5 which puts the matter beyond all doubt. Regulation 5 (1) states that every motor vehicle must be constructed so as to be steered from the right or off-side. There is a proviso giving the Commissioner the right to issue a special permit

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authorising the use of a motor vehicle that has its steering column on the left or near-side. Sub-section 2, however, prohibits the issue of a special permit unless certain conditions are fulfilled, and one of these conditions is the requirement of "a mechanical or illuminated device capable of giving distinct and intelligible signals required by section 155 of the Act and *of clearly indicating any intention to stop the motor vehicle*".

I set aside the conviction and acquit the accused.

Appeal allowed.

1952

Present : **Gunasekara J.**

M. M. A. DHARMATUNGA *et al.*, Appellants, *and* SUB-INSPECTOR OF POLICE, PADDAWELA, Respondent

S. C. 591–593—M. C. Gampaha, 56,429

Criminal Procedure—Joinder of accused and charges—Same transaction—No averment of it in plaint or charge—Irregularity.

Several accused persons were jointly tried in respect of several offences. There was no allegation either in the report filed in terms of section 148 (1) (*b*) of the Criminal Procedure Code or in the charge framed by the Magistrate that the offences with which the accused were severally charged were committed in the same transaction.

Held, that the accused could not have been jointly tried.

APPEAL from a judgment of the Magistrate's Court, Gampaha.

H. V. Perera, Q.C., with *Christie Fernando*, for the accused appellants.

J. G. T. Weeraratne, Crown Counsel, for the Attorney-General.

June 25, 1952. GUNASEKARA J.—

There is no allegation either in the report filed in terms of section 148 (1) (*b*) of the Criminal Procedure Code or in the charge framed by the Magistrate that the offences with which the accused are severally charged were committed in the same transaction. Crown Counsel very properly agrees that in these circumstances the accused could not be tried jointly.

In view of the misjoinder I quash the conviction of the accused. It will of course be open to the Police to institute fresh proceedings if they are so advised.

Conviction quashed.

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1953 *Present :* **Swan J.**

K. CYRIL, Appellant, *and* DOLE (Inspector of Police), Respondent

S. C. 942—M. C. Galle, 9,551

Postponement—Application therefor—Circumstances when it should be granted.

At the conclusion of the case for the prosecution the Proctor who was appearing for an accused person applied for a postponement stating that it was well past the ordinary working hours of the court, that he had had a heavy day and that the defence would take at least two hours.

Held, that in the circumstances the application for postponement should have been granted.

APPEAL from a judgment of the Magistrate's Court, Galle.

G. E. Chitty, with *A. W. W. Goonewardene*, for the 1st accused appellant.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

December 9, 1953. SWAN J.—

There were two accused in this case. Only the 1st accused has appealed. Perhaps the 2nd accused is satisfied with the order that the learned Magistrate has made. Mr. Chitty, appearing for the 1st accused, complains that at the conclusion of the case for the prosecution the Proctor for the 1st accused applied for a date which the learned Magistrate refused, although it was well past the ordinary working hours of the court. Thereupon the Proctor for the 1st accused withdrew from the case and the accused was deprived of his services. I think the refusal of the Magistrate to grant the 1st accused's Proctor a date prejudiced the 1st accused. Ordinarily when there is co-operation between Bench and Bar an application for a date is readily granted. In this particular case the Proctor for the 1st accused drew the attention of the court to the fact that it was ten minutes to five and stated that the defence would take at least two hours and that he had had a heavy day and asked for the courtesy of a postponement which was curtly refused. In the circumstances I do not think there has been a satisfactory trial so far as the 1st accused is concerned. I would therefore set aside the conviction of the 1st accused and order the case to be tried before another Magistrate who may or may not assume jurisdiction as District Judge as he thinks fit.

Conviction set aside.

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1953 *Present :* **Rose C.J., Nagalingam S.P.J. and K. D. de Silva J.**

SITHAMPARANATHER MAILVAGANAM *et al.*, Appellants, *and* KUMARASWAMY KURUKKAL RAMANATHA AIYAR *et al.*, Respondents

S. C. 58—D. C. Jaffna, 395T

Hindu temple—No evidence of express dedication—Charitable trust—Inference of its existence—Relevant factors—Trusts Ordinance (Cap. 72), s. 107.

In deciding, under section 107 of the Trusts Ordinance, whether or not a temple, even in the absence of an express dedication, should be deemed to be a charitable trust, such matters as the holding of public services at the temple, donations to the temple by members of the public throughout a long period of time and improvements effected to it by them are matters which can properly be taken into consideration.

APPEAL from a judgment of the District Court, Jaffna. This case was referred to a Bench of three Judges owing to a difference of opinion between the two Judges before whom it had been previously listed.

S. J. V. Chelvanayakam, Q.C., with *C. Vanniasingham* and *C. Shanmuganayagam*, for the plaintiffs appellants.

E. B. Wikramanayake, Q.C., with *H. W. Tambiah* and *S. Sharvananda*, for the defendants respondents.

Cur. adv. vult.

[The following cases were cited at the argument :—*Kumarasamy Kurukkal v. Karthigesa Kurukkal* (1923) 26 N. L. R. 33, *Pujari Lakshmana Goundan v. Subramana Ayyar* A. I. R. 1924 P. C. 44, A. I. R. 1920 Madras 42, *Narayanan Nambudripad v. Board of Commissioners for Hindu Religious Endowments* A. I. R. 1938 Mad. 209, *Somasunderam v. Rangunather Mudaliyar* (1930) 12 C. L. Rec. 78 at 81, *Doraiswami Kurukkal v. Thambipillai* (1949) 53 N. L. R. 323 at 328, *Mandacheri Koman v. Thachangat Nair* A. I. R. 1934 P. C. 230.]

October 12, 1953. ROSE C.J.—

The plaintiffs-appellants pray for a declaration that a Hindu temple known as the Innuvil Kandaswamy Kovil and its temporalities constituted a religious charitable trust. They also ask for certain ancillary reliefs under Section 102 (1) of the Trusts Ordinance (Cap. 72).

In the past there has been some contest between the parties as to whether the land on which the temple stands belonged to the successors-in-title of one Kulandayar Velayuthar, as alleged by the plaintiffs. This matter appears to have been determined, for all practical purposes, in favour of the defendants in D. C. Jaffna case No. 8,813 decided in 1914,

2——J. N. B 33437-1,590 (1/54)

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The matter to be decided in the present case is whether the temple in question is a charitable trust. The learned District Judge in a long and analytical judgment, while conceding that a number of improvements had been effected and donations given by members of the public, considered that these matters were insufficient to convince him that the temple was a charitable trust. In the course of his consideration of this matter, the learned Judge said :

> " To my mind, this erecting of a temple by a Brahmin priest and dedicating it for religious worship by the Hindus of the neighbourhood is no more than like a barber erecting a saloon and equipping it in order that he may ply his trade by shaving the beards of the men in the neighbourhood. If in appreciation of the services of the barber and the comforts enjoyed in the saloon men add to the equipment and the building, one will not argue that thereby the saloon had been converted into a trust."

It seems to me, with all respect to the learned District Judge, that his analogy is unhelpful, particularly in view of the fact that according to the decided cases the question as to whether or not a particular temple may be deemed, in the absence of express dedication, to be a charitable trust must depend upon the circumstances of the particular matter and the inferences to be drawn from such factors as the holding of public services, general access to the public at all times, donations of land and monies to the temple by the public and improvements effected to it by them.

There is no doubt that the defendants and their predecessors have for the last hundred years or so exclusively officiated at the temple and have had in effect unfettered control of the organisation and arrangements of the various services and festivals held there. This, however, to my mind, is a neutral fact when considering whether or not the temple should be held to be a charitable trust. The fact that a particular family of a priestly caste should be entrusted with the conduct of the services and the business management of the temple does not seem to me to be necessarily inconsistent with the fact of a charitable trust. It is significant, and does not seem to have been adequately appreciated by the learned Judge, that the very first deed, in which specific mention is made of the temple (P 15), states that a deed of charity donation had been executed and granted " unto the Trustee Paraparipukaran of Kandaswamy Temple Subramaniar Arumugam ". Subramaniar Arumugam was admittedly an ancestor of some of the present plaintiffs. It would thus seem to be that as long ago as 10th May, 1852—the date of the deed—Subramaniar Arumugam was regarded by the donors as being the Trustee of the Kandaswamy Temple.

Besides deed P 15, there is a long series of deeds from 1852 to 1909, in all of which, Subramaniar Arumugam and the members of his family have been described as Trustees of the Temple by various donors. P 3 also of 1852, P 16 of 1884, and P 5 of 1874 refer to Subramaniar Arumugam as trustee, while P 16 of 1885 and P 7 of 1886 refer to his son-in-law, Ramalingam Ambalavanar, in the same capacity, and deeds P 9 of 1906,

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P 10 and P 11 both of 1907 and P 12 of 1909 describe Ambalavanar Cadiratamby, son of Ramalingam Ambalavanar, as the trustee. In fact even the ancestors of some of defendants, themselves, have been described as trustees and officiating priests of the temple—see deeds D 43 and D 44 of 1863, D45 of 1865, D 46 of 1867, D 10 of 1858, and D13 of 1937. In one deed, D9 of 1870, Vyravanather Aiyer Suppiyer, one of the ancestors of the defendants, is designated the owner of the temple, but the Tamil word, which has been translated as owner, is a word of neutral meaning—it may mean either an owner or a man who merely looks after and officiates in the temple.

Although, therefore, by reason of the fact that the ancestors of some of the plaintiffs in earlier deeds, and of some of the defendants in later deeds have been described as trustees or managers of the temple, leading to the inference that rival claims were advanced to the trusteeship of the temple at a date long after the foundation of the temple, there is very slight basis for the contention that the temple itself was the private property of the defendants or their ancestors. If the temple was a private temple of the defendants' ancestors, there would have been no need to describe them as managers of the temple, a term which negatives the private character that is claimed for the temple by the defendants.

Furthermore, as early as 1879 and 1891, by deeds of appointment, functionaries, styled as trustees have been appointed to look after the temporalities and the secular management of the temple, and in the operative words of the deeds are to be found specific statements as regards the person or persons who built the temple, the land on which the temple was built and the functions performed by the trustees. By deed P 4 of 1879 the first known individual designated as a trustee of the temple, namely, Subramaniar Arumugam, appoints his son-in-law Ramalingam Ambalavanar as trustee in succession to him, as he is old and unable to conduct and carry on the various activities in relation to the temple, and he further constitutes his son-in-law the trustee in succession to himself, of the properties held by him as trustee, to the intent and purpose that Ambalavanar too should manage and look after the affairs of the temple, in the same manner as he had up to then done. In this deed of appointment, even as in the earliest deed, in which specific mention of this temple is made, P 15, there is a statement that the land, on which the temple stands, is a land registered in the tombu in the name of Kulanthai Velayuthar (or Kulanthayan Velayuthan) and Kanthan Kanny, of whom the former is the great-grandfather of Subramaniyar Arumugam. Besides, the deed of appointment P 4 specifically records the fact that the father of Subramaniyar Arumugam started the " sacred work " of building the temple and that while the work was yet in progress he had died and that thereafter Subramaniyar Arumugam continued the task of completing the building by utilising his own funds and by receiving contributions from members of the public, and that thereafter he had the consecration ceremonies performed. In 1891, by deed P 8, Ramalingam Ambalavanar appointed his son, Ambalavanar Cadiratamby, the trustee of the temple in succession to him. It is not denied that the temporalities of the temple, referred to in the various deeds produced by the plaintiffs, have always been in the possession and control of these

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trustees, clearly establishing that the deeds of appointment of trustees have been acted upon. On the other hand, the defendants have not been able to show any dealing with the temple as private property. One would have expected a temple, which, admittedly, is worth a considerable sum of money, to have been administered on the death of the various proprietors, if the claim of the defendants be true ; but it is conceded by the defendants that on no occasion when, if the temple were private property, it would have been necessary to administer it had it been so administered. But an unconvincing excuse is put forward that the defendants and their ancestors did not do so, in order to evade payment of the stamp and estate duty that would have been payable if the temple had been administered as private property. The conduct of the defendants in not administering the temple would have been clearly proper and right if the temple were regarded by them too as a charitable trust.

One should not, I suggest, give serious weight to the consideration that all these deeds two of which were executed as long ago as 1852 were drawn up with a view to the subsequent litigation between the parties which did not come before the Courts until 1914 and 1953 respectively.

In the light of this consideration, it is convenient now to consider the subsequent history of the temple. It is in evidence, and does not appear to be in conflict, that over a considerable period of years the temple has been in consistent use by the public of the neighbourhood. Public and private services and ceremonies have been held, in which no doubt the services of the defendants and their predecessors have always been availed of. Sums of money have been presented by members of the public to the temple, walls have been built, the premises have been enlarged and towers (goparam) have been erected. Moreover, there was evidence, which is not adverted to by the learned District Judge, and which was not challenged in cross-examination, that a certain member of the public had presented a " Vel " car, used for the transportation of the images of deities, at a cost of Rs. 10,000 from money and materials collected from the public of the neighbourhood.

It is true that the mere fact that a temple is frequented by members of the public and that services are held which are attended by the public is not of itself sufficient to indicate that the temple is a charitable trust ; but when such consistent and uninterrupted public user is added to the fact that throughout a long period of time the public have been in the habit of making contributions, both of money and kind, it seems to me that this militates strongly against the contention of the defendants that the temple and all the gifts received by it were and are their private property.

I would add that Section 107 of the Trusts Ordinance expressly negatives the necessity for specific evidence of a ceremonial dedication of a private temple to the public. It is sufficient if the Court considers " from all the circumstances of the case that a trust in fact exists, or ought to be deemed to exist ".

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Many authorities were cited to us by learned counsel in the case, but it seems to me that the principles to be applied can be derived from two of them—*Pujari Lakshmana Goundan and another v. Subramania Ayyar and others* [1] and in *Kumarasamy Kurukkal v. Karthigesa Kurukkal* [2], in which Sir John Edge and Bertram C.J., respectively, say in effect that such matters as the holding of public services at a temple, donations to a temple by members of the public and improvements effected to it by them are matters which can properly be taken into consideration in deciding whether or not a temple, even in the absence of an express dedication, should be deemed to be a charitable trust.

Whether any particular case falls on one side of the line or the other is, of course, a question of degree. As far as this particular case is concerned, I am of opinion that the plaintiffs have established that the circumstances surrounding the temple are such as should properly have led the learned District Judge to conclude that a charitable trust in fact existed or should be deemed to exist.

That being so, the appellants are entitled to succeed.

At one stage of the argument the Junior Counsel for the respondents adumbrated a submission that the learned District Judge had no jurisdiction to entertain the action at all, because the procedure indicated in Section 102 (3) of the Trusts Ordinance had not been followed. This objection, however, which was of a highly technical nature and had not been taken in the lower Court, was not pursued in appeal, and I do not, therefore, regard it as necessary to take it into consideration.

For these reasons the appeal is allowed, the judgment of the learned District Judge set aside, a declaration is granted to the plaintiffs that the Innuvil Kandaswamy Temple is a charitable trust and the matter is remitted to the learned District Judge to settle a scheme of management and to make such orders, in regard to the ancillary reliefs claimed by the plaintiffs, as may be deemed to be proper, and to enter a decree in conformity therewith. No relief, however, will be granted to the plaintiffs on the basis that the defendants have been guilty of mismanagement. He will, however, no doubt, take into account the fact that the defendants are admittedly the officiating priests of the Temple, and will, no doubt, also consider whether any special interests of the plaintiffs or any of them should be protected.

The respondents must pay the costs of this appeal and of the proceedings in the Court below which have resulted in the present appeal. The costs, if any, of any subsequent proceedings in the District Court will be in the discretion of the learned District Judge.

NAGALINGAM S.P.J.—I agree.

K. D. DE SILVA J.—I agree.

Appeal allowed.

[1] *A.I.R. 1924 P.C. 44.*

[2] *(1923) 26 N.L.R. 33.*

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1953 *Present :* **Gratiaen J. and Gunasekara J.**

HIRDARAMANI LTD., Appellant, *and* T. A. K. DE SILVA, Respondent

S. C. 94—D. C. Colombo, 21,772M

Contract—Novation—Ingredients necessary.

P. T., who was carrying on a business, bound himself and his heirs, executors and administrators to pay monthly a certain sum of money to the plaintiff. Subsequently a private limited liability company acquired the business. P. T. who was the managing director of the company, continued the monthly payments notwithstanding the cessation of his private business. After he died the company made similar payments subject however to the express qualification that the payments were *ex gratia*. In an action instituted by the plaintiff for a declaration that the company was liable to continue to make such monthly payments—

Held, that the claim of the plaintiff was insupportable in law. A novation of a debt cannot, in the absence of any express declaration by the parties, be held to exist except by way of necessary inference from all the circumstances of the case.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the defendant appellant.

Sir Ukwatte Jayasundera, Q.C., with *L. G. Weeramantry* and *O. M. de Alwis*, for the plaintiff respondent.

Cur. adv. vult.

March 3, 1953. GRATIAEN J.—

On 29th January, 1944, an agreement was entered into between three persons named Paramanand Tourmal, T. A. K. de Silva (who is the plaintiff) and A. C. P. Wijeratne (who is the plaintiff's brother-in-law). Paramanand Tourmal had for many years been carrying on business in Colombo under the name style and firm of "Hirdaramani". He employed the plaintiff as his "leading Jeweller", and Wijeratne as "assistant Jeweller".

The agreement arrived at between these three parties was, *inter alia*, to the following effect :

"(*a*) The said Silva shall retire as leading jewellery maker in the firm of Hirdaramani as from the 1st day of February, 1944, and shall in consideration of the sum of Rs. 475, being the purchase price, deliver to Mr. Paramanand all machines tools and other implements that are now at Hirdaramani and owned by Silva.

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(*b*) The said Wijeratne shall as from 1st February, 1944, serve *under Mr. Paramanand* 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. Paramanand.

(*c*) In consideration of the services rendered as aforesaid by Silva and *as long as Wijeratne is employed under Mr. Paramanand* he Mr. Paramanand shall as from 1st February, 1944, pay to Silva monthly at the end of each and every month a sum of Rs. 150 during the lifetime of Silva.

(*d*) Towards the payment of the aforesaid monthly sum of Rs. 150 *by Mr. Paramanand* he the said Wijeratne shall contribute a sum of Rs. 75 monthly from his remuneration.

(*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 Hirdaramani at any time or in the event of the death of Silva then the payment to Silva of the said sum of Rs. 150 shall immediately cease anything herein contained to the contrary notwithstanding. "

The term " Paramanand Tourmal " was expressed to include his heirs, executors and administrators, but no provision was made for the eventuality of an assignment of the business by the proprietor during his lifetime.

Paramanand Tourmal ceased to carry on the business of " Hirdaramani " in his own right in 1946, and a private limited liability company, known as *Hirdaramani Ltd.*, and incorporated on 27th June, 1946, acquired the business. In fact he was the Managing Director of the new Company until he died in March, 1948.

It is common ground that, notwithstanding the cessation of his private business in 1946, Paramanand Tourmal continued the monthly payments of Rs. 150 to the plaintiff until the date of his death. The learned District Judge has held as a fact that he did so as the Managing Director of the Company. After he died, the Company continued to make similar payments until May, 1949, subject however to the express qualification that the payments were *ex gratia*.

The plaintiff sued the Company on 27th October, 1949, (*a*) for the recovery of a sum of Rs. 2,250 alleged to be due to him in respect of monthly payments since the month of June, 1948, under the agreement dated 29th January, 1944, and (*b*) for a declaration that the Company was liable to continue to make such monthly payments to him " in terms of the said agreement ". After trial the learned District Judge entered judgment in favour of the plaintiff as prayed for. The present appeal is from this judgment.

It is conceded that the Company could not be held liable under the original agreement, to which it was not a party, by reason only of the assignment in its favour of the business which had previously been carried

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on by Paramanand Tourmal personally. The contractual liability was primarily his alone, and was limited in point of time to the continuation of the contract of service between himself and Wijeratne, although I agree, as a matter of interpretation, that if his executors or administrators had carried on the business of " Hirdaramani " after his death, they too might have been obliged in law to pay the plaintiff's allowance so long as Wijeratne continued to serve them.

The basis of the plaintiff's cause of action is, as alleged in paragraph 6 of the annexed plaint, that the Company " undertook the liability of Paramanand Tourmal ". In support of this allegation the plaintiff stated as follows in the course of his evidence at the trial : " 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. " This evidence has been accepted by the learned District Judge as a truthful account of the conversation which took place between the plaintiff and Paramanand Tourmal shortly after the Company was incorporated. He decided that the Company was therefore liable *by novation* to discharge Paramanand Tourmal's obligations under the original contract.

If the averment that the Company " undertook the liability of Paramanand Tourmal " was intended to plead a novation, it is, to say the least, lacking in precision as to the terms of the agreement whereby Paramanand Tourmal is alleged to have agreed to the extinction, by a contract of novation of his personal obligation and the imposition of a substituted obligation on a different debtor, namely, the Company. I shall assume for the purposes of the present appeal that the plaint sufficiently complies with the wholesome rule that novation must be specially and precisely pleaded.

In the facts of the present case, the form of novation relied is a transaction described by the Roman-Dutch jurists as *delegation*, i e., a contract between the debtor and the creditor of an obligation and a third party, by which the third party, with his own consent and the consent of the creditor, is substituted for the original debtor in such a way that the obligation between the original creditor and the original debtor is extinguished and a new obligation established between the original creditor and the third party "— *Wessels on Contract*, Vol. 1, p. 728, para. 2433 (citing *Voet 46.2.11*).

The plaintiff could not succeed by pleading and proving that the Company had undertaken only the original obligation of Paramanand 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 Paramanand 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

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measured by the limits of Paramanand 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 " Hirdaramani Ltd. " as its " leading jeweller ". No such contract has been pleaded or proved by the plaintiff.

" A novation cannot, in the absence of any express declaration by the parties, be held to exist except *by way of necessary inference* from all the circumstances of the case ". *Darling v. Registrar of Deeds* (1912) S. A. A. D. 28 at 35. To my mind the correspondence between the plaintiff and the Company after the death of Paramanand Tourmal rules out the inference (and far less the necessary inference) that the Company had unequivocally undertaken an obligation of the kind which has now been suggested. For three successive months the Company sent him a cheque for Rs. 150 stating expressly that this was being done " without any obligation on our part ". On the first two occasions the plaintiff accepted the money without registering any protest against the conditions attaching to it. On the third occasion, nearly a month after he had realised the cheque, he wrote to say that he felt " that the Company *or in the alternative the estate of the late Mr. Paramanand Tourmal* is liable to continue the payment *throughout my lifetime* ". That suggestion was admittedly made after he had obtained legal advice. As far as the Company was concerned, it was promptly repudiated by its new Managing Director.

The learned District Judge has also held that the Company was estopped by its conduct from denying its obligation to continue the payments after the death of the original debtor. While I accept unreservedly the principle of estoppel by representation enunciated in *Hailsham,* Vol. 1, p. 479, para. 547, I do not see how it can be applied to the facts of the present case. There is no evidence to support the view that the plaintiff was misled into the belief that the Company would continue the payments " throughout (his) lifetime ". On the contrary, the letter dated 28th June, 1949, negatives the theory that he entertained such an unqualified belief.

In the view which I have taken, it is unnecessary to decide (1) whether a novation could have taken place without the concurrence of Wijeratne, who himself had undertaken certain obligations under the previous agreement, and (2) whether Wijeratne was in fact a party to the new agreement whereby, presumably, the scope of his liability was substantially enlarged.

It is indeed unfortunate for the plaintiff that he rejected the Company's offer to continue the payments upon the clear understanding that they would be made on an *ex gratia* basis. The plaintiff has chosen instead to obtain an adjudication of his legal rights, and I find myself constrained to decide that his claim is insupportable in law. I would therefore allow the Company's appeal and dismiss the plaintiff's action with costs both here and in the Court below.

GUNASEKARA J.—I agree.

Appeal allowed.

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1954 *Present :* **Gratiaen J. and Gunasekara J.**

V. SIVAPIRAGASAM, Appellant, *and* S. VELLAIYAN *et al.*, Respondents

S. C. 328—D. C. Point Pedro, 3,611L

Thesavalamai—*Pre-emption—Effect of partition decree thereon—Mortgagor's rights as against pre-emptor.*

A co-owner's right of pre-emption under the *Thesavalamai* is extinguished by a decree for partition entered in respect of the common property.

Vyramuttu v. Periathamby (1929) 30 N. L. R. 492, overruled.

A co-owner's right of pre-emption cannot defeat the rights of a *bona fide* mortgagee for value whose interests had been created before the right of pre-emption was asserted in a Court of law.

APPEAL from a judgment of the District Court, Point Pedro.

N. E. Weerasooria, Q.C., with *C. Renganathan*, for the defendant appellant.

H. V. Perera, Q.C., with *S. Subramaniam*, for the plaintiffs respondents.

Cur. adv. vult.

January 26, 1954. GRATIAEN J.—

This appeal calls for a decision on issues relating to certain aspects of a co-owner's rights of pre-emption under the *Tesawalamai*, and on the question whether, when exercised, they extinguish hypothecary rights acquired by a third party during the interval between the date of the impugned sale and the date of purported pre-emption.

A woman named Mathy, her son Sithambaram and her daughter (the 2nd respondent) were admittedly governed by the *Tesawalamai*. They owned a property in common by right of inheritance from Mathy's husband Kathiram. On 6th June 1945 Mathy and Sithambaram sold some of their undivided shares to Letchumipillai who, jointly with her husband, mortgaged her interests to the appellant by two notarial bonds dated 2nd July 1945 and 7th October 1945.

On 17th October 1945 Letchumipillai and her husband instituted an action for the partition of the common property, joining as parties all the co-owners including the 2nd respondent and her husband the 1st respondent. The appellant was also added for the protection of his hypothecary rights. On 12th December 1947 a final decree for partition was entered *inter partes* whereby a divided portion (hereinafter referred to as Lot 3) was allotted to Letchumipillai subject to the mortgages of 1945 in favour of the appellant ; a separate portion was allotted to the 2nd respondent. No appeal was filed against this decree, and its validity has not been challenged.

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On 5th October 1948 the appellant sued Letchumipillai and her husband for the enforcement of the mortgage bonds subject to which she had been declared entitled to Lot 3. A hypothecary decree was entered in his favour on 20th January 1949 ; the property was thereafter duly put up for judicial sale, and on 19th August 1949 the appellant, being the highest bidder, obtained a conveyance of Lot 3.

Under these circumstances, the appellant might well have regarded his ownership of Lot 3 as unassailable ; he had bought the property at a judicial sale in execution of the mortgage decree in his favour, and the title had at least been strengthened (if not made conclusive) by virtue of the partition decree of 12th December 1947. Nevertheless the respondents instituted the present action against him for, *inter alia*, a declaration that their title to Lot 3 was superior to his by virtue of a conveyance dated 14th May 1949 executed in their favour in pursuance of a decree in action No. 2,505 of the District Court of Point Pedro.

The basis of the respondents' claim is that on 24th October 1945, i.e., during the pendency of the partition action which I have previously mentioned, they had filed an action against Letchumipillai and her husband for the enforcement of their right under the *Tesawalamai* to pre-empt the undivided shares of the larger land (including Lot 3) which Mathy and Sithambaram had previously sold to Letchumipillai. On 31st July 1947 a decree was entered declaring the respondents entitled, as against Letchumipillai and her husband, to pre-empt these shares provided that they paid a sum of Rs. 1,125 as consideration for the " substituted purchase " on or before 29th August 1947. This sum was paid before the appointed date and they obtained on 14th May 1949 a conveyance of the undivided shares in the larger land which had previously been common property. In the meantime, the partition decree previously referred to had altered the entire situation.

The learned District Judge, after trial upon certain issues of law, declared the respondents entitled as against the appellant to the entirety of Lot 3. The present appeal is from this judgment.

Ultimately, the dispute resolves itself into the question whether (and if so, to what extent) the conveyance dated 14th May 1949 in favour of the respondents in the pre-emption action prevails over the conveyance dated 19th August 1949 in favour of the appellant in the hypothecary action. The effect of the final decree for partition dated 12th December 1947 is, of course, of considerable relevancy to our decision.

With regard to the respondents' conveyance dated 14th May 1949 executed in pursuance of the decree in their favour in the pre-emption action, it will at once be observed :

(*a*) that the appellant was not a party to that action, and is *prima facie* entitled for this reason to claim that the decree dated 31st July 1947, being *res inter alios acta*, does not affect the hypothecary rights which he had acquired before the action was instituted ;

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(*b*) that, by way of contrast, the respondents were without question bound by the final decree entered on 12th December 1947 in the partition action to which they had been joined as parties ; and that this decree (quite apart from the effect of section 9 of the Partition Ordinance) operates as *res adjudicata* between the appellant and the respondents *in so far as the appellant's hypothecary rights over Lot 3 on 12th December 1947 were concerned.*

The effect of a final decree for partition on a co-owner's earlier right to pre-empt an undivided share of another co-owner must now be considered. If a person governed by *Tesawalamai* proposes to sell his undivided interests in the common property to a stranger, he must first offer them to his co-owners at a fair price, and, should he sell his share to a stranger without taking that precaution, any co-owner may within a reasonable time thereafter exercise his right to pre-empt it. (I need not in this context discuss the corresponding rights of heirs or adjacent landowners). The pre-empting co-owner must pay to the stranger either the price previously paid as consideration for the purchase complained of or (if that alleged consideration can be proved to be fictitious) a fair market value assessed by the Court. The principle involved is clear enough. The *Tesawalamai* recognises the pre-emptor's right to exclude strangers from the intimate relationship of joint ownership within the family or community ; at the same time it ensures a fair price for the vendor who has chosen to separate himself from the bond of co-ownership ; and, in addition, the purchasing stranger to whose prejudice the right of pre-emption is exercised is adequately compensated for the loss which he has suffered through his vendor's fault.

A co-owner's right of pre-emption is in truth only a right to pay a reasonable price in exchange for the privilege of excluding strangers from the common property. It cannot logically survive the severance of the bond of co-ownership itself—e.g., after the common property has been partitioned into separate allotments each of which becomes the exclusive property of an individual member of the former group. Once that has taken place, the foundation of any previously acquired right of pre-emption is automatically destroyed. There is no justification for extending the principle of a customary law beyond the purposes which it is intended to serve.

It is pertinent in this connection to quote certain observations of Voet (*18.3.9*) on the scope of the *jus retractus legalis* (i.e., a right created by law or custom and not by agreement) whereby, in the Rhineland and in Delft, a co-owner's right to pre-empt shares sold to a stranger was apparently recognised in former times :—

> " Undoubtedly this right of superseding another who has obtained the ownership in a legitimate mode, being a deviation from the common law and *contrary also to freedom of contract* . . . . . must receive a strict interpretation. "

Customary rights of this nature have been regarded as unsuitable for introduction into the general law of South Africa and Ceylon.

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I am aware that Akbar J., sitting alone, expressed the opinion in *Vyramuttu v. Periathamby* [1] that, even after the date of a final decree for partition, a *Tesawalamai* co-owner's right of pre-emption continues to attach to the divided lot which has taken the place of the undivided share in what was originally common property. In my opinion, *Vyramuttu's case* was wrongly decided on this point and should be overruled.

The *inter partes* decree for partition entered on 12th December 1947 effectively extinguished as from that date the respondents' right to pre-empt the undivided share in the common property which Letchumipillai had purchased from the 2nd respondent's co-owners; indeed, her title to that share had been wiped out by the decree, and was replaced by a new and unimpeachable title to Lot 3 of which she became the absolute owner subject only to the appellant's hypothecary rights which were expressly reserved by the decree. Letchumipillai's title, and the appellant's hypothecary rights over Lot 3, were protected thereafter from the impact of any claims to "substitution by pre-emption" by a former co-owner of Letchumipillai's vendor. After that date, the respondents were divested of their essential qualification to rely on the special benefits which they had previously enjoyed under the customary law, because they had themselves ceased to be co-owners of the larger land; they had become instead exclusive owners of an allotment adjacent to Lot 3. And it is clear law that, under the *Tesawalamai*, an adjacent owner is not entitled to pre-empt his neighbour's land unless he also enjoys hypothecary rights over it—*Sabapathy v. Sivaprakasam* [2].

There is a further reason for rejecting the respondents' claim. They had instituted their action for pre-emption after Letchumipillai's mortgages in favour of the appellant had been duly registered. In that situation no decree in their favour for pre-emption could operate in derogation of the appellants' previously acquired hypothecary rights except in an action to which the appellant was made a party—so that he could have had an opportunity of challenging the validity of their claim.

A co-owner's right of pre-emption cannot defeat the rights of a *bona fide* mortgagee for value whose interests had come into existence before the right of pre-emption was asserted in a Court of law. Both sets of right can logically and equitably be reconciled without injustice to either.

In *Bodiga v. Nagoor* [3] this Court held, after consideration of the conflicting opinions of the jurists upon the point, that, if a sale is set aside on grounds of *enormis laesio*, the rights of a mortgagee under the purchaser are not extinguished by a decree passed in an action to which he was not a party. If, therefore, the title of a purchaser under a sale which is voidable on the ground of *enormis laesio* is not regarded in Ceylon as a defeasible title (the extinction of which would automatically destroy hypothecary rights based on it) I do not see why the principles enunciated in *Voet 20.6.8.9* should be applied to a title which is liable to pre-emption at the instance of a *Tesawalamai* co-owner. For, as was held in *Karthigesu v. Parupathy* [4], "the right of pre-emption . . . . . is simply a right of *substitution*, entitling the pre-emptor . . . . . to stand in the

[1] (*1929*) *30 N. L. R. 492.*
[2] (*1905*) *8 N. L. R. 62.*
[3] (*1943*) *45 N. L. R. 1.*
[4] (*1945*) *46 N. L. R. 162.*

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shoes of the vendee in respect of *all the rights and obligations* arising from the sale under which he has derived his title. It is, in effect, as if in a sale-deed the vendor's name was rubbed out and the pre-emptor's name substituted in its place". In such a situation, justice requires that, by the same fiction, the "substituted" purchaser should take over the share subject to real interests created by the original purchaser before he was superseded.

There is no hardship involved in the acceptance of this principle because, in a properly constituted action, the pre-emptor could *either* be substituted as owner subject to the existing mortgage *or* take over the property unencumbered if he prefers to discharge the mortgage by payment. In either event, the price to be paid to the original purchaser would be proportionately reduced. This solution permits the customary rights of a *Tesawalamai* co-owner to be preserved in all their integrity without violating the sanctity of legitimate commercial transactions which, in a developing society, call for just as much respect.

Certain issues of prior registration were also raised at the trial. They too must be answered in favour of the appellant. The doctrine of *lis pendens* cannot adversely effect the appellant's mortgage because it was created before the action for pre-emption was instituted. If, again, one examines the competition between the decree for partition (on which the appellant relies) and the decree for pre-emption (which is the basis of the respondents' claim), the former clearly prevails because the partition action was duly registered before the pre-emption action had commenced. Indeed, Mr. Perera very properly conceded that the appeal must succeed unless we accept the argument that, under the decree for partition, Letchumipillai's title to Lot 3 continued (as Akbar J. suggested) to be defeasible at the instance of a former pre-empting co-owner of the larger land. That submission I have respectfully rejected.

For all these reasons, I would set aside the judgment under appeal and enter a decree dismissing the respondents' action with costs both here and in the court below.

GUNASEKARA J.—I agree.

Appeal allowed.

1953 *Present :* **Nagalingam A.C.J.**

SANITARY INSPECTOR, MIRIGAMA, Appellant, *and*
THANGAMANI NADAR, Respondent

S. C. 1,274—M. C. Gampaha, 5,596

Evidence Ordinance—Section 106—"Especially within the knowledge of any person"—Quarantine and Prevention of Diseases Ordinance—Contravention of Regulation 46—Burden of proof.

By section 106 of the Evidence Ordinance,

> "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

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Held, that when the section refers to a fact as especially within the knowledge of a party, the term "especially" means "almost exclusively", if not "altogether exclusively", within the knowledge of a party.

The charge that was preferred against the accused was under the Quarantine and Prevention of Diseases Ordinance alleging that he did "being permanently or temporarily resident in a building in which was a person affected with a contagious disease, to wit, small pox, fail to inform the proper authority forthwith in contravention of Regulation 46 of the Regulations made under the Ordinance".

Held, that section 106 of the Evidence Ordinance did not cast on the accused the burden of proving that he had given information to the proper authority until some *prima facie* evidence at least had been first led by the prosecution of the failure on his part to give the information.

The presumption of innocence casts on the prosecution the burden of proving every ingredient of an offence even though negative averments be involved therein.

APPEAL against an order of acquittal from the Magistrate's Court, Gampaha.

H. N. G. Fernando, Acting Solicitor-General, with *A. Mahendrarajah*, Crown Counsel, for the Crown.

S. Nadesan, with *T. K. Curtis*, for the accused respondent.

Cur. adv. vult.

September 28, 1953. NAGALINGAM A.C.J.—

This is an appeal by the complainant with the sanction of the Attorney-General against an order acquitting the respondent of a charge that was preferred against him under the Quarantine and Prevention of Diseases Ordinance in that he did "being permanently or temporarily resident in a building in which was a person affected with a contagious disease, to wit, small pox, fail to inform the proper authority thereof forthwith in contravention of Regulation 46 of the Regulations made under the Ordinance".

The reason for the acquittal of the accused was that there was no evidence placed before the Magistrate to show that he had failed to inform the proper authority of the presence of the person so afflicted with the disease. The learned Magistrate felt himself bound, as in fact he was, to follow a decision of this Court on almost an identical question. That was a prosecution under Regulation 45 of the same Regulations, whereunder a medical practitioner was charged with having failed to give information in writing to the proper authority stating the name of the diseased person, his residence and the nature of his disease; he was convicted but on appeal Keuneman J. set aside the conviction and acquitted the accused, holding that—

"Material evidence which should have been led was not in fact led, namely that the *accused failed to give information to the proper authority.*

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Apparently the prosecution completely overlooked the necessity of this evidence until after the case was over. In the circumstances I set aside the conviction and sentence." [1]

These observations are equally apposite to the facts of the present case.

The learned Acting Solicitor-General who appeared in support of the appeal, however, contended that that decision needed review, and contended firstly that it would be very inconvenient for the prosecutor to establish a failure on the part of an accused person to give the necessary information to the proper authority, which consists of a fairly large class of persons, and though for the purpose of construing a statute that may not be a very cogent argument, he, however, submitted secondly that whether notice was given or not was a fact especially within the knowledge of the accused and that under section 106 of the Evidence Ordinance the burden lay on him of establishing such fact.

Without burdening one's mind with regard to what the English cases have decided on similar or analogous matters, I think the proper approach to a determination of the question is to ascertain what are the facts which the prosecutor must establish under our law to secure a conviction. If one analyses the charge, it is apparent that the prosecutor must establish the following three ingredients :

(*a*) that the accused was permanently or temporarily resident in a building ;

(*b*) that in that building there was a person affected with a contagious disease of the kind set out therein ; and

(*c*) that he failed to inform the proper authority of the presence therein of the person suffering from such disease.

It was not gainsaid by the learned Acting Solicitor-General that under our law, as under the English Law, " the presumption of innocence casts on the prosecution the burden of proving every ingredient of the offence ". This principle has undoubtedly well recognised exceptions. One is that the Legislature itself may impose the burden of proving a fact on an accused person. Another is that in view of certain presumptions arising under the law of Evidence an accused would be under a necessity to rebut the presumption to avoid the consequences.

It is conceded that neither under the relevant Regulations nor under the Ordinance is the burden of proving any fact in relation to the charge expressly laid by the Legislature on the accused person ; and also that none of the presumptions created by sections 107 to 114 of the Evidence Ordinance applies to this case.

To turn to the charge, the proof of ingredients (*a*) and (*b*) has been given to the satisfaction of the Court. In regard to ingredient (*c*) there was no evidence ; but the contention of the learned Acting Solicitor-General is that by virtue of section 106 of the Evidence Ordinance the burden of proving that ingredient is on the accused, who must prove the fact of his

[1] *S. C. No. 449, M. C. Jaffna 21,445, S. C. Mins. 4.7.44.*

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having given information to the proper authority if he wishes to escape the penal consequences that would otherwise flow.

I cannot see my way to agree with this contention. When the section refers to a fact as being especially within the knowledge of a party, the term " especially " there means " almost exclusively " if not " altogether exclusively " within the knowledge of a party, and not that the fact is one within the knowledge of the one party as well as of the other. English Judges use the term " peculiarly within the knowledge of a party " for the phraseology adopted by the framers of the Evidence Ordinance in section 106 thereof.

One of the earliest cases where an elucidation of the term " peculiarly within the knowledge " of a party is to be found is the case of *K. v. Turner* [1]. The prosecution was for possession of game by the accused, " he being a person not having lands, &c., nor being a person in any manner qualified or authorised by the laws of the realm to kill game, nor being a person entrusted with such game by any person or persons qualified to kill game ". No evidence for the prosecution was given of the fact that the accused was a person who had no lands or had not been qualified or authorised by the laws of the realm to kill game, or that he had not been entrusted with game by a person qualified to kill game. The accused was convicted and in upholding the conviction all the Judges agreed that each one of the qualifying matters was peculiarly within the knowledge of the accused person. The following extract from the judgment of Holeroyd J. clearly furnishes the reason for the view that was taken, that those were matters peculiarly within the knowledge of the accused person, and throws light on the meaning to be attached to that phrase :

> " Now all the qualifications mentioned in the Statute are peculiarly within the knowledge of the party qualified. If he be entitled to any such estate as the Statute requires, he may prove it by his title deeds or by receipt of rents and profits or if he is son and heir or servant of any lord or lady of a manor appointed to kill game, it will be a defence. All these qualifications are peculiarly within the knowledge of the party himself, *whereas the prosecutor has probably no means whatever of proving the qualification.* "

To appreciate fully this passage, it must be borne in mind that title deeds in England, unlike in Ceylon, are private documents in the custody of parties themselves; nobody else is able to have access to them, nor are there public offices where such deeds are registered excepting in certain very limited areas to which it is unnecessary to make any reference for the purposes of the present discussion. That is an important factor which should be borne in mind. So that, the holder of a title deed alone can establish his title to the land, and it will be correct to say that that is a fact which is *peculiarly* in the sense of exclusively within the knowledge of the accused person, and is not one of which the prosecutor could have any knowledge. Similar observations would apply to the other qualifications referred to by the learned Judge, namely whether the accused is the son and heir or servant of a person lawfully entitled to kill game.

[1] *(1816) 5 M. & S. 206.*

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Section 106 to my mind embodies the same principle and has been construed in the same sense in India :—

> " It is particularly clear that section 106 contemplates facts which in their nature are such *as to be within the knowledge of the accused and of nobody else*, for instance his own intention in doing an act (illustration C) or the fact that he purchased a ticket though he was subsequently found to be without one (illustration B). It has no application to cases where the fact in question having regard to its nature is such as to be capable of being known not only by the accused but also by others if they happen to be present when it took place. It cannot in my opinion be invoked to make up for the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused." —*per* Niamat Ullah J. in *Ram Bharosi v. Emperor* [1].

Can it be said that whether the accused person gave information to the proper authority or not is not as much a fact within the knowledge of the proper authority as the accused himself? That the burden of proving a fact especially within the knowledge of a person is thrown upon him by section 106 of the Evidence Ordinance does not mean that in a criminal case the principle that the burden of proving every essential ingredient necessary to constitute the offence lies at every stage of the case on the prosecution is in any way modified or whittled down or that the golden thread of the presumption of innocence of the accused thereby gets snapped and that the prosecutor could say that merely because a particular fact is within the knowledge of the accused person he need not lead any evidence of such fact though it may constitute an essential element of the offence.

I should like at this point to draw attention to the second illustration given under section 106 ; a person is charged with having travelled without a ticket ; would it be sufficient to give evidence only of the fact that the accused was found travelling in a train without leading any evidence at all as to whether the accused had a ticket or not ? And if there was no evidence about the non-possession of a ticket can there be the slightest doubt but that the prosecution cannot be said to have proved its case ? If on the contrary the prosecution did lead some evidence of that fact by establishing that the accused when called upon to produce the ticket did not do so, would there be any doubt but that the prosecution had placed a prima facie case against the accused? In those circumstances the accused cannot be heard to contend that there was no proof that he had not in fact bought a ticket or that having bought one he had misplaced or lost it. Where such a contention is put forward by the accused, the burden would indisputably be upon him to prove the fact of his having purchased the ticket and also of his having misplaced or lost it, if such be the case.

Though the learned Acting Solicitor-General cited the case of *Huggins v. Ward* [2] which may be said to lay down the law in a contrary sense, he did not feel himself justified in contending that without some slight proof at least being led before Court of the fact that the accused had no

[1] *(1937) 38 C. L. J. 205.* [2] *(1873) L. R. Q. B. 521.*

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ticket, the prosecution could be said to have established its case, and ultimately veered to the view expressed in Phipson on Evidence. [1]

> " These cases (under the old game laws), however, have been considered to rest partly upon the construction of the Acts, and in the absence of statutory provision the better opinion now seems to be that in general some prima facie evidence must be given by the complainant in order to cast the burden on his adversary. "

In fact, Phipson's comment *loc. cit.* on *Huggins v. Ward* (supra) is, "this case would probably not now be followed ".

I shall now pass on to a consideration of the other authorities cited on behalf of the appellant. In the case of *Rex v. Cohen* [2] undoubtedly it was held that once it is proved that a person was in the possession of dutiable goods in such circumstances as would entitle a Court to find that he was consciously in possession of them the onus was on the accused person to prove that duty had in fact been paid, although there was no evidence placed by the prosecution before the Court to prove either that no duty had been paid or that there were circumstances from which the Court could draw the inference that no duty had been paid. But that view was based upon the express provision of the Statute, which provided :—

> " If in any prosecution in respect of any goods seized for non-payment of duties or for the . . . . recovering of any penalty or penalties under the Customs Act, any dispute shall arise whether the duties of customs have been paid in respect of such goods . . . . then, in every such case the proof thereof shall be on the defendant in such prosecution. " (Section 259, Customs Consolidation Act, 1876.)

This case, therefore, falls within the well known principle enunciated by Taylor in his Law of Evidence [3] :

> " Necessity of giving . . . . prima facie evidence on the part of the prosecution having been found in the great majority of criminal cases not only useless but highly inconvenient, the Legislature has in many instances interfered sometimes by describing the offence and omitting all mention of the negative matter, but generally by expressly enacting that *the burden of proving authority, consent, lawful excuse and the like* should lie on the defendant. In such cases, the defendant by the express language of the Statutes relating to them is bound to protect himself by showing the existence of some lawful authority or excuse. "

Within the same principle falls also the case of *Buckman v. Button* [4]. The charge here was that the accused person was carrying on business (of a kind referred to in the Orders under which information was laid) without having applied to be registered as required by the Orders. The relevant provision of the Orders, sub-section 5 of section 1 of the Limitation of

[1] *9th ed. at p. 41.*
[2] *(1951) L. R. K. B. 505.*
[3] *12th ed. sec. 372.*
[4] *59 T. L. R. 261.*

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Supplies (Miscellaneous) (No. 5) Order under which the prosecution was launched provided that—

> " No person who is required by this article to be registered shall carry on any business referred to in this Article after the prescribed date unless he had made that application. "

The language of this Article places the burden of proving the excuse or qualification, namely that the offender has made the necessary application, on the offender himself by virtue of section 39 of the Summary Jurisdiction Act, 1879, sub-section 2 of which states :—

> " Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act . . . . creating the offence *may be proved by the defence but need not be specified or negatived in the information or complaint*, and if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant. "

It was held that the burden of proving that the accused had not committed the offence by showing that he had applied to be registered was on him and not on the prosecution.

The third case is that of *Rex v. Oliver* [1] which was a prosecution for supplying sugar as a wholesaler otherwise than under the terms of a licence. In this case too the burden of proving that the accused had a licence or permit was fairly and squarely laid on him by the Statute itself, which runs as follows :—

> " Subject to any directions given or except under and in accordance with the terms of a licence, permit or other authority granted by or on behalf of the Ministry no wholesaler shall by way of trade . . . . supply . . . . any sugar."

Had, for instance, the Regulation in the present instance run as follows :

> " No person shall permanently or temporarily reside in any building in which there shall be any person affected with any contagious disease unless he shall forthwith inform the proper authority thereof "

there can be no question but that the prosecution need only prove (*a*) that the accused person had resided in a building, (*b*) that in that building there was a person affected with the contagious disease, and then it would be upon the accused person to establish that he had informed the proper authority, for the offence would consist in occupying a building in which a person affected with a disease was present and not consist in a failure to do an act such as to give information of the presence of a diseased person. In those circumstances on his failure to do so he could properly be found guilty of the offence as under section 105 of the Evidence Ordinance the burden of proving the exception would lie on him.

[1] *(1944) 1 K. B. 68.*

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Mr. Nadesan on the other hand relied upon the case of *Over v. Harwood* [1] where it was expressly stated that the presumption of innocence casts on the prosecutor the burden of proving every ingredient of the offence even though negative averments be involved therein. For an application of the principle enunciated in this case, see *Nair v. Saundias Appu* [2], a Divisional Bench case.

In the present case, as stated earlier, the ingredient (*c*), though a negative averment, is an essential element of the offence and must be established by the prosecution. There is not an iota of evidence to support ingredient (*c*) of the charge as set out earlier. It will be idle to contend that any burden rests on the accused to prove that he gave information till some prima facie evidence at least has been given of the failure on his part to do so. In the absence of such evidence there is no case for him to answer. The presumption of innocence continues in his favour and has not been displaced by the prosecution. The judgment of Keuneman J., if I may say so with respect, embodies the correct view in regard to the question, and I therefore see no reason to make an order for reviewing that judgment.

In the result the order of acquittal must be affirmed and the appeal dismissed, which I do hereby.

Appeal dismissed.

1954 *Present :* **Gratiaen J.**

K. P. M. SURIYA, Appellant, *and* BOARD OF TRUSTEES OF MARADANA MOSQUE, Respondent

S. C. 144—C. R. Colombo, 36,196 R/E

Rent Restriction Act, No. 29 of 1948—"Non-occupying tenant"—Meaning of expression—Forfeiture of statutory protection.

The theory of forfeiture of the rights of a "statutory tenant" by "non-occupation" is not applicable in a case where the tenant has lawfully sub-let the premises without violating either the terms of his contract of tenancy or the provisions of any statute.

Sabapathy v. Kularatne (1951) 52 N. L. R. 425, explained.

APPEAL from a judgment of the Court of Requests, Colombo.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the defendant appellant.

M. H. A. Aziz, for the plaintiff respondent.

Cur. adv. vult.

[1] *(1900) 1 K. B. 803.* [2] *(1936) 37 N. L. R. 439 ; 6 C. L. W. 1.*

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February 9, 1954. GRATIAEN J.—

In this case the plaintiff (which is an incorporated Board of Trustees) sued its tenant the defendant, after due notice, to have him ejected from certain premises in Maradana. The premises are protected by the provisions of the Rent Restriction Act, No. 29 of 1948. At the trial, the plaintiff's claim was based only on two allegations—(1) that the defendant had sub-let the premises to A. J. M. Juffer in breach of section 9 (1) of the Act, and (2) that she was a " non-occupying tenant " and had therefore forfeited her status as a statutory tenant entitled to the protection of the Act.

On the first ground, the learned Commissioner held in favour of the defendant. The evidence established that the sub-tenancy complained of had been created before the prohibition contained in section 9 (1) of the Act passed into law. In the result, the lawful exercise by the tenant of her common law right to sub-let the premises did not give rise to a cause of action for ejectment.

Mr. Aziz argued, on the second ground, that the judgment under appeal is supported by certain observations I had made in *Sabapathy v. Kularatne* [1]. My decision in that case, however, related to an entirely different set of circumstances. The landlord had there sought to recover certain protected premises in Matale from his tenant who, after the commencement of the tenancy, had taken up residence permanently in Colombo. The landlord genuinely required the premises for his own use, but the tenant contended the claim was " unreasonable " because he (the tenant) himself " required the premises for the purpose of allowing his brother Ratnapala to carry on business there ". It was proved, however, that the tenant had no proprietary interest in Ratnapala's business, and that Ratnapala was not his " dependant ". In these circumstances I held that the landlord's claim clearly prevailed *on the issue relating to the " reasonableness " of his requirement.* It was in that context that I pointed out that, in such a situation, the claims of the landlord must necessarily be preferred to those of a " non-occupying tenant " who merely wished to continue his tenancy for the benefit of someone who " was in no sense privy to the contract of tenancy ".

The present case is entirely different. To begin with, the plaintiff did not suggest that it required the premises for its own use. Moreover, the defendant, though not in personal occupation, had lawfully sub-let the premises without violating either the terms of her contract of tenancy or the provisions of any statute. The theory of forfeiture by " non-occupation " in the sense in which that term was explained in *Brown v. Brash* [2] has therefore no relevancy to the circumstances of the case.

Brown v. Brash (*supra*) which declared that " a non-occupying tenant *prima facie* forfeits his status as a statutory tenant under the Rent Restriction Acts " must not be misunderstood. In *Sabapathy v. Kularatne* (*supra*) I intended only to accept the *dictum* that questions of relative

[1] *(1951) 52 N. L. R. 425.* [2] *(1948) 2 K. B. 247.*

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hardship cannot arise where the tenant has completely abandoned possession of the premises and thereby, to use the words of Asquith L.J., " completely removed himself from the protective orbit of the Acts ". But a tenant who lawfully sub-lets the premises can in no sense be equated to one who defeats the very object of rent restriction legislation by renting a house and then, by completely abandoning it, " withdraws it from circulation " although it is urgently required for occupation by others—*per* Scrutton L.J. in *Skinner v. Geary* [1]. See also *Wabe v. Taylor* [2]. Such instances, as far as I am aware, have not arisen in any action instituted in Ceylon, and I do not doubt that, if they do, the Courts would refuse to interpret the local Act so as to permit the tenant to claim protection. But in the normal cases with which we are only too familiar, the landlord can only obtain an order for ejectment by one or other of the conditions specified in the Act.

The judgment under appeal is based on a misdirection, and must be set aside. I allow the appeal and direct that the plaintiff's action be dismissed with costs both here and in the Court below.

Appeal allowed.

1953 *Present :* **Swan J.**

In re M. L. M. SALEEM

S. C. 609, with Application in Revision 298—M. C. Kandy, 7,842

Bail—Forfeiture of bond—Circumstances when it is wrong.

Where a person who gave bail for the appearance of an accused person did all that was possible to see that the accused was brought before court—

Held, that the bond should not be forfeited.

APPEAL, with application in revision, from an order of the Magistrate's Court, Kandy.

R. R. Crossette-Thambiah, Q.C., with *S. Saravanamuttu*, for the surety-appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

[1] *(1931) 2 K. B. 546.* [2] *(1952) 2 Q. B. 735.*

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December 14, 1952. SWAN J.—

In this case the appellant had given bail for the appearance of one D. Edward *alias* Wijesiri *alias* Cyril Jayawardena. He was also surety for the same accused in M. C. Colombo South 35106 and 26287 and M. C. Negombo 65604. The accused had absconded in all three cases and a warrant was out for his arrest. On the 6th March, 1953, the appellant traced the accused and after considerable difficulty and at the risk of his own life handed him over to the Moratuwa Police. The Moratuwa Police took him to Negombo and instead of remanding the accused the Magistrate there warned him to appear on the next day. The appellant had sent a telegram to the Negombo Magistrate notifying that the accused had been arrested and produced and begging to be released from his obligation. The Magistrate replied that the accused was warned to appear on the 14th March and that the appellant was liable for his appearance. When the case was called on the 14th March the accused was absent. The appellant explained matters to court and the learned Magistrate did the right thing when he discharged the appellant.

In this case, however, although the facts were fully explained to the Magistrate the appellant's bond was forfeited to its entire extent. Learned Crown Counsel very properly stated that he could not support the order made by the learned Magistrate. There can be no doubt that the appellant did all that was humanly possible to see that the accused was brought before court. In the circumstances I set aside the order of forfeiture. The appellant's bond is cancelled and discharged.

Order set aside.

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1954 *Present :* **Gratiaen J. and Gunasekara J.**

KIRIKITTA SARANANKARA THERO, Appellant, *and* MEDEGAMA DHAMMANANDA THERO *et al.*, Respondents

S. C. 266—D. C. Gampaha, 605/5643L

Buddhist temple—Claim to incumbency thereof—Reference to ecclesiastical court—Binding force of decisions of extra-judicial tribunals—Computation of prescriptive period—Prescription Ordinance (Cap. 55), s. 10.

Persons who voluntarily submit a dispute to an extra-judicial tribunal must abide by its decision unless it be vitiated by misconduct or substantial irregularity of procedure or by a violation of the principles of natural justice.

Plaintiff sued the 1st defendant for a declaration that he, and not the 1st defendant, was the incumbent of a certain Buddhist temple. This dispute had been previously referred to an ecclesiastical court whose decision the rival claimants had (by necessary implication, if not expressly) agreed to regard as binding on them. After the decision of the ecclesiastical court in favour of the plaintiff, the 1st defendant requested him to refrain from enforcing his rights for about a year " until it is settled amicably without getting into litigation ". After the period of indulgence asked for had expired, 1st defendant repudiated his obligation to obey the decision of the ecclesiastical court and reasserted his false claim to the incumbency.

Held, (i) that the decision of the ecclesiastical court was binding on the parties and could be enforced in a Court of law.

(ii) that the conduct of the 1st defendant in repudiating the decision of the ecclesiastical court gave rise to a fresh cause of action entitling the plaintiff to claim the protection of a declaratory decree against further interference with his enjoyment of the rights which had been vindicated in the ecclesiastical court. As the present action was instituted within three years of the date on which this fresh cause of action arose, the plaintiff's remedy, which fell within section 10 of the Prescription Ordinance, was not barred by limitation.

APPEAL from a judgment of the District Court, Gampaha.

H. V. Perera, Q.C., with *Kingsley Herat*, for the plaintiff appellant.

N. E. Weerasooria, Q.C., with *S. W. Jayasuriya* and *W. D. Gunasekera*, for the defendants respondents.

Cur. adv. vult.

February 2, 1954. GRATIAEN J.—

The plaintiff instituted this action against the defendants on 23rd March, 1949, for a declaration that he was the incumbent of a Buddhist temple at Gampaha called the Swarnatilleke Ramaya. He also asked for consequential relief in the form of an order of ejectment against the defendants. The defendants filed answer disputing the validity of the plaintiff's claim to the incumbency. They alleged that the 1st defendant (and not the plaintiff) was the lawful holder of that office, and pleaded that in any event the plaintiff's claim was barred by prescription.

2——J. N. B 33438–1,590 (1/54)

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With regard to the merits of the dispute relating to the incumbency, the learned Judge has recorded very clear findings that (subject only to his ruling on the issue of prescription) the plaintiff was the lawful incumbent of the temple in succession to Walhalla Ratnapala Thero who died in 1944.

The plaintiff's appointment had previously been upheld on 15th September, 1945, by an *inter partes* decision of the ecclesiastical court of the Malwatte Chapter to whose disciplinary jurisdiction the plaintiff and the 1st defendant, as Buddhist priests, were admittedly subject. In my opinion the learned Judge was perfectly justified upon the evidence in holding that the 1st defendant was bound by that decision. It is no doubt correct to say that the ecclesiastical court was not strictly a judicial tribunal to whose judgments the principles of *res adjudicata* can be applied—*Sumangala v. Dhammarakitta* [1]. Nevertheless, there is an analogous and equally well-established rule of law whereby persons who voluntarily submit a dispute to a non-judicial or domestic forum must abide by its decision unless it be vitiated by misconduct or substantial irregularity of procedure or by a violation of the principles of natural justice—*Dharmarama v. Wimalaratne* [2], *Attadasi Unnanse v. Rewata Unnanse* [3].

In the present case, as the learned Judge has pointed out, the 1st defendant unequivocally submitted himself to the jurisdiction of the ecclesiastical court as a proper tribunal for adjudicating upon the question as to who was the lawful holder of the office in question. He took part in the proceedings without protest of any kind and placed his case fully before the tribunal whose members were specially qualified to appreciate the merits and demerits of the rival claims. His subsequent allegation that the decision was tainted by bias was rejected by the learned Judge. In that state of things, the decision dated 15th September, 1945, confirming the validity of the plaintiff's appointment is clearly binding on the first defendant.

The reference to the ecclesiastical court did not, perhaps, precisely comply with all the formalities which are appropriate to a formal submission to the jurisdiction of an arbitrator. But that by no means concludes the argument. The parties were (as the 1st defendant admits) Buddhist priests owing allegiance to the Malwatte Chapter, and he concedes in his evidence that their traditional procedure for the settlement of disputes relating to the title to an incumbency is for one party or the other to start proceedings before the Chapter by sending a petition ; the Chapter thereupon issues notice to the party against whom the complaint was made ; and a preliminary investigation of a quasi-judicial nature is then held by one or more priests selected for the purpose, after which a final decision is reached by the Sangha Sabha.

The analogy to be applied is that of a member of an institution who is bound by its rules as to the procedure whereby disputes are conveniently settled without the intervention of the Courts. In the

[1] *(1908) 11 N. L. R. 360.*

[2] *(1913) 5 Bal. N. C. 57.*

[3] *(1928) 29 N. L. R. 361.*

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present case, the proceedings which led to the decision relied on by the plaintiff had been conducted regularly and with due formality. It is true that, apart from certain disciplinary sanctions, the Chapter has no power directly to enforce its commands, but it is at this stage that the aid of a Court of law is made available to compel obedience to decisions which have been reached by extra-judicial tribunals in accordance with the principles of natural justice—see *per* Jayawardena J. in *Terunanse v. Terunanse* [1], and the English authorities examined by Morris L.J. in an article entitled " The Courts and Domestic Tribunals " in *69 L.Q.R. 318.*

So far, then, the judgment under appeal cannot be challenged, but the learned Judge has dismissed the plaintiff's action on the ground that the plaintiff's remedy is barred by the provisions of section 10 of the Prescription Ordinance. This issue must now be considered.

An action to be declared entitled to the incumbency of a Buddhist temple is an action for a declaration of a status. As the cause of action in proceedings of this nature has not been " otherwise provided for " in the Ordinance, section 10 applies, and the action must therefore be instituted " within three years from the time when such cause of action shall have accrued "—*Rewatte Unnanse v. Ratnajoti Unnanse* [2] and *Terunanse v. Terunanse* [3]. The " cause of action " is the " denial " of the plaintiff's status because it constitutes either an actual or seriously threatened invasion of his vested rights.

The earlier authorities certainly seem to indicate that, if a trespasser who disputes the status of the true incumbent of a temple continues thereafter to remain in adverse possession without interruption for a period of three years, the dilatory incumbent's right to relief in the form of a declaratory decree becomes barred by limitation under section 10. We must, of course, regard ourselves as bound by these decisions, but with great respect, I think that, on this particular point, the question calls for reconsideration by a fuller Bench on an appropriate occasion. It is clear 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 may destroy the remedy accruing from a particular " denial ", the right or status itself still subsists. It is true that the lawful incumbent can take no steps after three years to enforce his remedy *if it is based exclusively on that particular " denial " of his status*, but there is much to be said for the argument that a continuing invasion of a subsisting right constitutes in truth a continuing cause of action. Indeed, the contrary view would indirectly produce the anomalous result of converting the provisions of section 10 into a weapon for the extinction of a right which cannot in law be extinguished by prescription.

Be that as it may, the circumstances of the present case, interpreted by reference to the conduct of the parties, are clearly distinguishable from those which arose in the earlier decisions. The dispute as to the

[1] *(1928) 6 T. C. L. R. 22 at 25.* [2] *(1916) 3 C. W. R. 193.*

[3] *(1927) 28 N. L. R. 477.*

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plaintiff's title to the incumbency had been left in a state of abeyance pending an extra-judicial investigation by the ecclesiastical court whose decision the rival claimants had (by necessary implication, if not expressly) agreed to regard as binding on them. After the decision of the Malwatte Chapter in favour of the plaintiff was communicated to the parties, the 1st defendant wrote a letter dated 8th October, 1945, (P12) to the plaintiff requesting him in effect to refrain temporarily from enforcing his rights and "to be patient for about a year until it is settled amicably without getting into litigation". In compliance with that request (to use the 1st defendant's own words) "the plaintiff kept quiet for an year". After the period of indulgence asked for had expired, the 1st defendant repudiated his obligation to obey the decision of the Malwatte Chapter "without getting into litigation", and reasserted his false claim to the incumbency. Such conduct necessarily gave rise to *a fresh cause of action* entitling the plaintiff to claim the protection of a declaratory decree against further interference with his enjoyment of the rights which had been vindicated earlier in the ecclesiastical court. As the present action was instituted within three years of the date on which this fresh cause of action arose, the plaintiff's remedy was not barred by limitation. The judgment under appeal was wrongly decided on this point, and should therefore be set aside. I would enter a decree in favour of the plaintiff as prayed for with costs both here and in the Court below.

GUNASEKARA J.—I agree.

Appeal allowed.

1953 *Present :* **Pulle J. and Swan J.**

P. THEPANISA *et al.*, Appellants, *and* P. HARAMANISA *et al.*, Respondents

S. C. 228—D. C. Kegalle, 4,722

Kandyan Law—Fideicommissary deed of gift—Revocability.

The creation of a *fideicommissum* by a Kandyan deed of gift does not by itself affect its revocability.

APPEAL from a judgment of the District Court, Kegalle.

C. Thiagalingam, Q.C., with *B. S. C. Ratwatte*, for the defendants appellants.

Cyril E. S. Perera, Q.C., with *P. Somatilakam*, for the plaintiffs respondents.

Cur. adv. vult.

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June 12, 1953. PULLE J.—

The appellants are the 1st, 2nd and 3rd defendants. They appeal from a decree declaring the three plaintiffs in the action entitled to two lands called Yakambe Mukalana and Yakambewatta. The 1st plaintiff and the 1st and 2nd defendants are the children of one Pallewelayalage Bandiya by his first marriage. The 2nd and 3rd plaintiffs are the children of Bandiya by a second marriage. According to the plaintiffs Bandiya was a Kandyan. The questions raised in this appeal concern primarily the legal effect of a deed of gift P4 executed by Bandiya in 1911 to his children by the first marriage and before he contracted the second marriage. This deed was revoked by deed P5 of the 5th July, 1943, on which date the lands comprised in P4 were by another instrument P6 transferred to the plaintiffs.

It was argued that the execution of deed P5 did not operate as a valid revocation. An attempt was made to prove that Bandiya was not a Kandyan. It failed for the reasons set out in the judgment of the learned District Judge with which we are in agreement and which need not be repeated. It was next submitted that P4 was a settlement by a donor in favour of his children in contemplation of a second marriage and that, therefore, it was irrevocable. The revocability of this very deed was considered in *Romanis v. Haramanissa*[1] and it was held that it did not fall within the exception that the circumstances which constitute non-revocability must appear most clearly on the face of the deed itself.

It was next contended that the donees had rendered succour and assistance to Bandiya and he was thereby precluded from revoking P4. This involves a question of fact which the learned Judge has decided against the appellants and there is no reason for taking a contrary view.

The last point taken was that the deed P4 created a *fideicommissum* which is a concept unknown to the Kandyan law, at least in the sense that there are no rules peculiar or indigenous to that law relating to *fideicommissum*. On this premise it was argued, on the authority of *Weerasekere v. Pieris*[2], that the donor's right to revoke the gift must be ascertained solely within the framework of the Roman-Dutch law and that by the application of that law it was not competent for Bandiya to revoke the gift. The learned District Judge expressed a doubt as to whether P4 created a *fideicommissum*. I do not propose to set down here the clause which according to the appellants created a *fideicommissum*. One translation of the clause appears in the judgment reported at *51 N. L. R. 575*. The translation in the present case is different. In the course of the argument a further translation was prepared which appeared to support the contention on behalf of the appellants. Without deciding the question whether the clause creates a *fideicommissum* we propose to decide the appeal on the assumption that it does.

In my opinion there is no true analogy between *Weerasekere v. Pieris*[2] and the present case. The parties to the deed of gift in *Weerasekere v. Pieris*[2] were Muslims. The donor reserved to himself the right to revoke

[1] *(1950) 51 N. L. R. 575.*

[2] *(1932) 34 N. L. R. 281.*

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the deed, as if it had not been executed, and to deal with the property as he thought fit. Further, the donor reserved to himself the rents and profits during his lifetime and it was only after his death that the property was to go to the donee and to be possessed by him subject to a *fideicommissum* in favour of his children. As a gift *inter vivos* according to Muslim law it was at the outset open to attack by reason of the reservation of the right in favour of the donor to receive and enjoy the rents and profits of the property. Viewed from the aspect of Kandyan law there is nothing in the deed P4 of 1911 which is in conflict with the principles of that law. Of the authorities cited at the argument it suffices only to refer to the case of *Assistant Government Agent, Kandy v. Kalu Banda et al.*[1] in which de Sampayo J. said,

> "Nor is there anything in these text books or anywhere to show that gifts in the nature of *fideicommissum* are contrary to the spirit of the Kandyan law. In this case, as I ventured to remark in the course of the argument, it is not a question of applying any particular rules of the Roman-Dutch law to the construction of this deed of gift. It is rather a question of the right of an owner of property to dispose of it according to his pleasure. I am not aware of any principle of Kandyan law which prevents a Kandyan from giving a limited interest to one person and providing that at the termination of that interest the property should vest in another person. Such a disposition would, of course, be called in the Roman-Dutch law a *fideicommissum*. It may not be a proper expression to describe a similar disposition by a Kandyan. It is, however, a convenient expression, and if the thing itself may be done among the Kandyans, the Court will not hesitate to give effect to it, simply because the disposition may also amount to a *fideicommissum*."

In my opinion one can properly infer from the observations made by this learned Judge that the creation of a *fideicommissum* by a Kandyan deed of gift does not by itself affect its revocability. In my view no valid reason can be formulated for holding that while a gift simpliciter can be revoked one which is subject to restrictions becomes irrevocable.

At the hearing of the present appeal the case of *Noorul Muheetha v. Sittie Rafeeka Leyaudeen and others*[2] was pending before the Privy Council and it was anticipated that the judgment of their Lordships might assist us. It raised the question whether in the matter of an acceptance of a gift subject to a *fideicommissum*, by a Muslim mother on behalf of her minor children, the Roman-Dutch law or the Muslim law was applicable. That case has since been decided but no principle can be extracted from it which would support the contention on behalf of the appellants.

In my opinion the appeal fails on all points and should be dismissed with costs.

SWAN J.—I agree.

Appeal dismissed.

[1] *(1921) 23 N L. R. 26.*

[2] *(1953) 54 N. L. R. 270.*

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1953 *Present:* **Gratiaen J. and Weerasooriya J.**

C. NAGANATHAR, Appellant, *and* S. VELAUTHAM *et al.*, Respondents

S. C. 214—D. C. Point Pedro, 3,712

Thesavalamai—*Wife's separate immovable property—Husband's position in regard to such property*—Quia timet *action—Jurisdiction of Court to enter a declaratory decree—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap 48.), ss. 6, 19 (b), 20 (1)—Amending Ordinance No. 58 of 1947.*

A Court has jurisdiction to grant relief in the form of a declaratory decree in *quia timet* proceedings when such a decree would accomplish the ends of precautionary justice for the protection even of future or contingent rights. The Court must, however, be satisfied that the declaratory decree asked for in any particular action relates to a concrete and genuine dispute and would, if passed, serve some real purpose in the event of future litigation between the same parties.

By a deed executed in July 1944, a wife, to whom the *Thesavalamai* applied, purported, during the subsistence of her marriage but without her husband's consent, to convey her separate immovable property. Earlier, in November, 1943, the husband had, in the exercise of his right to manage his wife's property, informally leased her interests to certain parties.

Held, (i) that, under section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance, the conveyance executed by the wife without her husband's consent was void *ab initio*.

(ii) that although the husband had no proprietary interest in the separate property of his wife, he had other present and contingent interests therein. He was entitled, in the circumstances, to institute action asking for a declaration that the conveyance which his wife had purported to execute was null and void.

APPEAL from a judgment of the District Court, Point Pedro.

C. Renganathan, with *V. Ratnasabapathy*, for the plaintiff appellant.

H. W. Tambiah, with *S. Sharvananda*, for the 3rd and 4th defendants respondents.

Cur. adv. vult.

October 29, 1953. GRATIAEN J.—

The plaintiff and his wife Thangammah are persons to whom the Thesewalamai applies. Their marriage was solemnised according to Hindu rites in June 1939, and in March 1939 the plaintiff's wife received from her father by way of gift an interest in certain immovable properties including the lands to which this action relates. The effect of their marriage was that, although the properties remained her separate property, she was absolutely prohibited by the provisions of sec. 6 of the Jaffna

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Matrimonial Rights and Inheritance Ordinance (Cap. 48) from alienating them *inter vivos* during the subsistence of the marriage without the consent of her husband. In addition, the future income of the property (at least until the date on which the amending Ordinance No. 58 of 1947 came into operation) became *tediatetam* common to both spouses by virtue of sec. 19 (*b*) and sec. 20 (1) of the Ordinance.

By a deed D1 dated 1st July 1944 Thangammah purported, during the subsistence of the marriage, but without the plaintiff's consent, to convey certain shares in the property to the 4th defendant. This alienation was clearly void *ab initio—Chellapa v. Kumaraswamy* [1]—because " it was in contravention of her husband's right and could not be supported by the Tamil law ".

The plaintiff instituted this action against the 1st, 2nd, 3rd and 4th defendants on the following basis : he claimed that, in the exercise of his right to manage his wife's property for their mutual benefit, he had on 1st November 1943—i.e., before the execution of D1—informally leased her interest in the land in dispute to all four defendants at an agreed rental; that the defendants had since repudiated their obligations as lessees under him, and that the 4th defendant (as purported owner) and her husband the 3rd defendant (presumably as the manager of his wife's separate property) were wrongfully setting up an independent title under the void deed D1. He accordingly asked (*a*) for a declaration that the purported conveyance under D1 was null and void ; (*b*) for damages, and (*c*) to be restored to possession of the property.

The defendants joined issue with the plaintiff upon the allegations in the plaint, and in addition raised a preliminary objection that the action, as originally constituted, was bad for misjoinder of parties and of causes of action. This latter objection having been upheld at the commencement of the trial, the plaintiff elected to continue these proceedings against only the 3rd and 4th defendants for his declaratory decree in respect of the void alienation D1. His right to sue all four defendants in separate proceedings upon the other disputed causes of action were specially reserved to him.

The learned District Judge correctly decided that the purported alienation by Thangammah to the 4th defendant without the plaintiff's consent was void *ab initio*, and rejected their alternative plea that the shares conveyed had in truth been held in trust for the 4th defendant by Thangammah. Nevertheless, a declaratory decree in favour of the plaintiff was refused on the ground that he had no proprietary interest in the separate property of his wife who was not a party to the action.

The learned District Judge has, in my opinion, taken too narrow a view of the jurisdiction of a Court to grant relief in the form of a declaratory decree in *quia timet* proceedings. Cases may well occur in which such a decree would be justified to accomplish the ends of precautionary justice for the protection even of future or contingent rights. *Vide* the authorities cited in *Hewavitarane v. Chandrawathie* [2]. In a very recent decision of the Court of Appeal in England, Denning L.J. stated, " I know of no

[1] *(1915) 18 N. L. R. 435.* [2] *(1951) 53 N. L. R. 169 at 174, 175.*

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limit to the power of the Court to grant a declaration *except such limit as it may in its discretion impose upon itself* "—see *Barnard v. National Dock Labour Board* [3]. On the one hand, I agree entirely that a Court should not permit itself to be converted into a *forum* for the discussion of purely academic problems, and ought therefore to be satisfied that the declaratory decree asked for in any particular action relates to a concrete and genuine dispute and would, if passed, serve some real purpose in the event of future litigation between the same parties.

Although the plaintiff cannot claim to be the present owner of his wife's separate property, he was undoubtedly vested at the relevant date with marital authority to restrain his wife from alienating her immovables *inter vivos*. Moreover he had, at the time of the void alienation complained of, a present vested interest in the *income* of that property. Whether he continued to retain such an interest since the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947, came into force on 3rd July 1947 need not be here discussed. Suffice it to say that D 1 had been executed in derogation not only of his marital authority but also of a right which he then enjoyed to share in the income of the property. Moreover, even upon a construction of the amending Ordinance which is least favourable to him it cannot be said for certain that he does not enjoy at least a *contingent right* to receive any part of the income of that property if his wife should predecease him. It is idle to speculate now whether that right will ever become enlarged into a vested right, but the plaintiff is now entitled to complain of an invasion of his contingent rights by trespassers who seek to divert the income by asserting pretended ownership of the property under a void alienation.

Finally, it cannot be said that a declaratory decree would not be of real assistance to the plaintiff in the litigation which the learned Judge has granted him permission to proceed with against all four defendants in separate proceedings. His claims to the management of his wife's separate property, and to have leased it out to the defendants in the exercise of these powers have both been challenged. Obviously, therefore, the onus will be on him to establish them. But before that litigation commences, it would manifestly be to his advantage to get out of the way, so to speak, the false assertion of the 4th defendant to be the owner of the property.

Upon all these considerations, I think that the learned District Judge should not have refused the plaintiff relief in this action. I would set aside the judgment under appeal, and enter a decree declaring, as between the plaintiff and the 3rd and 4th defendants, that the deed No. 11,236 dated 1st July 1944 and attested by M. S. Kandiah, Notary Public, is null and void *in so far as it purports to be a conveyance of the interests of the plaintiff's wife Vinnasithamby Thangammah*. The 3rd and 4th defendants must pay to the plaintiff his costs in both Courts.

WEERASOORIYA J.—I agree.

Appeal allowed.

[1] *(1953) 2 W. L. R. 995 at 1009.*

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1953 *Present :* **Nagalingam A.C.J.**

D. FERNANDO, Appellant, *and* S. I. POLICE, WELIKADE, Respondent

S. C. 567—M. C. Colombo, 24,457

Criminal Procedure Code—Sections 297 and 407—Accused absconding—Evidence of witnesses recorded in his absence—Procedure for reading it over at the trial.

Where an accused person absconds and evidence is recorded in his absence under section 407 of the Criminal Procedure Code, the evidence so recorded may be read over to the deponents at the trial of the accused. Section 407 must be read in conjunction with section 297.

Jane Sinno v. Ratnapura Police (1949) 39 C. L. W. 79, not followed.

APPEAL from a judgment of the Magistrate's Court, Colombo.

G. E. Chitty, with *V. Wijetunge*, for the accused appellant.

J. G. T. Weeraratne, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

September 28, 1953. NAGALINGAM A.C.J.—

The point taken on this appeal is that the conviction is vitiated by reason of the fact that the learned Magistrate took into consideration evidence which cannot be said to have been legally before him. The contention advanced arises in this wise : The accused was absconding and the Magistrate examined witnesses and recorded their depositions as provided by section 407 of the Criminal Procedure Code. At the trial the evidence so recorded was read over to the witnesses, they were further examined in chief and tendered for cross-examination and were in fact cross-examined by counsel for the accused.

Mr. Chitty argues that the reading over of the evidence of the witnesses recorded under section 407 is a fatal error as those depositions could only have been placed before Court if it were shown that " the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case would be unreasonable ", in terms of the second part of section 407. It has been urged that none of these conditions precedent to the reception of such evidence has been shown to exist and that in fact the contrary is established by reason of the presence of everyone of the witnesses at the trial.

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In support of this contention Mr. Chitty relied upon the judgment of Basnayake J. in *Jane Sinno v. Ratnapura Police* [1]. That case, no doubt, supports the contention of Counsel but I do not think that that judgment concludes the matter. In that case another relevant provision of the Criminal Procedure Code does not appear to have been brought to the notice of the learned Judge either by Counsel for the appellant or by Crown Counsel who appeared for the respondent. Section 407 cannot be divorced from the other provisions of the Code. Section 297 of the Code has a very material bearing on the question. The proviso to section 297 enacts that where " 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 to the accused in the presence of such witness and the accused shall have a full opportunity allowed him of cross-examining such witness thereof " and embodies a rule laying down a general principle of legal admissibility of evidence recorded in the absence of an accused person. In this case it is clear that the attendance of the accused person had not been dispensed with at the time the evidence was recorded under section 407, so that if the proviso is applicable it would be perfectly regular for the evidence of those witnesses whose evidence had been taken in the absence of the accused to be read over to the accused in the presence of such witnesses and the accused afforded an opportunity of cross-examining them.

Mr. Chitty, however, contends that the proviso to section 297 can have application only where it is shown that the conditions prescribed by section 407 do exist. I think this is wholly erroneous and untenable; for if the deponent were dead, to take only one of the conditions, then under the proviso to section 297 you cannot read out the deposition in the presence of the witness nor give the accused person an opportunity of cross-examining the witness; so that Mr. Chitty's argument must logically mean that section 297 can have no application where evidence has been recorded under section 407. To my mind it is clear that when section 407 says in the second part of it that the deposition recorded during the absence of the accused person may be given in evidence against him if the deponent is dead, it merely means that that deposition may be read in evidence without the observance of the ordinary rule that evidence should be given in the presence of the accused person and that the accused person should be provided an opportunity of cross-examining the witnesses. This provision enunciates a rule analogous to that underlying section 32 of the Evidence Ordinance.

In my view section 297 cannot be excluded from operation in cases where evidence has been recorded under section 407. The procedure adopted by the learned Magistrate is therefore unexceptionable, and the conviction is therefore founded on evidence which was properly before the Court.

The appeal is dismissed.

Appeal dismissed.

[1] *(1949) 39 C. L. W. 79.*

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1954 *Present :* **Swan J.**

In re S. A. WICKREMASINGHE

Election Petition No. 18 of 1952, Hakmana

In the Matter of a Notice on Dr. S. A. Wickremasinghe to show cause why he should not be reported to the Governor-General

Ceylon (Parliamentary Elections) Order in Council, 1946, as amended by Parliamentary Elections (Amendment) Act, No. 19 of 1948—Sections 81 and 82—Point of time at which election judge becomes functus—" *At the conclusion of the trial* "—*Corrupt or illegal practice—Notice on parties who are to be reported—May be given after judgment and issue of certificate—Persons who can be reported.*

By sections 81 and 82 of the Parliamentary Elections Order in Council, 1946, as amended by Act No. 19 of 1948 :—

" 81. 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 in writing under his hand.

Such certificate shall be kept in the custody of the Registrar of the Supreme Court to be dealt with as hereinafter provided.

82. At the conclusion of the trial of an election petition the election judge shall also make a report under his hand setting out—

(*a*) Whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, or by his agent, and the nature of such corrupt or illegal practice, if any ; and

(*b*) the names and descriptions of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice ;

Provided, however, that before any person, not being a party to an election petition nor a candidate on behalf of whom the seat is claimed by an election petition, is reported by an election judge under this section, the election judge shall give such person an opportunity of being heard and of giving and calling evidence to show why he should not be so reported.

Such report shall be kept in the custody of the Registrar of the Supreme Court, to be dealt with as hereinafter provided ."

Held : (i) The words " at the conclusion of the trial " in sections 81 and 82 denote a point of time when the trial is finally concluded by the delivery of the judgment. With reference to the issue of the certificate as to the validity of the election and the making of the report as to corrupt or illegal practice, the words mean within a reasonable time of the trial being concluded. What would be a reasonable time would depend upon the circumstances of the particular case.

(ii) It is not necessary for the certificate and report to go together. A person may be asked and allowed to show cause under the proviso to section 82 after the issue of the certificate and prior to the sending of the report. The jurisdiction of an election judge continues until the election inquiry is over and the final report is sent.

(iii) An election judge is not entitled to make a report under section 82 (*b*) in respect of an election offence which was not in issue at the trial, i.e., either in the particulars filed by the petitioner or in the recriminatory case of the respondent. A person, therefore, who was only a witness in the case cannot be reported.

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IN the matter of a notice on a witness to show cause why he should not be reported to the Governor-General under Section 82 (*b*) of the Parliamentary Elections Order in Council.

S. Nadesan, with *C. Manohara*, for the party noticed.

H. N. G. Fernando, Acting Solicitor General, with *Walter Jayawardene*, Crown Counsel, as *amicus curiae*.

Cur. adv. vult.

January 13, 1954. SWAN J.—

At the trial, during the cross-examination of Dr. S. A. Wickremasinghe, learned counsel for the respondent put certain questions to the witness regarding some statements appearing in his Election Manifesto. Objection was taken to these questions by Mr. Nadarasa, who appeared for the petitioner, on the ground that they were not relevant. Inasmuch as the questions were put in order to shake the credit of the witness I overruled the objection. From the answers given by Dr. Wickremasinghe to those questions it appeared to me that he had, in a paragraph entitled "*Service for himself and his Family*", made and published certain statements in relation to the personal character and conduct of the respondent, Mr. C. A. Dharmapala, which were false in fact, and which were presumably intended to affect the result of the election. At the conclusion of the trial, having determined that the respondent was duly elected, I caused notice to be issued on Dr. Wickremasinghe calling upon him to show cause why he should not be reported to the Governor-General under section 82 (*b*) of the Ceylon (Parliamentary Elections) Order in Council, 1946, as amended by the Parliamentary Elections (Amendment) Act, No. 19 of 1948, for having committed the corrupt practice set out in section 58 (1) (*d*) of the Order in Council.

On the returnable date, to wit, 27.11.53, Dr. Wickremasinghe appeared and said he had cause to show. Mr. Nadesan on his behalf stated that his first objection would be that the election court had no jurisdiction to report a person in respect of whom no charges were made in the particulars. He also stated that he would lead evidence, and/or make submissions, to prove that no election offence had been committed by Dr. Wickremasinghe. In connection with the latter he wanted to know whether I had, in coming to the conclusion that the evidence at the trial afforded *prima facie* proof of the commission of an election offence, acted on the testimony of the respondent. As I intended calling the case on 1.12.53 I told Mr. Nadesan that I would give him the desired information on that day. When the case was called in Chambers on 1.12.53, in view of the insinuations made in paragraph 3 of the two affidavits tendered on 27.11.53, I told Mr. Nadesan that he had no right to ask for, nor

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was I obliged to give him the information he desired to have. But I referred him to certain passages in the evidence and in the address of counsel for the respondent which should have left him in no doubt on the point. I particularly did so in order to give him an opportunity of satisfying me that the evidence upon which I acted did not prove, or was not sufficient to prove, the commission of an election offence. I was glad to note that in the course of this inquiry Mr. Nadesan frankly admitted that he had no right to ask me upon what material I acted.

I shall now deal with the preliminary objection taken by Mr. Nadesan. As developed at the inquiry my want of jurisdiction to report Dr. Wickremasinghe is urged on two grounds :—

(1) that I had no jurisdiction at the trial to take cognizance of any corrupt or illegal practice in respect of which no specific charge was made at the trial ;

(2) that as election judge I am now *functus* and therefore have no jurisdiction to make a report against Dr. Wickremasinghe.

I shall deal with the latter point first, but before I do so I desire to make a few observations on certain matters to which Mr. Nadesan adverted in the course of his very able address. He said that it was not proper for counsel who appeared for the respondent to have put questions to Dr. Wickremasinghe for the ostensible purpose of shaking his credit but with the ulterior object of exposing the commission of an election offence. If section 82 (*b*) of the Order in Council imposes on the Election Judge the duty of reporting any person who has been shown at the trial to have been guilty of any corrupt or illegal practice I should think it was immaterial how the evidence was obtained, provided it was relevant. If, in point of fact, the questions put to Dr. Wickremasinghe were admissible in order to show that his evidence was unworthy of credit because he was capable of saying things which he knew to be untrue, or the truth of which he did not investigate before he said them, I do not think it matters with what ulterior object the questions were put. As the learned Solicitor General remarked, one might even say that it was the duty of counsel to assist the court in the detection of an election offence.

Mr. Nadesan also submitted that to call upon a person who was only a witness in the case, and who was suddenly confronted with certain matters, and whose answers might suggest that he was guilty of an election offence to show cause why he should not be reported, was contrary to the principles of natural justice. He contended that before a man could be asked to plead he should be charged, or at least know the nature of the offence of which he was accused, so that he might take stock of the situation and advise himself, or seek advice, as to what he should say, and what questions he should put to the witnesses who might testify against him. If, as I have already said, it is the duty of the election court to report every person who has been shown at the trial to have been guilty of an election offence, I do not think that the procedure that has been adopted in this case could be said to violate any principle of natural justice. Assuming that I had jurisdiction to take cognizance of any corrupt or illegal practice

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brought to light in the course of the trial all I have found is that there is *prima facie* proof that Dr. Wickremasinghe had committed a corrupt practice. With the notice calling upon him to show cause there was also served on him a copy of the passage in his Manifesto which contained the offending statements. When he appeared on notice he was informed :—

(1) that it was open to him to prove that the evidence upon which I acted, though admitted without objection, was nevertheless inadmissible and irrelevant and could not be acted upon.

(2) that he could show that, even if the evidence was admissible and relevant, it did not disclose that he had committed a corrupt practice.

(3) that he could lead evidence to prove that the statements upon which the present charge is based are not false, or that they do not relate to the personal character and conduct of the respondent, or that they were not made or published for the purpose of affecting the return of the respondent.

With all these matters left open to the party noticed I cannot see how he can complain. I certainly do not think any fundamental principle of justice has been violated.

I shall now deal with Mr. Nadesan's contention that I am *functus*. His submission is that an election judge is *functus* immediately he sends his certificate to the Governor-General under section 81. His argument, briefly stated, is that under section 78 I was nominated by the Chief Justice to try the Hakmana Election Petition. That invested me with jurisdiction. My jurisdiction came to an end when the election trial was over. That took place when under section 81 I made my determination whether the respondent was duly elected or not, and sent my certificate to the Governor-General.

During the course of this inquiry I intimated to Mr. Nadesan that I had on 8.12.53 made an interim report to the Governor-General which was lodged with the Registrar the same day. This, according to Mr. Nadesan, concluded the matter. The circumstance that it was only an interim report did not make any difference according to him. In fact his argument was that the report under section 82 should be sent along with the certificate under section 81.

I shall at this stage reproduce sections 81 and 82 of the Order in Council as amended :—

81. " 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 in writing under his hand.

Such certificate shall be kept in the custody of the Registrar of the Supreme Court to be dealt with as hereinafter provided.

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82. At the conclusion of the trial of an election petition the election judge shall also make a report under his hand setting out—

(*a*) whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, or by his agent, and the nature of such corrupt or illegal practice, if any ; and

(*b*) the names and descriptions of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice ;

Provided, however, that before any person, not being a party to an election petition nor a candidate on behalf of whom the seat is claimed by an election petition, is reported by an election judge under this section, the election judge shall give such person an opportunity of being heard and of giving and calling evidence to show why he should not be so reported.

Such report shall be kept in the custody of the Registrar of the Supreme Court, to be dealt with as hereinafter provided. "

Mr. Nadesan's first point is that the phrase " *at the conclusion of the trial* " means *simultaneously with* or *immediately after*. He drew my attention to the fact that there is no provision in the rules for judgment to be reserved. The practice in England is for judgment to be delivered just after the case is closed. It would be difficult to adopt that practice in Ceylon. The learned Solicitor General said that he was not aware of a single election case in Ceylon where judgment was delivered forthwith. Mr. Nadesan himself admitted that it was well-nigh impossible after a protracted trial for judgment to be given at the close of the proceedings.

As long as there is nothing in the Order in Council or the rules that compels an election judge to deliver judgment forthwith I do not see why an election judge should not take time to consider his judgment. In my opinion the trial includes the judgment, and the phrase *at the conclusion of the trial* denotes a point of time when the trial is finally concluded by the delivery of judgment.

Mr. Nadesan was prepared to concede this, but the point upon which he insisted was that the certificate and report must follow *simultaneously with* or *immediately after* the conclusion of the trial. In my opinion the words " at the conclusion of the trial " in the context and with reference to the issue of the certificate and the making of the report mean within a reasonable time of the trial being concluded. What would be a reasonable time would depend upon the circumstances of the particular case.

The next point he urged was that the certificate and report must go together, and a person must be asked and allowed to show cause before the issue of the certificate and the sending of the report. He contends that as I have already sent a certificate I cannot now send a report. That, he said, was the practice in England.

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But the words of the English Enactment are not quite the same as ours. Paragraph 13 of Section 11 of the Parliamentary Elections Act 1868 (31 and 32 Vict. C 125) states :—

"At the conclusion of the trial the judge who tried the petition shall determine whether the member whose return or election is complained of, or any and what other person was duly returned or elected, or whether the election was void, and shall *forthwith* certify in writing such determination to the Speaker, and upon such certificate being given such determination shall be final to all intents and purposes."

And paragraph 14 is :—

"Where any charge is made in an election petition of any corrupt practice having been committed at the election to which the petition refers, the judge shall, in addition to such certificate, and *at the same time* report in writing to the Speaker as follows :—

(*a*) Whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at such election, and the nature of such corrupt practice ;

(*b*) The names of all persons (if any) who have been proved at the trial to have been guilty of any corrupt practice ;

(*c*) Whether corrupt practices have, or whether there is reason to believe that corrupt practices have, extensively prevailed at the election to which the petition relates."

I may here mention that by 42 and 43 Vict. C 75 provision was made for election petitions to be tried by two judges, and that by the Corrupt and Illegal Practices Prevention Act 1883 (46 and 47 Vict. C 51) provision was made that before a person, not being a party to an election petition nor a candidate on whose behalf the seat is claimed, is reported he should be noticed and be given an opportunity of being heard and of calling evidence in his defence to show cause why he should not be reported (see section 38).

The words to be noted in section 11 (14) are "*at the same time*". We have not taken over those words. They might mean *at the conclusion of the trial* or *at the time of determination and certification*. The use of the words *at the same time* may imply that in England there is a narrower limitation as to the time. In any event the limitation of time in Ceylon cannot be less than in England.

The manner in which election cases are heard in England makes it possible for a judge to certify his determination at the same time. In England persons have been called upon to show cause and have actually shown cause before the final judgment. The learned Solicitor General however cited a number of cases where cause was shown after judgment, and one case where even notice to show cause was issued after judgment.

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I shall now refer to the local decisions in which conflicting views have been expressed as regards notice on parties to be reported. In *Lateef v. Saravanamuttu* [1] the question arose incidentally. It arose on a consideration of section 79 of the State Council Elections Order in Council of 1931. That section is substantially the same as section 82 of the present Order in Council except that it provided for notice on all persons who were to be reported and not only " any person not being a party to an election nor a candidate on behalf of whom the seat is claimed ". In this case Mrs. Saravanamuttu was returned at a bye-election. At the previous election her husband Dr. Saravanamuttu had been returned. He was however unseated. The determination that his election was void was on 8.3.1932, and the certificate under section 78 (which corresponds to section 81) was entered accordingly. Notice was issued on Dr. Saravanamuttu to show cause why he should not be reported. After inquiry he was reported on 22.3.1932. The learned Solicitor General who appeared for the Attorney General argued *inter alia* that under section 78 the Judge was required at the conclusion of the trial to certify whether the election was valid or not, and under section 79 to make a report. This report had to be forwarded at the same time as the certificate, namely at the conclusion of the trial. Dalton J. in the course of his judgment said :—

" Article 79 (2) has been adapted from the provisions of 46 and 47 Vict. C. 51 section 38. The purport of the provision seems to be that no one should be reported for any corrupt or illegal practice who has not had an opportunity of being heard in his own defence. There would appear to be no uncertainty as to the practice followed in England as set out in the cases to which the Acting Solicitor General has referred. There is no suggestion there that any further proceeding subsequent to judgment is denoted. The indications are all to the contrary. One might infer that any person entitled to notice duly received such notice before judgment . . . On this matter I am in entire agreement with the argument of Mr. Illangakoon and have no doubt that under the provisions of the Order in Council the certificate and report are required to be issued at the same time, namely at the conclusion of the trial. In practice in England in reported cases one finds the certificate and report contained in one document . . . I concluded however . . . that there was some uncertainty on that occasion as to what practice should be followed in view of the provisions of Article 79 (2) which sets out that before a person is reported . . . he should be given an opportunity of being heard."

In *Saravanamuttu v. Joseph de Silva* [2] judgment was delivered on 22.12.1941 declaring the election void. The learned judge thereafter called upon Mr. Goonesinghe and two others to show cause why they should not be reported. These proceedings are to be found in the same volume at pages 243 to 253. Discussing section 78 de Kretser J. said :

" The natural conclusion is that both the judgment and the report are contemporaneous and follow immediately upon the conclusion of the trial, the trial being as in the Civil Procedure Code something

[1] *(1932) 34 N. L. R. 369.* [2] *(1941) 43 N. L. R. 294.*

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different from the judgment. As far as I have been able to gather this is what happens in England, and Dalton J. supports that view in *Lateef v. Saravanamuttu* (supra).

The next point to be noted is that the election judge determines whether the election was void and his determination is final. Now his determination may be based purely on corrupt or illegal practices committed by an agent of the candidate. It seems to follow that his determination that an agent has committed an electoral offence is final also. It would lead to the most awkward consequences if after a candidate had been unseated his agents were allowed to prove that no offence had been committed."

The learned judge however said that he did not agree in every respect with Dalton J. and pointed out that Dalton J. was not right when he stated that no proceedings are taken in England subsequent to judgment, giving by way of illustration the *Cheltenham* case [1] and the *East Dorset* case [2].

In *Illangaratne v. G. E. de Silva* [3] Windham J. took the view that where a person is to be reported he should be noticed and permitted to show cause before a decision is given as to the validity of the election. In this connection he said :—

"I have no doubt at all on the authorities. In particular I would refer to the case of *Lateef v. Saravanamuttu* . . . that the finding of the Election Judge under Article 81 and the report to the Governor-General under Article 82 (1) ought to be made simultaneously. Furthermore since such a report must be made by the election judge in the case of any person found to have committed an election offence it would be futile for such a person to be allowed to show cause why he should not be reported at a stage after he had been found guilty of the election offence."

In *re James Appuhamy* [4] Windham J. nevertheless took the view that section 82 (2) was sufficiently wide in its terms to allow a party noticed to show cause even after the court had given its judgment and issued the certificate under section 81. He added however :—

" Obviously by far the more satisfactory course would be to give an applicant such an opportunity before judgment for the reasons which I have in my ruling delivered during the course of the same petition—*Illangaratne v. G. E. de Silva* [3]."

In *re Amarasena* [5] Dias J. held that where a person was found guilty at an election trial of a corrupt practice it was obligatory on the court to report him but that such a person if not a party to the petition was entitled to canvass the finding of the Election Judge.

[1] *6 O'M. & H. 194.*
[2] *6 O'M. & H. 22.*
[3] *(1947) 49 N. L. R. 87.*
[4] *(1948) 49 N. L. R. 261.*
[5] *(1948) 50 N. L. R. 523.*

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In *re Fred de Silva* [1] Nagalingam J. issued notice after he had delivered judgment in the election trial. I shall refer to this case later but for the present I am citing it as authority in support of the proposition that notice to show cause can be issued after judgment.

In my opinion, on the language of sections 81 and 82, it is not necessary for the certificate and report to go together. At the conclusion of the trial the election judge has, in addition to determining whether the member whose return or election is complained of, or any other or what person was duly returned or whether the election was void, to do certain other things, namely :—

(1) to certify such determination in writing under his hand ;

(2) to make a report under his hand setting out whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate or by his agent, and the nature of such corrupt or illegal practice, if any, *and*

(3) to make a report under his hand setting out the names and descriptions of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice.

If the report is negative then the certificate and report can go together. So also if the person or persons to be reported need not be noticed under the proviso. But if notice is necessary the report cannot be sent until the party noticed has been heard and given an opportunity of giving and calling evidence to show why he should not be reported.

The fears entertained by Mr. Nadesan that the Appellate Court, in the event of an appeal, might deal with the matter before the report is made are imaginary and not real. The election judge must send a report. Until he does so the Registrar will not list the appeal for hearing. If the appeal is inadvertently listed for hearing before the report is sent the Appellate Tribunal will on looking into the record realize that the appeal is not ripe for hearing and adjourn the matter. In this particular case the interim report sent on 8.12.53 will make anybody realize that the appeal cannot, and should not be heard till my further report is sent.

Assuming that I had jurisdiction to take cognizance of the corrupt practice in respect of which I have noticed Dr. Wickremasinghe to show cause why he should not be reported I hold that my jurisdiction as election judge continues until the inquiry is over and my final report is sent.

I shall now consider the other point taken by Mr. Nadesan, namely, whether an election judge can make a report in respect of an election offence which was not in issue at the trial, that is either in the particulars

[1] (*1949*) *51 N. L. R. 55.*

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filed by the petitioner or in the recriminatory case of the respondent. That objection was foreshadowed at the trial but I did not then have the advantage of a calm and dispassionate argument as I have been privileged to have at this inquiry. Mr. Nadarasa did not seem to be interested or pretended not to be. When I asked him whether Mr. Nadesan would care to address me he said that would be done later, if and when I decided to call upon Dr. Wickremasinghe to show cause why he should not be reported.

In this inquiry the learned Solicitor General prefaced his reply with the remark that as only one side was represented he thought the matter should be fully discussed from the other point of view, so that I might see whether the view taken by Nagalingam J. in *re Fred de Silva* [1], by which I confess I was influenced when I decided to issue notice on Dr. Wickremasinghe, was the correct view.

Mr. Nadesan has amply demonstrated by reference to text-books and case law that in England nobody is reported except with reference to a corrupt or illegal practice that has been in issue at the trial. The learned Solicitor General concedes that this is so, but has sought to explain why the position in Ceylon is not the same. He maintains that the jurisdiction of an election judge in Ceylon to report in respect of corrupt and illegal practices is wider than in England. He bases his argument on the fact that there is nothing in the Order in Council of 1946 corresponding to paragraph 14 of section 11 of the English Statute which limits the report to corrupt or illegal practices in respect of which a charge has been made in the election petition. If there is a recriminatory case the same condition would apply. He contends that these words were not omitted by accident *but of set purpose*. The omission was designedly made so as to go with or compensate for the omission of paragraph 14 (*c*) of section 11 and paragraph 15, namely the need to report " whether corrupt or illegal practices have, or whether there is reason to believe that they have extensively prevailed at the election to which the petition relates " and the special report to the Speaker " as to any matter arising in the course of the trial an account of which in his judgment ought to be submitted to the House of Commons ". His submission is that we have dropped the provision for these additional reports and widened the scope of the first part of the paragraph. I am unable to agree with this contention. If the Order in Council was, more or less, a copy of the English Statute then the omission of certain phrases and certain clauses may induce one to conclude that there was a purpose behind the omission. But the 1946 Order in Council is based on the State Council Elections Order in Council of 1931 which was not copied from any particular English Statute but was a new piece of Legislation so far as Ceylon was concerned.

If one looks carefully at the various sections of the Orders in Council of 1931 and 1946 one is unable to find anything that directly says or indirectly suggests that an election judge in Ceylon is vested with greater powers in the matter of reporting persons found guilty of election offences than the election courts in England. I can see nothing in these Orders

[1] *(1949) 51 N. L. R. 55.*

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in Council which justifies the conclusion that we have departed from the law of England in this respect, and I can see no reason for the alleged departure.

Let me now examine the present Order in Council which, as I have already pointed out, is based on the Order in Council of 1931.

Section 78 (1) says that an election petition shall be tried by the Chief Justice or a Puisne Justice nominated for the purpose by the Chief Justice, and section 78 (2) says that the Chief Justice or the person so nominated is referred to in the Order as the election judge.

In order to find out what an election judge has to try we have to look at section 77 which sets out the grounds for avoidance of an election. Section 79 states who may present a petition and section 80 the relief that may be claimed.

In order to get the correct angle from which to read and interpret section 82 (*b*) one must start with section 77 and then read sections 78, 79, 80, 81 and 82 (*a*). First of all let us consider what is the jurisdiction of the Chief Justice or a Puisne Justice nominated by him in the trial of an election petition ? Obviously it is to try the matters in issue. If the submission of the learned Solicitor General *from the other point of view* is correct the election judge is invested with purely judicial functions in respect of the corrupt or illegal practices in issue between the parties, but as regards corrupt and illegal practices at the election with inquisitorial functions as well. That is the wider jurisdiction to which the learned Solicitor General referred.

The point taken by Mr. Nadesan was not taken in the case of *Fred de Silva*[1]. There the argument turned on the meaning of the words "*any candidate*" in section 82 (*a*) and "*any person*" in the proviso. Mr. Nadesan conceded that *any candidate* included both the successful candidate and the unsuccessful candidate but contended that the limitation was elsewhere, namely that the election judge could only report persons in respect of corrupt or illegal practices in issue at the trial and proved at the trial.

I have considered this matter very carefully and have come to the conclusion that Mr. Nadesan's contention is correct. To take any other view would mean that an election judge is not free to control the conduct of the trial but must allow the admission of evidence that is irrelevant to the immediate issues, because it is his duty to follow up a clue in order to detect and report on every corrupt and illegal practice that may have been committed at the election.

The notice is discharged. Dr. Wickremasinghe will not be reported in spite of the fact that I thought that there was *prima facie* proof at the trial that he was guilty of a corrupt practice.

Notice discharged.

[1] (*1949*) *51 N. L. R. 55.*

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1953 *Present:* **Gunasekara J. and K. D. de Silva J.**

C. A. ODIRIS SILVA & SONS, LTD., Appellant, *and* P. JAYAWARDENE, Respondent.

S. C. 234—D. C. Galle, X 876.

Amendment of plaint—Misdescription of defendant—Substitution of proper defendant—Prescription.

Where a plaint mistakenly named the defendant as "Odiris Silva & Sons" when, in fact, the defendant was Odiris Silva & Sons, Ltd., and the Court allowed the plaintiff to amend the caption of the plaint—

Held, that, for the purpose of reckoning the period of prescription, the action against the company must be taken to have been instituted on the date of the original plaint and not upon the amendment of the caption of the plaint.

APPEAL from a judgment of the District Court, Galle.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the defendant appellant.

D. D. Atulathmudali, with *E. L. P. Mendis*, for the plaintiff respondent.

Cur. adv. vult.

November 10, 1953. GUNASEKARA J.—

This is an appeal from a judgment of the District Court of Galle directing the defendant-appellant, a limited company, to pay to the plaintiff-respondent a sum of Rs. 1,272 as the price of two consignments of empty oil drums which he alleged he had sold and delivered to the company on the 19th and 22nd July, 1948.

The plaintiff had consigned the drums by railway to "C. A. Odiris Silva and Sons" of Matara, and the defendant company's manager, Dharmasena, had taken delivery of them, signing the railway consignment notes on behalf of the company in the place intended for the consignee's signature and giving the company's address as "Oil Mills, Matara". According to the plaintiff's evidence these consignments had been made in pursuance of an agreement between him and Dharmasena, but the latter, who was called as a witness for the defendant, denied that there had been such an agreement. He admitted that the consignment notes had been signed by him on behalf of the defendant company, but he stated that they had been brought to him by one Martin Silva, who had been supplying the company with drums, and that he had bought for the company from Martin Silva some of the drums included in the consignments in question and rejected the rest. The learned District Judge accepted the plaintiff's evidence and disbelieved Dharmasena's denial of the agreement alleged by the plaintiff, and there appears to be no sufficient ground for disturbing this finding.

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The learned judge also rejected a plea of prescription that was set up by the defendant. The plaint had been filed on the 18th July, 1949, within the period of limitation, but it named as the defendant " C. A. Odiris Silva and Sons, Oil Mills, Matara," and not " C. A. Odiris Silva and Sons, Limited," which is the name of the defendant company. On the 23rd March, 1950, after the expiry of the period of limitation, the caption of the plaint was amended by insertion of the word " Limited " immediately after " C. A. Odiris Silva and Sons ". It is contended for the defendant company that the action against the company must be taken to have been instituted only upon the amendment of the caption of the plaint and that the plea of prescription should therefore have been upheld.

The learned judge's rejection of the plea is based upon a finding that it was the defendant company, on whose behalf its manager had bought the drums from the plaintiff, that the plaintiff intended to sue, though the plaint had given the defendant a wrong description. This is a finding of fact which, it seems to me, it was open to the learned judge to reach upon the evidence, and in this view of the facts no objection can be taken to the order allowing the plaintiff to amend the caption of the plaint. In similar circumstances, where it appeared that a plaintiff had intended to sue an Urban District Council but had filed a plaint mistakenly naming the chairman of the Council as the defendant, it was held that the plaintiff should be allowed to amend the caption : *Velupillai v. The Chairman, Urban District Council* [1]. The effect of the amendment in the present case was merely a correction of an error in the name by which the present defendant was described and was not the substitution of that defendant for another. I am therefore unable to accept the contention that the action against the defendant company must be taken to have been instituted only on the 23rd March, 1950.

The appeal must be dismissed with costs.

K. D. DE SILVA J.—I agree.

Appeal dismissed.

[1] *(1936) 39 N. L. R. 464.*

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1954 *Present :* **Nagalingam A.C.J., Pulle J. and Swan J.**

M. M. DIAS, Appellant, *and* P. VINCENT GOMES, Respondent

S. C. 28—C. R. Colombo, 39,638

Rent Restriction Act, No. 29 of 1948—Section 13 (1) (a)—Rent in arrears—Tender of it before institution of action—Landlord's right to eject tenant.

By section 13 (1) of the Rent Restriction Act :—

" Notwithstanding anything in any other law, no action or proceedings for the 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 :

Provided, however, that the authorisation of the Board shall not be necessary, and no application for such authorisation may be entertained by the Board, in any case where—

(*a*) rent has been in arrear for one month after it has become due ; or
(*b*) . . . . "

Held, that once a tenant has been in arrear of rent for one month after it has become due he forfeits the protection given to him by the Act against being ejected. He cannot regain the protection by the mere act of tendering the arrears before the institution of the action.

George v. Richard (1948) 50 N. L. R. 128, overruled.

APPEAL from a judgment of the Court of Requests, Colombo. This appeal was referred to a Bench of three Judges in view of certain conflicting decisions.

H. W. Tambiah, with *V. Ratnasabapathy*, for the plaintiff appellant.—This appeal raises the question as to the interpretation of section 13 (1) (*a*) of the Rent Restriction Act of 1948. The phrase " has been in arrear for one month after it became due " denotes a period of time when the rent has been in arrear. The two termini of this period are (1) the time when rent became due and (2) one month after it became due. Once the tenant is in arrear for the period there is a vested right in the landlord to bring an action which can only be taken away by waiver. The sub-section does not state that the tenant has been in arrear till action is brought.

George v. Richard[1] purported to follow *Bird v. Hildage*[2]. Section 13 (1) (*a*) of our Act is entirely different from the corresponding English statute. Under the English Act a discretion is given to the Judge to dismiss the action of the landlord or to stay proceedings against a tenant even where the tenant has been in arrear up to the date of action. See *Gill v. Luck*[3], *Crate v. Miller*[4], *Dellenty v. Pellow*[5]. Under our statute no discretion is given to Court when tenant is in arrears. Further, according to the wording in the English statute no action shall be brought

[1] *(1948) 50 N. L. R. 128.*
[2] *(1947) 2 A. E. R. 7.*
[3] *(1924) 93 L. J. K. B. 60.*
[4] *(1947) 2 A. E. R. 47.*
[5] *(1951) 2 A. E. R. 716.*

2——J. N. B 35134-1,592 (4/54)

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when the tenant has been in arrears. *Bird v. Hildage* correctly interpreted the English statute, but it cannot be relied upon when the wording of our statute is different from that of the English statute.

Section 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. 5, c. 17) states, " It shall not be lawful for any mortgagee under a mortgage to which the Act applies so long as interest at the rate permitted under the Act is paid and is not more than 21 days in arrear . . . . to call in his mortgage or to take any steps for exercising any right of foreclosure ". Where the mortgagor was in arrear it was held that he was not entitled to any relief—*Evans v. Horner*[1] ; *Nichols et al. v. Walters*[2]. By analogy a right vests in the landlord to bring an action when the tenant has been in arrear for one month after it became due. When the conditions set out in the proviso to section 13 of the Rent Act of 1948 are satisfied the authorisation of the Board is no more necessary to bring the action. The procedural bar to bring an action is taken away. The paraphrase given in *George v. Richards* (*supra*) will be contrary to the rule of interpretation that when the words of a statute are plain the Courts should not add to or paraphrase a statute. The words in a proviso cannot be taken into account to alter the operative part of the main section. See *Craies on Statute Law*. In interpreting a statute there is a presumption against tautology. Every word must be given a meaning. The phrase " after it became due " must be given a meaning. It denotes the period of time the tenant has to be in arrear. The interpretation given in *Fernando v. Samaraweera*[3] and *Suyambulingam Chettiar v. Pechchi Muttu Chettiar*[4] is correct.

It is not necessary to terminate the contract by notice at the time the authorisation of the Board is asked for. After getting the authorisation of the Board one can terminate the contract by notice and then bring the action. This meets the argument that a landlord can only have a vested right to bring the action after termination of the contract of notice.

Walter Jayawardena, *Crown Counsel*, with *G. F. Sethukavaler*, *Crown Counsel*, as *amicus curiae*.—The questions for decision are :—

(*a*) whether the phrase " has been in arrear " in paragraph (*a*) of the proviso to Section 13 means " has been and is in arrear " ; and

(*b*) if the phrase has this meaning, whether the condition of being in arrears must be satisfied as at the date of filing the plaint.

Ex Parte Kinning[5] and *Re Storie*[6], referred to in *George v. Richard*[7], merely show that the words " has been " are *capable*, in certain contexts, of denoting a fact continuing to subsist up to the occurrence of a certain event or the performance of some act. Whether they do bear this meaning or not, in a particular context, is a matter to be decided by examining the language of the relevant statute.

[1] (*1925*) *1 Ch. 177.*
[2] (*1953*) *2 A. E. R. 1517.*
[3] (*1951*) *52 N. L. R. 278.*
[4] (*1952*) *53 N. L. R. 382.*
[5] *16 L. J. Q. B. 257.*
[6] *2 D. G. F. and J. 529.*
[7] (*1948*) *50 N. L. R. 128.*

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Assuming that in paragraph (*a*) of the proviso to Section 13 the words " has been in arrear " bear the meaning referred to, the *event*, up to the occurrence of which the condition of being in arrears must subsist, is not the institution of the action. The words " after it has become due " (also taken as denoting a continuous fact) are inappropriate if the event contemplated is the institution of the action. If the " event " is, however, taken to be the accrual of the right for the landlord to sue or the incidence of the corresponding disability of the tenant, each word in the paragraph can be given its natural and appropriate meaning. Had the paragraph been in the form of the paraphrase set out in *George v. Richard*, the " event " naturally suggested by the words would have been the institution of the action. This paraphrase, however, is misleading since the proviso, in form, deals with circumstances in which the authorisation of the Board is unnecessary for instituting an action. The idea of instituting an action, though vital, is only implied, so far as the form of the proviso is concerned ; and the form of language employed is important when questions of interpretation arise. *Bird v. Hildage* cited in *George v. Richard* might have been an authority if paragraph (*c*) of the proviso was to be considered ; but it is not relevant to a consideration of paragraph (*a*).

Assuming it is correct in law that a landlord must terminate the tenancy by due notice before taking advantage of paragraph (*a*), that matter does not displace the view of this paragraph adopted in *Fernando v. Samaraweera* [1], viz., that a right accrues to the landlord to evict his tenant when the conditions in paragraph (*a*) of the proviso are fulfilled. The right can be regarded as accruing subject to the implied condition that the requirements of the general law are complied with.

The cases cited by Counsel for the appellant may not be authorities on the point to be considered but they furnish examples of statutory provisions similar in form being regarded by Courts as imposing disabilities.

Cur. adv. vult.

March 26, 1954. NAGALINGAM A.C.J.—

The question that has been referred to a Bench of three Judges is one of great public importance involving, as it does, the determination of the question whether tenancy terminates by reason of the non-payment by a tenant of the rent for a period of over one month after the date on which it fell due. On a question of such importance that affects the community at large it is far more essential that the law should be settled with clarity and precision rather than even that what may be regarded, according to one school of thought, as the proper view should be permitted to gain currency and foster a spirit of uncertainty and doubt.

I have had the advantage of reading the judgment of my brother Pulle J., with which I understand my brother Swan J. agrees, and I am

[1] *(1951) 52 N. L. R. 278.*

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prepared to adopt the reasoning and the conclusion set out therein with a view to set at rest once and for all the controversy in respect of the point of law raised on this appeal.

I agree to the order proposed by my brother.

PULLE J.—

This appeal has been referred to a Bench of three Judges in view of conflicting interpretations of the proviso to section 13 (1) of the Rent Restriction Act, No. 29 of 1948,—corresponding to section 8 (*a*) of the Rent Restriction Ordinance, No. 60 of 1942,—which provides that the authorisation of a Rent Control Board is not necessary for the institution of an action in ejectment where " rent has been in arrear for one month after it has become due ".

In the case of *George v. Richard* [1] my Lord, the Acting Chief Justice, held on the following facts that where the arrears of rent were tendered before the commencement of the action in ejectment the landlord was not entitled to maintain it in view of section 8 (*a*) of Ordinance No. 60 of 1942. The tenant was in arrears for the months of January to April, 1947, and a letter dated 24th April, 1947, was sent to him by the landlord claiming the arrears of rent and terminating the tenancy with effect from 31st May, 1947. In response to the letter the tenant sent a money order to the landlord who declined to accept it. Another money order was sent on the 10th June, 1947. This too was not accepted and the action in ejectment was filed on the 19th June, 1947. It was assumed for the purpose of deciding the case that rent should be paid at the beginning of each month. Therefore, at the date of institution the landlord had refused to accept rent for five months in respect of the contractual tenancy and for one month of the statutory tenancy.

In *Fernando v. Samaraweera* [2] Basnayake J. said,

" Once the tenant commits a breach of any one of his statutory obligations the bar against the institution of proceedings in ejectment imposed by section 13 of the Act is removed and there is nothing the ' statutory tenant ' can do to regain his immunity from eviction. His rights and obligations are governed by the statute and immediately he violates its provisions the consequences of such violation begin to flow. For instance if he is in arrear of rent for one month after it has become due the landlord becomes free to institute proceedings in ejectment. He cannot prevent his eviction by process of law by tendering the rent out of time either before or after the institution of legal proceedings. The consequences of the failure to observe the obligations imposed by the statute cannot be avoided by doing late what should have been done in time. "

In *Suyambulingam et al. v. Pechchi Muttu Chettyar* [3] H. A. de Silva J. held that, where the tenant is in arrear of rent for one month after it has become due and the tenancy is thereafter duly terminated, the

[1] (*1948*) *50 N. L. R. 128.*

[2] (*1950*) *52 N. L. R. 278.*

[3] (*1951*) *53 N. L. R. 382.*

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landlord's right to eject the tenant is not taken away by tender of the arrears before the action is instituted. The learned Judge preferred the view expressed in *Fernando v. Samaraweera* [1].

In the present case which was filed on 1st July, 1952, it was alleged that the tenant was in arrears from 1st September, 1951. A previous case, C. R. Colombo, No. 37469, had been filed to recover rent due for the months of September, 1951, to January, 1952, but ejectment was not asked for. Pending that suit the tenant was given notice on the 8th May, 1952, to quit and deliver possession on the 30th June, 1952. In case No. 37469 the tenant filed his answer on the 3rd June, 1952, and along with the answer he deposited in Court Rs. 80·11 being the arrears of rent up to 31st May, 1952. As stated earlier the present action was filed on the 1st July, 1952. The rent for June was payable on or before the 10th July, 1952.

Learned Counsel for the landlord sought to argue that the deposit in case No. 37469 of the arrears up to the end of May, 1952, did not constitute a valid tender but, as the point was not raised in the petition of appeal, he had to confine himself solely to the submission that once a tenant has been in arrear of rent for one month after it has become due he forfeits the protection given to him by the Act against being ejected. The problems raised by this submission are by no means easy of solution and although the tenant was not represented by counsel we have had the assistance of Mr. Walter Jayawardena, Senior Crown Counsel, to whom we are indebted for appearing as *amicus curiae*.

The decision in *George v. Richard* [2] was partly based on the case of *Bird v. Hildage* [3] in which it was held that where rent had been tendered before the commencement of an action in ejectment it could not be said that " rent lawfully due from the tenant has not been paid " within the meaning of paragraph (*a*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, (23 & 24 Geo. 5, c. 32). The view was expressed in *George v. Richard* [2] that although the words " lawfully due " do not occur in the section of the Ordinance of 1942 corresponding to proviso (*a*) to section 13 (1) of the Rent Restriction Act yet the notion underlying these words is implicit in proviso (*a*). On this premise the learned Judge went on to develop the argument as follows :

" Now a landlord under our law cannot institute an action for recovery of rent unless it remains unpaid at date of institution of action. If rent is in arrear, a cause of action accrues to the landlord to sue for it but if, before he files or can file action, rent is tendered or paid to him the cause of action is extinguished, and with it the right to sue. Hence at the date of institution of action the plaintiff must be in a position to show that not only had a cause of action accrued to him prior to institution of action but that the cause of action continued to subsist even at the date of institution. "

With all respect I am unable to agree—and here I speak naturally with some difference—that the notion underlying the words in the English

[1] *(1950) 52 N. L. R. 278.*

[2] *(1948) 50 N. L. R. 128.*

[3] *(1947) 2 All E. R. 7.*

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Act is implicit in proviso (*a*). I venture to say that basically they are different. The expression " lawfully due " when spoken of rent due at any given point of time is inextricably associated with the idea of an action being instituted to recover the same because nothing could be said to be lawfully due unless enforceable by action. While, undoubtedly, it is true that " if rent is in arrear, a cause of action accrues to the landlord to sue for it, but if before he files or can file action, rent is tendered or paid to him, the cause of action is extinguished and with it the right to sue " I cannot assent to the proposition that any disability to maintain an action for *rent* by reason of a valid tender before action has necessarily the effect of restoring the tenant to the status of irremovability—which is the protection afforded by the Act—if in fact he lost that protection the moment he was in arrears of rent beyond one month after it became due. There may be circumstances attending the acceptance of rent before action from which it may be inferred that a new contract of tenancy came into existence which would confer on the tenant *de novo* all the benefits of the Act. In that event an action for ejectment will have to be determined on the basis of the new tenancy and the fact that during an earlier period of a contractual or statutory tenancy the tenant was in arrears beyond a month would become irrelevant.

This brings me to the final question whether the protection conferred on a tenant by the Act is taken away, if he allows himself to be in arrears for over a month. It seems to me that being in arrears is a condition or state in which the tenant finds himself by his own lapse and upon that condition or state supervening the tenant places himself outside the limits of the protection and it is for him to show how thereafter he regained that protection. I fail to see how he regains the protection only by the act of tendering the arrears before the institution of the action. The Rent Restriction Act has made heavy inroads into the common law rights of the landlord and I do not see anything oppressive in interpreting proviso (*a*) to mean that, having regard to the new and extensive rights conferred on a tenant, it is a condition precedent to the continued protection of the Act against eviction that the tenant shall pay the rent not necessarily as it falls due but at least within a month thereafter. The opinion that I have just expressed is supported by the case of *Evans v. Horner* [1] relied on by the appellant. That case arose out of an originating summons to have a mortgage security enforced by foreclosure or sale on the ground that interest at the rate permitted by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. v, c. 17) had not been paid and was in arrear for more than twenty-one days. Under section 7 of the Act if rent was paid within the specified time of twenty-one days it was not lawful for the mortgagee to call in his mortgage or to take any steps for exercising any right of foreclosure or sale or for otherwise enforcing his security or for recovering the principal money thereby secured. Interest was due on 19th May, 1924, and more than twenty-one days later, namely, on the 11th June the originating summons was issued. On 14th June the mortgagor sent a cheque for the interest, which was accepted by the

[1] *(1925) 1 Ch. 177.*

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mortgagee " on account generally ". While I do not overlook the fact that the interest was paid after the originating summons was issued and served, the judgment of Russell J. is in terms wide. At page 178 he states,

" In my opinion the section only suspends the rights of the mortgagee during one continuous period, which lasts so long as conditions (*a*), (*b*) and (*c*) are complied with, and that when once these conditions are broken a subsequent compliance with them does not revive the protection given by the section. "

I do not think it is necessary to make reference to a number of subsidiary topics argued in the course of the appeal. For the reasons which I have given I would set aside the decree under appeal and enter judgment for plaintiff for the rent due at the date of action, damages and ejectment. The appellant will be entitled to his costs in both courts.

SWAN J.—I agree.

Appeal allowed.

1953 *Present:* **Rose C.J. and K. D. de Silva J.**

P. B. RATWATTE, Appellant *and* P. ARTHUR SILVA (Assistant Government Agent) *et al.*, Respondents

S. C. 18—D. C. (Inty.) Anuradhapura, 3,172

Land acquisition—Valuation—Intervention by interested parties.

In awarding compensation in respect of compulsory acquisition of land, the value to be ascertained is the value to the vendor, not its value to the purchaser. Therefore, any increase in value consequent on the execution of the undertaking in connection with which the acquisition is made must be disregarded.

In land acquisition proceedings, tenants and others claiming compensation for improvements effected on the land to be acquired may be allowed to intervene.

APPEAL from a judgment of the District Court, Anuradhapura.

N. K. Choksy, Q.C., with *D. S. Jayakody* and *E. P. Wijetunge*, for the 1st defendant appellant.

V. Tennekoon, Crown Counsel, for the plaintiff respondent.

Cur. adv. vult.

October 16, 1953. ROSE C.J.—

This matter turns upon the amount of compensation to be awarded to the appellant in respect of the compulsory acquisition of a certain land named Elabodekelle of about 29 acres in extent. The sum of

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Rs. 20,470 as compensation for the land at the rate of Rs. 700 per acre was awarded, of which Rs. 6,165 was allotted to certain tenants of the appellant in respect of improvements which the learned District Judge held they had effected.

The first point that the appellant takes is that the rate of compensation was too low. It appears that the land in question was acquired for the purpose of developing the new town of Anuradhapura situated outside the urban limits of the old town.

Evidence was called both on behalf of the appellant and the 1st respondent in regard to the value of certain lands in the neighbourhood. These estimates naturally varied and the learned District Judge was placed in the somewhat difficult position of having to arrive at an arbitrary figure. One of the assessors was of the opinion that the compensation should be at the rate of Rs. 1,200 per acre whereas the other, with whom the learned District Judge agreed, estimated the appropriate compensation at Rs. 700 per acre.

We are invited by learned counsel for the appellant to hold that the learned District Judge is wrong in his computation. As is pointed out by Mr. Justice Eve in *South Eastern Railway v. L. C. C.*[1]—and his observations are referred to with approval in *Cripps' Compulsory Acquisition of Land*, 9th Edition at page 503—the value to be ascertained is the value to the vendor, not its value to the purchaser, and that therefore any increase in value consequent on the execution of the undertaking in connection with which the acquisition is made must be disregarded.

While the market price, as Eve J. points out, is not a conclusive test of real value it has, of course, a distinct bearing upon the value of the land to the vendor. Crown Counsel points out that this land was relatively waterless and only intermittently cultivable once every three or four years and that it had no saleable value at all, apart from the value it had to the 1st respondent in connection with the proposed Housing Scheme. That being so, it seems to me that there is really no adequate material upon which we, as an Appellate Court, can hold that the learned District Judge's assessment, which in the very circumstances of the case must have been more or less of an arbitrary nature, is wrong ; especially as there is some material upon the record which would seem to lend support to the adoption of the figure that he chose. This point of the appeal therefore fails.

There remains the question of the compensation which was awarded to the various tenants for improvements. As regards the amount, I am of opinion that there is no good ground for this court to interfere with the decision of the learned District Judge. There was evidence, which he accepted, as to the value of the various buildings and other improvements effected ; moreover there was evidence to support his finding that the respondents (who were the tenants in question) effected those improvements. On those matters, therefore, I see no reason to disturb the finding of the learned District Judge.

[1] *(1915) 2 Ch. 252.*

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The appellant contends, however, that the matter of improvements and the compensation to be paid for them should not have been considered at all by the learned District Judge in the present proceedings. There is some support for this view in the case of *G.A., W. P. v. Cooray & others*[1]. That case, however, which was decided as long ago as 1908, although it does not appear to have been expressly overruled, does not seem to have been followed in subsequent decisions of this court, or indeed in the practice of the District Courts themselves. I am informed from both sides of the Bar, and I accept, that the general practice in these matters is for intervention to be allowed by tenants and others claiming compensation for improvements effected on the land to be acquired. This practice seems to me to have at any rate the advantage of being convenient and, that being so, I would be reluctant at this late stage to introduce any innovation, Moreover, it may well be that the observations of Grenier A.J. in *G. A., W. P. v. Cooray & others* were only intended to be read in the context of their application to the particular facts of that case.

I consider therefore that the appellant's second point also fails.

The appeal is therefore dismissed with costs payable to the 1st respondent. The remaining respondents did not appear and will receive no costs.

K. D. DE SILVA J.—I agree.

Appeal dismissed.

1954 *Present :* **Gratiaen A.C.J. and Gunasekara J.**

ANGLO-CEYLON AND GENERAL ESTATES CO., LTD.,
Appellant, *and* ABUSALIE, Respondent

S. C. 424—D. C. Kandy, L 2,570

Improvements—Claim for compensation—Bona fide *possession—Proof of* bona fides *and* mala fides.

Before a person can claim compensation for improvements effected upon a land on the ground that he made the improvements as a *bona fide* possessor of the land he must show that he had reasonable or probable grounds to think that he had some right of ownership in the land.

APPEAL from a judgment of the District Court, Kandy.

H. V. Perera, Q.C., with *Kingsley Herat*, for the plaintiff appellant.

H. W. Tambiah, with *A. C. M. Uvais*, for the defendant respondent.

Cur. adv. vult.

[1] *(1908) 11 N. L. R. 190.*

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February 15, 1954. GRATIAEN A.C.J.—

The land which is the subject-matter of this action forms part of Naranghena Estate belonging to the plaintiff-Company. The title of the Company has been clearly established and the learned District Judge has also held in the Company's favour on the issue of prescription. He decided, however, that the defendant was a *bona fide* possessor, and accordingly, while upholding the Company's title, he awarded the defendant a sum of Rs. 3,500 as compensation for improvements. It is to the latter part of the decree that this appeal relates.

The judgment under appeal gives no indication as to why, in the circumstances of this case, the defendant was regarded as a *bona fide* possessor. In my opinion, his *mala fides* has been very clearly established by the evidence.

The property in dispute forms part of a jungle which had for over 25 years been maintained by the Company as a " wind belt " of Naranghena Estate. On 5th November 1948, the superintendent of the Estate noticed that a number of people (including the defendant and a man named Sinniah) had commenced, without his permission, to fell the trees standing on a portion of this " wind belt ". He immediately protested, and on the same day the Village Headman held an inquiry on the spot. Sinniah claimed that he was the owner of the property and that he had sold ten acres belonging to him to the defendant and to certain others. The Headman advised them not to clear the land or erect buildings on it until the dispute as to title had been investigated.

On 26th January 1949, a similar incident occurred, and on this occasion the District Revenue Officer, Mr. Tennekoon, held an inquiry into the dispute. He examined the relevant deeds and plans on which Sinniah, the defendant and the other " purchasers " claimed title to the property, and pointed out to them that (as the learned judge has since held) " they were on the wrong land ". In spite of this warning, the defendant, without any further investigation, insisted on clearing the jungle and commenced to erect a building on it. The Company promptly instituted this action to vindicate its title. The building in question represents the so called " improvement ". It was in fact completed after the action commenced.

The defendant claimed title on a deed from Sinniah dated 23rd September 1948. It purports to convey to him a title enjoyed by Sinniah on two very recent deeds which have not been produced. The property was described as " *an undivided one acre out of undivided six acres* " which allegedly fell within certain boundaries depicted in specific title plans which the defendant admits he had not taken the trouble to examine. It was these plans which established at the D.R.O.'s inquiry that Sinniah's property was situated elsewhere.

" Possession is in good faith when the possessor thinks, *on reasonable or probable grounds*, that he has some right of ownership in the thing possessed ; it is in bad faith when he does not think so "—*Wille : Principles of S. African Law (1st Edn.) p. 144.* In this case, the defendant had no reason whatsoever to believe that his " undivided one acre "

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fell within the land which the Company had possessed and maintained for over 25 years, and which Sinniah (who was employed as a watcher in Kandy) had never enjoyed. The defendant ignored the proof which the D.R.O. placed before him on 26th January 1949, and if he persisted thereafter in his belief that he had title to the property, it was a reckless opinion. A trespasser who behaves in this fashion is not a *bona fide* possessor. Moreover, it is impossible to regard the building which the defendant constructed as an "improvement". The Superintendent has explained that the Company will now be compelled to re-plant the property in order to replace a necessary "wind-belt".

I would allow the appeal and set aside that part of the decree which awards the defendant a sum of Rs. 3,500 as compensation. The defendant must pay the plaintiff's costs in both Courts.

GUNASEKARA J.—I agree.

Appeal allowed.

1954 *Present :* **Gratiaen J. and Gunasekara J.**

G. P. BASTIAN SILVA, Appellant, *and* W. G. M. WILLIAM SILVA, Respondent

S. C. 315—D. C. Chilaw, 12,526M

Prescription Ordinance (Cap. 55)—Goods sold and delivered—Appropriation of payments—Part-payment—Section 8 and proviso to section 12.

Where there has been a series of transactions, between two persons, of goods sold and delivered, each item of purchase constitutes a separate debt, and the mere occurrence of an item of purchase within the period of limitation does not keep the claim alive as to the older sales effected outside that period. Further, when payments are made by the debtor without any indication that they are to be appropriated on account of all the debts collectively, the creditor is entitled at his option to appropriate the payments in reduction of the earlier debts which are statute-barred, but such appropriation cannot operate by itself as a part-payment so as to take the balance due on those earlier debts out of the statute ; the balance due on the earlier debts continues to be statute-barred.

APPEAL from a judgment of the District Court, Chilaw.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the defendant appellant.

Kingsley Herat, for the plaintiff respondent.

Cur. adv. vult.

February 12, 1954. GRATIAEN J.

This is an appeal against a judgment in favour of the plaintiff for a sum of Rs. 1,482/95, representing the balance found to be due to him upon a series of transactions whereby he sold and delivered various quantities of fish to the defendant.

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The only issue which calls for decision is whether a part of the plaintiff's claim is barred by prescription. The action was instituted on 16th November, 1946, and the account particulars filed with the plaint show that the total value of the consignments of fish which were delivered within one year of that date was only Rs. 295/50. *Prima facie*, therefore, the claim in respect of the earlier consignments could not be maintained in view of the provisions of section 8 of the Prescription Ordinance. ,, In a claim for goods sold and delivered, the mere occurrence of an item of purchase within the period of limitation does not . . . keep the claim alive as to the older sales effected outside that period "—*Silva v. Adakkan Kangany* [1], *Usuf Saile v. Punchi Menike* [2] and *Abdul Cader v. Velaiden* [3]. The plaintiff has not pleaded or proved that there was an " account stated " between the parties in respect of the series of transactions to which the action relates. His claim, when analysed, is based on a number of separate causes of action, each of which is referable to a particular contract of sale.

In meeting the plea of prescription the plaintiff relied on three payments, amounting to a total sum of Rs. 261, which he had received from the defendant on November 23rd, 24th and 27th, 1945, in liquidation of the liability (so it has been argued) " on the running account " which includes the earlier items which were *prima facie* statute-barred. The learned judge accepted this argument and allowed the plaintiff's claim in its entirety.

The legal consequences of a payment in reduction of a debt are clear enough, and the application of the principle involved is expressly provided for in a proviso to section 12 of the Prescription Ordinance. The effect of a part-payment, in circumstances from which a promise to pay the balance may legitimately be inferred, is to take the case out of the operation of the statute—*Moorthipillai v. Sivakaminathan* [4]. As was explained in *Arunasalem v. Ramasamy* [5], the law, *in the absence of anything to the contrary*, implies a promise to pay the balance, even if the debt was already prescribed.

If a claim relates to a single debt which is *prima facie* statute-barred, the burden is on the creditor relying on the subsequent payment " to show that it was made *on account of the debt, and as a part-payment* "—*per* Clarence C.J. in *Sathappa Chetty v. Muttu Raman Chetty* [6]. If, however, there are more debts than one, the creditor must prove that the part-payment was made " on general account " in order to defeat a plea of prescription in respect of all the items—*Re Rainforth : Gwynn v. Gwynn* [7].

Let us apply these principles to the facts of the present case. Neither party has explained the circumstances in which the defendant made the payments of November, 1945, relied on by the plaintiff. There is accordingly no evidence which justifies an inference that the defendant intended any of those payments to be appropriated *on account of all the debts collectively*. It follows that, as the defendant himself made no appropriation at the time of payment, the plaintiff was entitled at his

[1] (*1904*) *1 Bal. 36.*
[2] (*1904*) *3 A. C. R. 121.*
[3] *3 C. W. R. 57.*
[4] (*1912*) *14 N. L. R. 30.*
[5] (*1914*) *17 N. L. R. 156.*
[6] (*1882*) *5 S. C. C. 62.*
[7] (*1879*) *49 L. J. Ch. 5.*

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option to appropriate the payments to any debts which he selected, *but such appropriation could not operate by itself as a part-payment so as to take the balance of the selected debt out of the statute.—vide the authorities quoted in Hailsham Vol. 20 p. 639 footnotes (r) and (t).* The reason is perfectly clear; an inference of an acknowledgment (which is treated as a promise to pay the balance) cannot be drawn except from the conduct of the debtor himself.

In my opinion the judgment under appeal was not justified by the evidence. The plaintiff was entitled to (and I shall assume in his favour that he did in fact) appropriate the payments made in November, 1945, in reduction of the earlier debts which would otherwise be statute-barred, but the balance due on those debts continued to be statute-barred. On the other hand, his claim amounting to Rs. 295/50 on the later transactions which took place within a year of the institution of the action is not prescribed. I would accordingly vary the decree by ordering the defendant to pay to the plaintiff a sum of Rs. 295/50 with legal interest thereon from the date of the action until payment in full, together with costs taxed in the class in which the action ought to have been instituted. The plaintiff must, however, pay to the defendant the costs of this appeal.

GUNASEKARA J.—I agree.

Decree varied.

1951 *Present:* **Gratiaen J. and Gunasekara J.**

V. R. SINNATHAMBY, Appellant, *and* ANNAMMAH, Respondent

S. C. 60—D. C. Jaffna, 558

Divorce—Malicious desertion—Proof—Mutual aversion to marital relations—Is there constructive malicious desertion?

There were many disputes between a husband and his wife because the wife insisted that her brother should remain in the house contrary to the desire of the husband. There was evidence that the husband was assaulted on two occasions by the wife's brother and that, on the second occasion, the husband left the home.

Held, that in the circumstances the husband's departure from the home did not constitute malicious desertion on his part.

Further, the wife claimed divorce from her husband on the ground of constructive malicious desertion " in that he intentionally ceased to cohabit with the plaintiff and thereby repudiated the state of marriage between the parties ". She admitted, however, that she herself would not have agreed to sexual intercourse.

Held, that the legal concept of constructive malicious desertion was not involved in a husband's alleged lack of interest in a mutual matrimonial obligation which his wife herself admittedly disdained.

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APPEAL from a judgment of the District Court, Jaffna.

C. Renganathan, with *A. Nagendra* and *E. B. Vannitamby*, for the defendant appellant.

No appearance for the plaintiff respondent.

Cur. adv. vult.

July 27, 1951. GRATIAEN J.—

The plaintiff and her husband the defendant are both retired members of the teaching profession. They married in January, 1920, taught at the same school, pooled their salaries for their joint benefit, and admittedly lived happily together for at least 19 years. By this time their ages were 42 and 46 respectively. It was a childless marriage but later, apparently, they adopted a son called Jayadeva who was at the time of the trial being educated in Colombo.

It cannot be pretended that the marriage was not punctuated by occasional quarrels followed by the usual reconciliations. The wife would complain that her husband was extravagant. She would sometimes complain that he drank rather too much. All that it is necessary to point out in this connection is that there is such a thing as "give and take" in any matrimonial home, and that the law does not recognise such lapses as giving rise to a cause of action for divorce. Besides, the allegations to which I have referred, such as they were, have clearly been exaggerated. The plaintiff herself called as a witness the parish priest who almost invariably helped them to smoothe over their differences. He said, in answer to a question put to him by the learned Judge, that the defendant was "not addicted to liquor". With regard to the allegation that the defendant was unreliable in matters of finance, he seems at any rate to have been regarded as a suitable person to be entrusted with the responsibilities of Treasurer of the Parish Church.

In 1942 the position deteriorated. This circumstance synchronised with the arrival in the matrimonial home of the plaintiff's younger brother Daniel. It is common ground that from that time there were many disputes between the parties because the defendant demanded that Daniel should take up residence elsewhere, while the plaintiff was adamant that he should remain where he was. Admittedly, Daniel was prone to the thoroughly nasty habit of carrying tales to the plaintiff about the alleged "goings on" of her husband in the village. The defendant says that this idle gossip was entirely without foundation. Daniel did not give evidence on the point, so that the tales which Daniel conveyed have not been substantiated. Nevertheless the learned Judge appears to think that they were probably true merely because the plaintiff at any rate believed them.

In 1943 Daniel assaulted the defendant, who prosecuted him in the Magistrate's Court at Mallakam. The proceedings were later withdrawn at the plaintiff's request, and Daniel for sometime left the home in which he had been such an unwelcome guest to the master of the house. Later,

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however, he returned and the troubles and gossip started all over again. The learned Judge seems to have taken the view that it was unreasonable conduct on the part of the defendant to object to giving shelter to a brother-in-law who delighted in carrying tales about his host to his host's wife. It is a matter of opinion, I suppose. For myself, I think that any man would reasonably have regarded such a situation as quite intolerable, and that any woman who did not agree to send away a brother so addicted to inquisitiveness was only asking for trouble. In 1945 the defendant left his home by way of protest. There was another reconciliation at the instance of the parish priest. Until June, 1949, husband, wife and brother-in-law lived together, after a fashion, under the same roof. But during this final period the husband spent most of his time in philosophic detachment in a separate room of his own. He now occupied the position of an unwanted guest himself rather than the master of his own household.

The culminating episode took place on 29th June, 1949. On that day the adopted son Jayadeva had sent an urgent telegram to the defendant from Colombo. A postman took it to the matrimonial home at a time when only Daniel and the plaintiff were in. They refused to accept it. Later in the day the defendant was informed of this incident by the postman. He was naturally incensed, and remonstrated with Daniel and the plaintiff, whereupon he was assaulted by Daniel. The plaintiff complains that the defendant finally left the home after this incident. I really do not know what else a man in his position could have been expected to do.

The evidence of the parish priest is to the effect that on more than one occasion after this incident the defendant had expressed his willingness to resume cohabitation with his wife provided that Daniel, who by now had twice laid hands on him, would remove himself from the scene. This condition was rejected by the plaintiff. Instead, she sued him on 15th August, 1949, for a decree of divorce *a vinculo matrimonii* upon two causes of action.

The second cause of action, which can more conveniently be disposed of at this stage, alleges that the defendant "maliciously deserted" the plaintiff on 29th June, 1949, after what I would refer to as the "telegram incident". The learned Judge's findings on this issue are in accordance with the facts which I have already described. I shall quote the relevant passage of the judgment appealed from :—

> "There remains the question whether the defendant finally left the plaintiff in June, 1949. This is connected with the incident of the telegram. Here too assuming that the defendant is speaking the truth in regard to the incident of the telegram and that the plaintiff and Daniel spitefully refused to accept the telegram and deliver it to him I am inclined to think that there was a sufficient ground for the defendant to take the initiative for a quarrel. The evidence of the Kirama Vidane who inquired into the respective complaints of the parties shows what either party had to say. Perhaps the defendant himself got the worse of the quarrel and it was this reason that compelled

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him to leave the house finally. He may have considered that discretion was the better part of valour. I am satisfied that the defendant never came back to the plaintiff after the incident of June, 1949, and that he did so with a view to leave the plaintiff alone. "

In another part of the judgment the learned Judge says with reference to Daniel's continued presence in the house in the combined role of unwelcome guest and gratuitous informant :—

" If in the course of these troubles Daniel did use violence on the defendant, the defendant was himself to blame if he got the worse of it ".

I am content to say that on the *facts* relating to the second cause of action, the learned Judge was clearly not entitled to hold that *in law* the defendant had maliciously deserted his wife.

There remains for consideration the plaintiff's first cause of action, which alleges, according to issue (3) as framed by counsel who appeared for her at the trial, that the defendant was " guilty of constructive desertion since 1939 "—i.e., no less than 10 years before the institution of this action—" in that he intentionally ceased to cohabit with the plaintiff and thereby repudiated the state of marriage between the parties ".

I should have been inclined to regard this allegation as ambiguous except for the fact that it was clearly understood by the parties, their respective counsel, and by the learned Judge himself as the complaint of a frustrated female spouse that, after 19 years of connubial happiness, her husband had wilfully and maliciously ceased to have sexual relations with her. It is not necessary to decide whether such an allegation, if true, could by itself support a charge of *constructive* malicious desertion—and whether relief in such a situation would in any event be available 10 long years after the alleged cause of action had first accrued. All that I need say is that the plaintiff herself has by her own evidence rendered academic any legal issue which might have arisen from this aspect of the case. I shall quote three passages of what she said :—

" *Q.* Did the defendant fail to have marital relations with you after 1939 ?

A. We had no intercourse after 1939.

Q. After 1939 did the defendant request you for marital intercourse ?.

A. I have no recollection of his having asked me.

Q. Why did he keep away like that ?

A. He did not like me so he did not ask ".

. . . . . .

Q. Do you like the defendant ?

A. Now I have no love for him.

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Q. From when was that ?

A. From 1939.

Q. Have you ever asked him after 1939 to have sexual intercourse with you ?

A. No.

Q. You did not desire it ?

A. I did not like it.

To Court.

Q. You did not like it ?

A. Yes.

Q. Is it because you did not want it or you did not ask for it ?

A. I did not like him. I hated him.

Q. So that even if he had asked you you would have refused ?

A. He did not ask. Even if he did I would not have consented ".

. . . . . .

Q. Since 1939 if the defendant had invited you affectionately to have intercourse with him would you have agreed ?

A. No."

In spite of these very frank admissions, the learned Judge took the view that constructive malicious desertion was established against the defendant because " the plaintiff's attitude of mind which she explained at the trial is not relevant to this particular issue, for the only question which arises is whether the defendant intentionally ceased to cohabit with her ". Once again, I am content to say that, in my opinion, the legal concept of constructive malicious desertion is not involved in a husband's alleged lack of interest in a mutual matrimonial obligation which his wife herself admittedly disdained.

In my opinion the judgment appealed from should be set aside, and I would make order dismissing the plaintiff's action. As the evidence recorded in certain incidental proceedings discloses the fact that the plaintiff is possessed of property of her own, I think that this is a case in which she should be ordered to pay the defendant's costs both in this Court and in the Court below.

GUNASEKARA J.—I agree.

Appeal allowed.

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1952 *Present :* **Gunasekara J.**

D. S. GNANAMUTTU, Appellant, *and* THANGIAH (Inspector of Police), Respondent

S. C. 777—M. C. Kalmunai, 7,548

Notaries Ordinance (Cap. 91)—Breach of paragraph (a) of rule (35) in Section 30—Burden of proof.

The charge against the accused was that he did " being a notary and not being a proctor fail to live and hold office at the place approved by the Governor by warrant " , in breach of paragraph (*a*) of rule (35) in section 30 of the Notaries Ordinance.

Held, that there was no burden on the prosecution to prove that the accused was not a proctor. The burden was on the defence to prove that he was.

APPEAL from a judgment of the Magistrate's Court, Kalmunai.

S. Nadesan, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 29, 1952. GUNASEKARA J.—

This is an appeal by a notary against a conviction of a breach of paragraph (*a*) of rule (35) in section 30 of the Notaries Ordinance (Cap. 91), punishable under section 31 of that Ordinance. The charge upon which he was tried alleges that he did " between 1st March and 15th July, 1950, being a notary and not being a proctor fail to live and hold office at the place approved by the Governor by Warrant dated 5th November, 1944, to wit Saindamaruthu in Karavaku pattu of Batticaloa District ". The judgment however states that the charge alleges an offence committed " during the period 1.3.49 to 15.7.49 " ; and the question that the learned Magistrate has considered is whether the appellant committed the alleged offence in that period and not whether he committed it a year later as alleged in the charge. At the hearing of the appeal I invited the learned Crown Counsel's views on the question whether this circumstance vitiated the conviction and I agree with his submission that there has only been an error in the charge that has not occasioned a failure of justice. The period alleged in the report under section 148 (1) (*b*) of the Criminal Procedure Code, by which the proceedings were instituted, is 1st March to 15th July, 1949, and the record of the evidence indicates that the prosecution and the defence presented their cases upon the footing that that was the period alleged in the charge as well. The point that the appellant has been convicted of an offence with which he was not charged has not been taken in the petition of appeal and was not taken in the argument for the appellant ; no doubt

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for the reason that the parties as well as the Magistrate understood that the appellant was tried on a charge of having committed an offence in 1949 and not in 1950. There has been a clerical error in the charge that has not misled the appellant and which, in terms of section 171 of the Criminal Procedure Code, cannot be regarded as material, and cannot, in terms of section 425, be a ground for reversing the judgment under appeal.

The learned Magistrate held that during the period in question the appellant did not live at Saindamaruthu but lived at Kallar, six miles away. The main ground of appeal was that the finding that the appellant did not live at Saindamaruthu is erroneous, and that proof that he lived at Kallar is insufficient to establish the allegation that he committed a breach of the rule by failing to live at Saindamaruthu, for that would not exclude the possibility that he had a residence at each place. The charge is not that he contravened the rule by living at Kallar.

The appellant was appointed a notary by a warrant under the hand and seal of the Governor dated the 5th November, 1944, which authorised him to practise in the Batticaloa District " with residence and office at Saindamaruthu". From that time until the time of the trial in 1951 he was the tenant of two rooms adjoining each other in a building at Saindamaruthu owned by one Parihari, and one of these rooms he used as his office throughout that period. The prosecution sought to prove by the production of householders' lists that the other room was occupied by his clerk, one Ponniah. This fact was established beyond doubt, however, by the evidence of Parihari, who was called on behalf of the appellant and whose evidence on this point was accepted by the learned Magistrate. This witness stated that of the two rooms one was occupied by the clerk and his family, consisting of his wife and son, and the other by the appellant. According to him, at the time when he gave evidence, which was the 4th June, 1951, the clerk's wife was not there, having left two months earlier. Under re-examination he said that she had come into occupation of that room about 7 years previously—that is to say, in 1944. The appellant himself admitted that Ponniah and his wife and son occupied the room adjoining the office but denied that they did so in the period 1948 to 1949. This denial was disbelieved by the Magistrate.

It is common ground that at no time in the years 1944 to 1951 had the appellant's name been entered in the householders' lists in respect of the rooms in Saindamaruthu. The prosecution adduced evidence to the effect that in respect of the period June 1947 to June 1950 his name had been included annually in the lists relating to a house in Kallar, where admittedly his wife and children were living, and that in those lists he had described himself as the chief occupant of that house. The appellant himself admitted that in the six and a half years during which he had his office at Saindamaruthu he continued to enter his name in the householders' lists as the chief occupant of the house at Kallar. He has also been registered as a voter in the Periya Kallar Ward of the Karavaku North Village Committee area upon the footing that he had been resident in Kallar for a continuous period of six months in the

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period 1st March, 1947, to 31st August, 1948, and at an election held in April, 1949, he was elected to represent that ward. He has not been registered as a voter in respect of Saindamaruthu, which is a ward of the Karavaku South Village Committee area.

A prosecution witness named Mustapha, who was a clerk in the office of the Divisional Revenue Officer and who lived in Saindamaruthu, gave evidence to the effect that on his way to and from the office he regularly met the appellant riding a bicycle, with a bag on its luggage carrier. He himself went daily to his office between 6 and 9 in the morning and returned between 4.30 and 6 in the afternoon, and he would meet the appellant in the mornings riding towards the appellant's office from the direction of Kalmunai which is on the way to Kallar, and in the opposite direction in the evenings. He used to meet him in this way, he said, in 1949 and during a period of about 2 to 3 years before the middle of July, 1949. A village headman, who lives in a house thirty yards away from the appellant's office and within sight of it, also gave evidence to the effect that he had seen the appellant riding a bicycle in the direction of Kalmunai and away from his office in the evenings, and towards his office from the direction of Kalmunai in the mornings, and that he used to carry a suitcase on the luggage-carrier. The evidence of these two witnesses about the appellant's movements was not contradicted, but the appellant explained that in the period during which he had his office at Saindamaruthu, from 1944 to the time of the trial, he had his morning tea and dinner at a hotel in Kalmunai about a mile from his office, and that he would go there in the mornings at 6.30 or 7 and return to the office after his morning tea and go again for dinner at 5.30 or 6 p.m. and return at about 8 or 8.30 p.m. The learned Magistrate disbelieved this explanation.

The other witnesses who were called for the prosecution gave evidence to the effect that the appellant was a resident of Kallar. One was a retired teacher named Kanagasabai who had lived all his life at Kallar and the other was the Chairman of the Village Committee of Karavaku North. They gave evidence in June, 1951, and the former stated that at that time the appellant had been living in Kallar for 38 to 40 years, and the latter that to his knowledge he had been living there for about 12 years. Each of them had contested the appellant at a Village Committee election, and the appellant suggested that they had a grudge against him and that their evidence was false. According to him, from the time when he opened an office at Saindamaruthu in 1944 he slept either in the office or in the room adjoining it, and visited Kallar only on Sundays. The learned Magistrate has considered this evidence and the other evidence called for the defence upon which the appellant relied for corroboration of it, and he has accepted the evidence that during the period in question the appellant lived at Kallar and not at Saindamaruthu, and has disbelieved the appellant.

There is no ground for disturbing the learned Magistrate's findings on the questions of credibility of evidence that arose for his decision. The evidence accepted by him establishes beyond doubt that in the period 1st March to 15th July, 1949 (and indeed during the whole of the period

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November 1944, to May, 1951) the appellant was the tenant of two rooms at Saindamaruthu, one of which was used by him as his office and the other as quarters for his clerk, and that neither of them was used or intended to be used as a place of residence for himself, and further that his only place of residence was at Kallar. In my opinion the learned Magistrate's finding that at the material time the appellant failed to live at Saindamaruthu must be affirmed.

Mr. Nadesan also contended that the conviction is bad for the reason that there is no evidence that the appellant was not a proctor. I do not think that this case is distinguishable from the case of *Perkins v. Dewadasan*[1] where it was held that in a trial on a charge under section 41 of the Medical Ordinance No. 26 of 1927 (now section 39 of Cap. 90) the burden of proof on the issue as to whether the accused was a medical practitioner lay on the accused. There was no burden on the prosecution to prove that the appellant was not a proctor. The burden was on the defence to prove that he was.

The appeal is dismissed.

Appeal dismissed.

1953 *Present :* **Rose C.J.**

R. K. LANEROLLE, Appellant, *and* M. K. J. PERERA, Respondent

S. C. 1,140—M. C. Nuwara Eliya, 7,287

Stolen property—Assisting in concealing or disposing of it—Penal Code, s. 396.

The mere assisting in obtaining the return of stolen property, even if it were done with a view to protecting the original thief, does not fall within the ambit of section 396 of the Penal Code.

APPEAL from a judgment of the Magistrate's Court, Nuwara Eliya.

M. M. Kumarakulasingham, with *Christie Fernando*, for the 2nd accused-appellant.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

October 1, 1953. ROSE C.J.—

In this case the appellant was convicted of an offence contra section 396 of the Penal Code. The position would appear to be, and learned Crown Counsel does not dispute, that the motive of the 2nd accused in this matter was to obtain the return of the stolen blankets by the 1st accused,

[1] *(1938) 39 N. L. R. 337.*

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who admittedly had stolen them, to their lawful owner, with a view, no doubt, to preventing, if possible, the 1st accused from being prosecuted. While there can be no doubt that the conduct of the appellant in this case was foolish and indiscreet, it seems to me that the matter is covered by the principle that is explained in a case reported in *11 Criminal Law Journal of India at page 493*, where a section in identical terms with section 396 was under consideration and where it was held that the mere assisting in obtaining the return of stolen property, even if it were done with a view to protecting the original thief, does not fall within the ambit of this section. That being so, the appeal is allowed and the conviction quashed.

Appeal allowed.

1954 *Present :* **Swan J.**

ANDIYA VIDANE, Appellant, *and* I. JANSZE (Excise Inspector), Respondent

S. C. 1,077—M. C. Chilaw, 52,026

Excise officer—Power to release on bail an arrested person—Excise Ordinance (Cap. 42), ss. 7, 33 (1), 34, 37—Criminal Procedure Code, ss. 2, 36, 39.

An excise officer is not *prima facie* a peace officer. When he arrests a person without a warrant, under section 34 of the Excise Ordinance, he has no power under section 37 to release that person on bail.

Therefore, when an excise officer takes a bond from a surety in order to secure the arrested person's attendance in court, a Magistrate has no jurisdiction to forfeit that bond if the accused fails to appear.

APPEAL from a judgment of the Magistrate's Court, Chilaw.

G. E. Chitty, with *A. S. Vanigasooriar*, for the surety appellant.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 13, 1954. SWAN J.—

This appeal raises an interesting question, namely whether an Excise Inspector can take from a person whom he has arrested a bond in order to secure his attendance in court and whether a Magistrate can forfeit that bond if the accused fails to appear.

Excise Inspector Jansze of Chilaw had arrested one Devadasan on a charge of possessing an excisable article. He then took a bail bond from Devadasan and the appellant by which Devadasan undertook to

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appear and the appellant bound himself as surety to produce Devadasan in court on 23.4.52 to answer the charge against him. The accused failed to appear, and the appellant was noticed to show cause why his bail bond should not be forfeited. Mr. Vanderkoen appearing for him submitted that the Excise Inspector had no authority to release the accused on bail and that the court had no jurisdiction to forfeit the bond of the surety. The learned Magistrate however overruled the objection and forfeited the bond.

In the course of his order the learned Magistrate observed that the bond was voluntarily given. He also remarked that " most persons arrested would be so happy to get out on bail forthwith that they would not question whether the taking of bail was permitted or not ". But neither of these matters is really relevant to the point in issue. It may be that a bond given by an arrested person in circumstances like these could be enforced by the person to whom it was given. The question is whether the Magistrate's Court had jurisdiction to forfeit it.

That the Inspector had the right to arrest the accused without a warrant is beyond question. Section 34 of the Excise Ordinance makes that quite clear. As the offence was bailable the accused was entitled to be released on bail. If Mr. Jansze was a Peace Officer he could have released the accused either on his own bond or on bail. Section 36 of the Criminal Procedure Code provides that a peace officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein mentioned as to bail take or send the person arrested before a Magistrate having jurisdiction in the case, and section 39 provides that no person who has been arrested by a peace officer shall be discharged except on his own bond, or on bail, or under the special order in writing by a Magistrate.

The crux of the question, therefore, is whether an Excise Officer can be equated to a peace officer. In section 2 of the Criminal Procedure Code the expression " peace officer " is said to include Police Officers and Headmen appointed by a Government Agent to perform police duties. In the Excise Ordinance an Excise Officer is stated to mean a Government Agent, Assistant Government Agent or an officer or other person appointed or invested with powers under Section 7. So that an Excise Officer is not *prima facie* a peace officer. We must therefore see whether there is anything in the Excise Ordinance which can be construed as conferring upon Excise Officers the power, authority, rights or obligations of peace officers.

Section 33 (1) of the Excise Ordinance provides :—

> " Within such specified area as the Minister by notification may direct any excise officer not below such rank as the Minister may prescribe shall, within the limits of the area to which he is appointed, and as regards all offences under this Ordinance, exercise the powers that may be exercised in respect of cognizable offences by an inquirer, or by an officer in charge of a police station, under the provisions of Chapter XII of the Criminal Procedure Code."

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Admittedly no notification has been made under this Section. But the learned Magistrate upon an interpretation of section 37 took the view that an Excise Officer by necessary implication is invested with all the powers of a peace officer. Now Section 37 reads as follows :—

> " The provisions of the Criminal Procedure Code, relating to arrests, searches, search warrants, the production of persons arrested, and the investigation of offences shall be held to be applicable to all action taken in these respects under this Ordinance."

The learned Magistrate's reasoning is that inasmuch as section 37 of the Excise Ordinance makes the provisions of the Criminal Procedure Code applicable it follows that section 36 of the Criminal Procedure Code which provides for what is to be done to a person arrested must be read in Excise cases to read as if it was " *an Excise Officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions hereinafter mentioned as to bail take or send the person arrested before the Magistrate having jurisdiction in the case* ".

I am unable to agree with this view for the simple reason that while section 37 of the Excise Ordinance refers to the production of persons arrested it does not mention the taking of bail or the release of arrested persons on their own bond or on bail.

Mr. Chitty suggests that the legislature apparently did not think it prudent to give Excise Officers the power to release arrested persons on bail. He also points out that in Excise Stations there are no lock-ups so that if an arrested person does not choose to give bail or sign a bond the officer who arrests an offender would not know what to do with him till he is produced in court. In this connection he drew my attention to section 66 of the Police Ordinance which provides that every person taken into custody by a police officer without a warrant shall forthwith be delivered into the custody of the officer in charge of the station *in order that such a person may be secured until he may be brought before a Magistrate to be dealt with according to law.*

There may be something in Mr. Chitty's suggestion but there is no doubt in my mind that inasmuch as section 37 makes no reference at all as to the applicability of the provisions of the Criminal Procedure Code with regard to releasing arrested persons on their own bond or on bail, Excise Officers who arrest persons without a warrant have no power to release them on bail.

The order forfeiting the bond of the appellant is set aside. If the amount forfeited has already been paid it will be refunded.

Appeal allowed.

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1954 *Present :* **Gratiaen J. and Gunasekara J.**

BANK OF CHETTINAD, Appellant, *and* MUNICIPAL COUNCIL OF COLOMBO, Respondent

S. C. 329—D. C. Colombo, 22,991

Municipal Councils Ordinance, No. 29 of 1947—Sections 236 (1) and 325 (1)—Annual value of premises—Scope of assessee's objection to assessment—Principles applicable in assessing annual value—Relevancy of economic factors of supply and demand—Rent Restriction Act, No. 29 of 1948.

When the annual value of a house is assessed for rating purposes, the owner may, under section 236 (1) of the Municipal Councils Ordinance, institute an action against the Municipal Council to have the annual value increased so that the premises may be taken outside the scope of the Rent Restriction Act.

In assessing the annual value of premises which, at the time of assessment, are not rent-controlled, the proper test of " annual value " as defined in section 325 (1) of the Municipal Councils Ordinance is what a man of ordinary prudence and foresight, who has duly advised himself as to the state of the market existing at the relevant time, would offer to pay as rental for the premises rather than fail to obtain the tenancy. The test prescribed is concerned only with the reasonableness of the expectation that a certain rent would be obtained in a commercial transaction ; the " fairness " of the bargain is irrelevant.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *G. T. Samarawickreme*, for the plaintiff appellant.

E. G. Wikramanayake, Q.C., with *N. Nadarasa*, for the defendant respondent.

Cur. adv. vult.

April 2, 1954. GRATIAEN J.—

The appellant Company owns four residential bungalows, precisely similar to one another in all respects, which were erected in Park Road, Havelock Town, Colombo, during the year 1949. After their completion, the respondent Council served a notice on the appellant under the Municipal Councils Ordinance, No. 29 of 1947, assessing the " annual value " of each bungalow for rating purposes at Rs. 1,245. The appellant objected to the assessments and instituted this action against the Council to have the annual value increased in each case to Rs. 2,100.

2——J. N. B 35520—1,590 (5/54)

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An issue was raised at the trial as to whether the action was maintainable, the Council's argument being that the appellant could not properly claim to be " aggrieved " by the assessments within the meaning of section 236 (1) of the Ordinance. If (so it was contended) the assessments were in fact too low, the appellant stood to gain financially by the under-assessments. Under normal circumstances, this argument would no doubt have carried conviction. But in the present case, the foundation of the appellant's " grievance " was that the under-valuation complained of would have the consequence of bringing each bungalow within the scope of the Rent Restriction Act, No. 29 of 1948, whereas the correct assessments would have the opposite effect. It is therefore perfectly clear that the appellant had a pecuniary interest in securing assessments beyond the limit of statutory rent control. For these reasons, I agree with the learned Judge that this preliminary objection was without substance. It is interesting to note that in *R. v. Surrey (Mid-Eastern Area) Assessment Committee* [1] Lord Goddard C.J. explained that a " person aggrieved " for the purposes of the Rating & Valuation Act 1925 " must mean a person who considers that he is aggrieved ".

With regard to the merits of the dispute, the learned Judge took the view that the appellant had not discharged the burden of proving that the assessments were too low, and the action was accordingly dismissed with costs. The conclusion at which I have arrived is that the principle underlying the Council's assessments, as explained by its expert witness Mr. Ferdinands (a retired officer of the Assessor's Department), was erroneous, and that the undisputed evidence led at the trial justified the contention that the Council's valuations should be increased.

Section 325 of the Ordinance defines " the annual value " of rateable premises as " the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for (the premises) if the tenant undertakes to pay all public rates and taxes, and if the landlord undertakes to bear the cost of repairs, maintenance and upkeep, if any, necessary to maintain the (premises) in a state to command that rent ".

These words have been authoritatively interpreted in the English Courts in rating cases. For instance,

1. " The directions given by the Act are equivalent to saying that one must look to all possible tenants, and the phraseology does not exclude an owner who himself occupies the premises "—*per* Lord Esher in *R. v. School Board of London* [2].

2. " Although the tenant is imaginary, the conditions in which his rent is to be determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time when the valuation is made "—*per* Lord Buckmaster in *Poplar Assessment Committee v. Roberts* [3].

[1] *(1948) 1 All E. R. 856 at 858.* [2] *(1886) 17 Q. B. D. 538 at 740.*

[3] *(1922) 2 A. C. 93 at 103.*

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3. "The hypothetical rent which the (hypothetical) tenant would give is estimated with reference to the hereditament in its actual physical condition (*rebus hic stantibus*), and a continuation of the existing state of things is *prima facie* to be presumed "—*per* Lord Maugham in *Townley Mill Co. (1919) Ltd. v. Oldham Assessment Committee* [1].

The acute shortage of residential accommodation in the city of Colombo under post-war conditions is so notorious that very little evidence, if any, would have been necessary to bring it to the formal notice of a Court of law, and there was no justification for assuming in 1949 that the situation would improve within a measurable distance of time. In the case of uncontrolled premises in particular, the landlord could virtually dictate his terms, and hardly any limit (beyond the limits of his own conscience) was placed on his ability to exact a bargain which under normal circumstances would have been impossible. In this context, at any rate, Colombo was certainly not the capital of Utopia.

The Council's expert disregarded the prevalence of these regrettable conditions, although he admitted that " if a house falls vacant, there are hundreds of prospective tenants to outbid one another. Because tenants are prepared to pay large sums in respect of premises, there is competition ". He further conceded that, but for the provisions of the Rent Restriction Act, controlled premises would also have been able to command far higher rents than they were doing in 1949. The evidence established that, by way of contrast, there had been no housing shortage in Colombo, and no such competition between prospective tenants bidding against one another for vacant bungalows before the year 1941.

This witness very candidly explained the formula which he had adopted for computing the annual value of the appellant's bungalows in November 1949 ; he took as his " yardstick " the annual value of *a (structurally) comparable pre-war bungalow which was subject to rent control legislation*, and merely added to that figure an allowance for the circumstance that a new bungalow (because it was new) could generally command a slightly higher rental than an older one. He was asked why no further allowance was made for the fundamental change which had taken place in the conditions of the market during the intervening period. To this question he succintly replied :

> " I am not concerned whether a (tenant) is willing to pay or not. I never assess the value on (that) basis. What I consider is whether it is *a fair rental*."

Far be it from me to condemn the philosophy which underlies this method of approach. But, in disposing of rating cases, a Judge or a Municipal Assessor must not be influenced by his individual predilections for " social engineering ". His duty is to administer the law as it has been enacted, and not the law which, in his private opinion, ought to be in force.

The proper test of " annual value " as defined in the Municipal Councils Ordinance, is what a man of ordinary prudence and foresight, who has duly advised himself as to the state of the market existing at

[1] *(1937) A. C. 419 at 436, 437.*

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the relevant time, would offer to pay as rental for the premises concerned *rather than fail to obtain the tenancy*. This formula is adapted from that laid down by the Privy Council for estimating the " value " of property in compulsory acquisition cases—*Pastoral Finance Association Ltd. v. The Minister* [1]. If the prevailing conditions lend themselves to the exploitation of prospective tenants by landlords, they cannot be excluded from consideration of the problem unless Parliament has stepped in to extend its protection to the hypothetical tenant. The test prescribed is concerned only with *the reasonableness of the expectation* that a certain rent would be obtained in a commercial transaction ; the " *fairness* " *of the bargain* is unfortunately irrelevant.

The evidence of another witness who was called by the Council revealed the true picture. Mr. A. O. Weerasinghe, a member of the Ceylon Civil Service, was appointed in June 1948 to assume duties in the office of the Ministry of Commerce, and from that time he had tried in vain to find suitable accommodation for himself and his family in Colombo. He applied for the tenancy of a Government bungalow, but failed. He advertised in the local press, but there was no response. In the result, he was put to the inconvenience and expense of living in Gampaha and travelling daily from there to his office in Colombo. Ultimately, he came to learn that the construction of the appellant's bungalows (to which these assessments relate) were nearing completion. Negotiations with the appellant Company followed, and on 7th September, 1949, he secured the tenancy of one of the bungalows in question at a monthly rental of Rs. 225, the terms of the contract providing that the landlord should pay the rates and taxes and meet the cost of all except minor repairs. At the time when Mr. Weerasinghe gave evidence on 13th January, 1951, he was still in occupation of the bungalow under this agreement. He explained that he was " almost compelled " to accept the situation because he was unable to find other suitable accommodation at a lower rental. He further complained that he did so " more or less under duress ", but such " duress " was in truth created only by the circumstances of the market, and was certainly not of a kind which would have entitled him to claim legal relief from the onerous terms of a contract of tenancy into which he had reluctantly but *voluntarily* entered.

Mr. Weerasinghe's experience was obviously characteristic of the difficulties encountered by innumerable other prospective tenants placed in a similar situation, and this transaction demonstrates that the rental which he had agreed to pay represented what the " hypothetical tenant " of rating law would " reasonably be expected " to be willing to pay for the bungalow rather than lose the tenancy. He was the victim of the ordinary laws of supply and demand, and the Ordinance gives us no option but to assess " annual value " by reference to those economic factors. We cannot ignore the realities of the situation prevailing at the time without also ignoring the requirements of the statute which it is our duty to obey.

I readily accept the proposition that " the actual rent paid is no criterion unless, indeed, it happens to be the rent that the imaginary tenant might reasonably be expected to pay in the circumstances

[1] *(1914) A. C. 1083.*

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mentioned in the section (which defines 'annual value') "—*Poplar Assessment Committee v. Roberts* (*supra*). The reason is obvious. In one case, the rent which a landlord actually receives might be only nominal, because the tenant is a friend, a relative or an employee ; in another case, it might well exceed the true annual value because it " includes the price paid for the goodwill of the business previously carried on there "—*Ryde on Rating* (8th Ed.), p. 231. But where, as happened in the case of Mr. Weerasinghe, the rental agreed upon was referable solely to " the higgling of the market ", it affords very valuable material from which the true annual value can be assessed. Mr. Ferdinands himself conceded, during the closing stages of his cross-examination, the force and relevancy of the following observations in *Witton Booth's Valuations for Rating* (1947 Ed.), p. 125 :

> " To be proper evidence of value, a rent should be determined exclusively by those economic factors which would influence the hypothetical tenant in his negotiations with the hypothetical landlord. One of the principal factors governing all rental values is the ordinary law of supply and demand. This scarcely needs emphasis at a time like the present, when post-war conditions have so materially increased the letting value of houses, *and particularly those not under the control of the Rent Restriction Acts.*"

The error into which the learned judge has fallen in upholding the assessments made by the Council was that he attached too much weight to the circumstance that the maximum rental of certain bungalows in the city (no doubt comparable to the appellant's bungalows in respect of accommodation and attractiveness) happened to be controlled by the provisions of the Rent Restriction Act. He therefore decided that the appellant's buildings should be similarly controlled. Hence the confusion between (1) the sum which an unprotected hypothetical tenant would reasonably be expected to pay *in fact* for a bungalow which was not rent-controlled, and (2) the maximum " fair rental " which the landlord *ought to be compelled to accept* for such a bungalow.

In England, Bankes L.J., whose minority judgment in the Court of Appeal in the *Poplar Assessment Committee's case* (*supra*) was expressly approved by the House of Lords, pointed out that, *even in the case of rent-controlled houses :*

> " Although the Rent (restrictions) Act 1920 may *affect* the rateable value, it does not *fix* the rateable value "—(*1922*) *1 K.B. 25 at 44.*

It is unnecessary for the purposes of this appeal to decide whether, (and if so, to what extent) the annual value of rent-controlled premises in Ceylon can ever be assessed at more than the authorised rent. Suffice it to point out that, in the present state of the law, no artificial restrictions are permissible in the case of premises which, *at the time of assessment*, are not rent-controlled.

In the present case, there was also evidence of the rental paid in the immediate locality by tenants for comparable bungalows which were not rent-controlled. In 1948 another landlord had constructed four

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bungalows in Park Terrace, Havelock Town, each of which Mr. Ferdinands (in his official capacity) had originally assessed, by the application of his "fair rental" method of valuation, at Rs. 1,385 *per annum* (as against Rs. 1,245 *per annum* for the appellant's bungalows). In consequence of an appeal by the landlord concerned, the (then) Municipal Commissioner increased the annual value of those bungalows to Rs. 2,250 and according to the evidence, the actual monthly rental subsequently paid for each of them varied between Rs. 240 and Rs. 300—i.e., a little more than Mr. Weerasinghe had agreed in 1949 to pay for one of the bungalows with which this action is concerned.

The learned Judge rejected the argument that these four bungalows in Park Terrace were suitable standards for comparison because he felt that there seemed to be "a certain amount of suspicion" attaching to those particular assessments. There is no evidence on the record to justify any such vague suspicion. Admittedly, the bungalows themselves were structurally and in other respects comparable to those with which this action is concerned, and the correctness of the (then) Municipal Commissioner's final assessments was confirmed by the rents which the landlord concerned actually received in a "landlord's market". The Council had not thought fit since 1948 to revise the assessments of these bungalows under section 239 of the Ordinance.

In my opinion the concrete evidence of the rents paid by the tenants of comparable bungalows which are not rent-controlled and by the tenant of one of the appellant's bungalows under assessment made it quite unnecessary to seek a solution by reference to the controversial and less reliable calculations suggested by the experts who applied the "contractor's test" or the "square foot method". The Council's assessments must be rejected because they were based on a principle of computation which ignored the realities of the prevailing market for vacant bungalows. The definition of "annual value" in the Municipal Councils Ordinance of 1947 has not been subjected to statutory modification by the provisions of the Rent Restriction Act, 1948.

I would allow the appeal with costs in both Courts, and direct that the annual value of each bungalow to which the action relates should be assessed at Rs. 2,100. These bungalows, according to the admitted evidence, could reasonably have been expected to command only a slightly lower rental than those paid during the relevant period for the bungalows in Park Terrace, Havelock Town, whose assessments still stand at Rs. 2,250 *per annum* per bungalow.

The present state of the law is no doubt calculated in many cases to expose prospective tenants of uncontrolled premises to exploitation. Whether the law should be amended is for Parliament, and not the Courts, to decide.

GUNASEKARA J.—I agree.

Appeal allowed.

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1954

Present : **Gratiaen J.**

A. H. M. SIDEEK, Appellant, *and* A. R. M. SAINAMBU NATCHIYA, Respondent

S. C. 87—C. R. Kalutara, 1,604

Lessor and lessee—Expiration of notarial lease—Right of lessee to continue in occupation as statutory tenant—Duty to pay rent as it falls due—Tender of rent —Instance when it is not necessary—Rent Restriction Act, No. 29 of 1948, ss. 13 (1) (a) and 14.

A tenant who enjoys, under the Rent Restriction Act, a statutory right of occupation notwithstanding the termination of the earlier contract of tenancy must continue to pay " rent " at the original monthly rate ; if he fails to honour this obligation and is in arrear of " rent " for one month after it has become due, section 13 (1) (*a*) may be brought into operation to eject him.

A tenant need not formally tender payment of rent due when the landlord has in anticipation refused to accept it.

APPEAL from a judgment of the Court of Requests, Kalutara.

H. W. Jayewardene, with *A. C. M. Uvais*, for the defendant appellant.

H. W. Tambiah, with *S. Sharvananda* and *A. M. Ameen*, for the plaintiff respondent.

Cur. adv. vult.

April 8, 1954. GRATIAEN J.—

This is an action for the ejectment of a tenant from premises to which the Rent Restriction Act, No. 29 of 1948, applies.

The plaintiff had placed the defendant in occupation of the premises as her tenant under the terms of a notarial lease for a period of three years commencing on 1st February, 1949. The agreed rent of Rs. 1,000 for the entire period of three years was paid in advance.

Under the general law, the lease automatically expired by effluxion of time on 31st January, 1952, and the plaintiff had taken the additional precaution of serving a notice on the defendant calling upon him to quit on that date because " she required the premises thereafter *for the use of her sons* ". Nevertheless, the plaintiff's cause of action was postponed until she could prove that one or other of the conditions laid down by section 13 of the Act had been satisfied.

A Divisional Bench of this Court has authoritatively decided (1) that the protection of the Act is equally applicable where the tenant's contractual rights of occupation, having been created *under a notarial lease*, come to an end, and (2) that in rent restriction legislation the word " tenant " must generally be construed as including " a person who has at one time occupied the position of a tenant, even though at the time of action the tenancy was no longer in existence "—*Guneratne v. Thelenis* [1].

[1] *(1946) 47 N. L. R. 433.*

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The present action was instituted on 5th April, 1952, i.e., two months and six days after the termination of the notarial lease. The plaintiff claimed that the provisions of section 13 were satisfied because :

(1) she reasonably required the premises " for her own trade and business " within the meaning of section 13 (1) (*c*) ; and
(2) the rent had been " in arrears for one month after it had become due " within the meaning of section 13 (1) (*a*).

On both these grounds she asked for a decree of ejectment, and for damages from 1st February, 1952, at the rate of Rs. 27·69 *per mensem*.

With regard to the first ground relied on by the plaintiff, the evidence clearly established that she required the premises for a proposed trade or business *on behalf of her sons and not for her own purposes*. Section 13 (1) (*c*) does not work a forfeiture of the statutory rights of the tenant in such a case.

As for the second ground relied on by the plaintiff, the learned Commissioner held that the defendant had lost his statutory protection by (at the latest) the end of March, 1952, because he had neither paid nor tendered the " rent " for the previous month—i.e., after the contract had been terminated. He accordingly ordered a decree for ejectment.

It is a nice question whether a so-called " statutory tenant " whose contractual rights have come to an end can fairly be said to be under an obligation to pay " rent " within the meaning of section 13 (1) (*a*). As it is now settled law that in many contexts the word " tenant " in the Act includes a statutory tenant, I certainly find it difficult to imagine that Parliament could have intended to place such a protected person (in regard to the making of regular payments for his continued occupation of the premises) in a more favourable position than he had previously enjoyed under the terms of the contract. It is for this reason that in England section 15 of the corresponding Act of 1920 provides that a statutory tenant must, in order to retain his statutory protection, observe all the terms of the original contract. The local Act is, however, silent on this all-important point, although section 14 expressly provides for a revival (both prospectively and retrospectively) of the earlier contractual rights and occupation *after an action for ejectment has been dismissed*. Possibly, the remedy lies in a " broad, practical common-sense interpretation so as to effect the intention of the legislature "—*Read v. Goater* [1].

It seems to me implicit in the Act that, so long as a tenant enjoys a statutory right of occupation notwithstanding the termination of the earlier contract, a statutory obligation is imposed on him to pay monthly " rent " *at the original contractual rate ;* and if he fails to honour this obligation, section 13 (1) (*a*) may be brought into operation to deprive him of the protection which he had previously enjoyed. In the case of an ordinary monthly tenancy, the amount payable as monthly " rent " and the date it falls due can be ascertained without much difficulty. In a case such as the present, however, the problem is less easily solved, but is not incapable of a reasonable judicial solution should the parties fail to agree as to the measure of their mutual rights and obligations.

[1] *(1921) 1 K. B. 611 at 615.*

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I am satisfied that the defendant was liable to pay or at least to tender to the plaintiff statutory " rent " for February 1952, and succeeding months at the rate of Rs. 27·77 *per mensem* (i.e., calculated by dividing the previous contractual rent of Rs. 1,000 for three years by 36) in order to keep his statutory protection intact. Although no such payments were actually made even at the end of the relevant month, I have come to the conclusion that, upon the evidence, the defendant was still entitled to claim his statutory protection. Let me explain why.

During the months of February and March, 1952, frequent discussions took place at which the defendant consistently asked to be permitted to remain in occupation on payment of the original rental or an even higher rental, but the plaintiff's husband (who was acting on her behalf) made it clear that she insisted on being restored to possession immediately for the benefit of her sons.

Having examined the evidence, I am perfectly satisfied that the defendant had expressed his willingness to pay the rental for February, 1952, and for succeeding months, and that he would have done so except for the fact that the plaintiff's husband made it clear that no payment of any kind would be accepted (for fear, no doubt, that acceptance might prejudice the result of the contemplated proceedings for ejectment). After the action commenced, the defendant has regularly brought into Court the amounts which the plaintiff claims as " rent " for each month.

A formal tender of payment is not necessary where the creditor in anticipation refuses to accept it—*Wessels : Law of Contract, Vol. 1, p. 706, para. 2341.* A " refusal in anticipation " is the only reasonable inference which can be drawn from the attitude adopted by the plaintiff's husband during his negotiations with the defendant who, to his knowledge, was perfectly willing and able to pay Rs. 27·77 *per mensem* (or even more) for his continued occupation either as contractual tenant under a fresh agreement or in the alternative as a statutory tenant protected by the Rent Restriction Act.

I allow the appeal and dismiss the plaintiff's action with costs in both Courts. The plaintiff is however entitled to a payment order for all sums deposited as " rent " by the defendant during the progress of the action.

Appeal allowed.

1954 *Present :* **Pulle J. and K. D. de Silva J.**

K. L. PREMATHIRATNE *et al.*, Appellants, *and* N. ELO FERNANDO *et al.*, Respondents

S. C. 117—D. C. (Inty.) Negombo, 15,656

Partition action—Improvements made by a co-owner—Limits of their relevancy in allotting shares.

Although, in a partition decree, a co-owner should, whenever possible, be given the lot which carries his improvements, this principle should not be adhered to if, in the process of giving effect to it, substantial injustice is likely to be caused to the other co-owners.

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Where, however, improvements made by one co-owner fall within the portion allotted to another co-owner the latter should pay compensation to the former in respect of the improvements.

APPEAL from an order of the District Court, Negombo.

Sir Lalita Rajapakse, Q.C., with *M. L. S. Jayasekera*, for the plaintiffs appellants.

N. E. Weerasooria, Q.C., with *D. S. Jayawickreme* and *K. C. de Silva*, for the defendants respondents.

Cur. adv. vult.

January 28, 1954. K. D. DE SILVA J.—

This is a partition action The learned District Judge after trial ordered that an interlocutory decree for partition be entered. The two plaintiffs are jointly entitled to $\frac{3}{4}$ths of the land. The remaining $\frac{1}{4}$th share is allotted to the 2nd and 3rd defendants subject to the life-interest of the 1st defendant and to the conditions set out in certain deeds. The corpus to be partitioned comprise lots 1 to 6 shown in plan X filed of record. The extent of the land amounts to a little over 44 acres. The whole land is very marshy, particularly lot 1 shown in plan X. Admittedly the most valuable portion of the land consists of lots 2 and 3. At the trial the defendants sought to establish that on their chain of title they were entitled to the northern $\frac{1}{4}$th share of the land. There was also a contest between the plaintiffs on the one hand and the defendants on the other in regard to the ownership of the plantations of 25 years and under. The learned District Judge accepted the claim of the defendants to these plantations. In regard to the northern $\frac{1}{4}$th share of the land, he rightly, if I may say so with respect, held against them.

The young plantations allotted to the defendants stand on lots 2 and 3. In his judgment the learned District Judge observed " it will be reasonable for the Commissioner to allot a share to the defendants towards the north so as to include these plantations " at the partition. It is against this observation, which almost amounts to a direction, that the plaintiffs have appealed. Lot No. 2 contains 20 coconut trees of the old plantation and 12 trees of the young plantation allotted to the defendants. On Lot 3 the number of coconut trees of the old plantation amounts to 54, while it also contains 12 coconut trees allotted to the defendants. As to whether these young plantations belonging to the defendants stand on a defined section of these two lots or not it is not clear. The probabilities are that these trees are interspersed with the old trees. In that event, according to the mild direction given by the learned District Judge, the entirety of these two lots are likely to be allotted to the defendants.

It is true that wherever possible a co-owner should be given at the partition a lot which carries his improvements. This principle, however, cannot be adhered to in all circumstances. If in the process of giving effect to that order substantial injustice is likely to be caused to the other co-owners, the principle should not be adhered to. According to the Surveyor's report, most of the coconut trees standing on this land are

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stunted. That is not strange in view of the marshy nature of the soil. In regard to lots 2 and 3 it would appear what is more valuable is not the plantations but the soil itself. Out of the total number of trees standing on those two lots, the greater number would belong to the plaintiffs, as they are entitled to $\frac{3}{4}$th share of the land. It is also in evidence that the land immediately to the north of these two lots also belong to the plaintiffs. Taking all these facts into consideration, it would be unjust to allot these two lots or the greater part of them to the defendants who are entitled to only $\frac{1}{4}$th share of the land. Therefore, I would direct the Commissioner to allot the northern $\frac{3}{4}$th share of lots 2 and 3 to the plaintiffs and the southern $\frac{1}{4}$th share to the defendants. The line of demarcation is to run from the eastern boundary of lot 3 to the western boundary of lot 2 in a straight line. If any trees belonging to the plantations allotted to the defendants fall within the lot given to the plaintiffs, the defendants would be paid money compensation in respect of those trees. The Commissioner is directed to partition the other lots in the most equitable manner in his opinion.

The Interlocutory Decree is to be amended in terms of this Order.

The defendants will pay to plaintiffs fifteen guineas as costs of this appeal.

PULLE J.—I agree.

Decree amended.

1953 *Present :* **Pulle J.**

EBERT SILVA BUS CO., LTD., *et al.*, Appellants, *and* COMMISSIONER OF MOTOR TRANSPORT, Respondent

S. C. 62 and 79—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 6 (2), 7, 14 (3)—Tribunal of Appeal—Scope of its jurisdiction.

Under section 14 (3) of the Omnibus Service Licensing Ordinance it is not open to a Tribunal of Appeal to grant a road service licence to a party to run along a particular route when there is no appeal for such a route before the Tribunal.

If the Tribunal of Appeal agree with the termini and the line of a route selected by the Commissioner but are confronted with an insurmountable obstacle raised by section 7, they should leave it to the Commissioner under section 6 (2) to vary the conditions attached to an existing licence. It is essential that where the statute expressly states that a function is to be performed by the Commissioner it should be left to him in the first instance to come to a decision.

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CASES stated under the Omnibus Service Licensing Ordinance.

N. E. Weerasooria, Q.C., with *N. M. de Silva* and *W. D. Gunasekera*, for Ebert Silva Bus Co., Ltd.

C. Thiagalingam, Q.C., with *S. E. J. Fernando*, *P. Somatilakam* and *T. Parathalingam*, for the High Level Bus Co., Ltd.

Stanley de Zoysa, with *C. Manohara*, for the Gamini Bus Co., Ltd.

H. V. Perera, Q.C., with *H. W. Jayewardene* and *A. C. M. Uvais*, for the South-Western Bus Co., Ltd.

V. Tennekoon, Crown Counsel, for the Commissioner of Motor Transport.

Cur. adv. vult.

September 11, 1953. PULLE J.—

I have already dealt in my judgments on routes Nos. 1, 2 and 3 with the events which preceded the selection by the Commissioner of Motor Transport of these routes. At the same time the Commissioner selected the fourth route with which we are concerned in this case. Torrington Square at or near which a number of Government offices have come into existence is the focal point of this route. The Commissioner thought that in the interests of all concerned Torrington Square should be linked with Maradana and Pettah. Bambalapitiya as a possible terminus which would benefit travellers on the coastal belt wishing to proceed to Torrington Square was not selected because they would be served by the Ceylon Omnibus Company's buses plying on route No. 1 from Bambalapitiya to Borella However, passengers from Maradana and Pettah had to be provided for and that was the Commissioner's reason for selecting route No. 4. It is obvious that passengers who had to go from Pettah or Maradana to Torrington Square had no interests of any kind in common with passengers from Nugegoda, Kohuwela or even Bambalapitiya. When it came to selecting an operator the Commissioner found that he could not grant a licence to any company without contravening section 7 of the Omnibus Service Licensing Ordinance, No. 47 of 1942. He thought he could find a partial remedy for the situation if the High Level Road Bus Company ran their Nugegoda-Pettah service *via* Reid Avenue or Torrington Square. He said he would allow that modification if High Level applied with an amended time table.

Appeals were taken to the Tribunal of Appeal by High Level who had made two applications, namely, one to provide a service from Torrington Square and Maradana *via* Torrington Place, Alexandra Place, Union Place and Darley Road and another from Bambalapitiya to Maradana Railway Station *via* New Bullers Road, Bullers Road, Torrington Place, Alexandra Place, Eye Hospital junction, Union Place and Darley Road. An appeal was also taken by Ebert Silva Omnibus Company, Limited,

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who had made an application from Bambalapitiya Railway Station–Maradana *via* New Bullers Road, Bullers Road, Torrington Square, Alexandra Place, Eye Hospital junction and Deans Road.

The Tribunal did not grant either of the appeals of High Level or that of Ebert Silva but found a solution of their own to meet the needs of Torrington Square. They ordered that the Kohuwela–Pettah service of Gamini which runs through Deans Road be deviated at the Bullers Road roundabout to Torrington Square to rejoin the normal Pettah service at about Torrington Place. The Tribunal did not desire to increase the number of Gamini buses on the Pettah service to meet the needs of Torrington Square for fear of increasing congestion on Deans Road. The Chairman considered the claims of High Level but thought that Gamini had a slight advantage because its buses took passengers right past Maradana Railway Station itself. There are two cases stated in connexion with route No. 4. They are Supreme Court No. 62 at the instance of Ebert Silva and No. 79 at the instance of High Level.

I have heard in regard to route 4 a good many of the arguments which were urged in support of the respective claims of Ebert Silva, Gamini and High Level to route No. 2. It is not necessary to repeat them or to express an opinion on their value for the purpose of deciding the cases stated. Counsel for Ebert Silva and High Level submitted that the decision of the Tribunal was *ultra vires* and that the order made by them should be set aside. Crown Counsel appearing for the Commissioner supported them. The question is set out succinctly in paragraph (5) of the grounds which High Level wanted to be stated for the opinion of the Supreme Court :

" Whether the Tribunal was justified in granting to the Gamini Bus Company, Limited, a licence to run from Kohuwela to Pettah *via* Torrington Square, Deans Road and Maradana when there was no appeal for such a route before the said Tribunal."

I have already set out details of the licences applied for by High Level and Ebert Silva. Gamini made three applications, one from Pettah to Bambalapitiya Railway Station *via* Torrington Place and Torrington Square, another from Bambalapitiya Railway Station to Maradana Railway Station *via* Torrington Square and Torrington Place and a third from Torrington Square to Eye Hospital *via* Thurstan Road and Cambridge Place. On a consideration of the six applications referred to and the proceedings before the Commissioner it is obvious that the Tribunal did not have before them any appeal for a route from Kohuwela to Pettah *via* Torrington Square or, for that matter, any appeal involving the variation of the conditions of the licence for the Kohuwela–Pettah run of Gamini's. While the Commissioner selected route No. 4 he found that section 7 stood in the way of finding an operator. In appeal it was perfectly competent for the Tribunal to have selected within the ambit of the applications (or reasonable modifications thereof) a route different to the Commissioner's selection. What the Tribunal did was to travel completely outside in search of an expedient, undoubtedly, with the best of intentions. If the Tribunal agreed with the termini and the line of the route but were confronted with an insurmountable

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obstacle raised by section 7, they should have left it to the Commissioner under section 6 (2) to vary the conditions of an appropriate licence that would meet the need of transporting passengers to and from Torrington Square. It is essential that where the statute expressly states that a function is to be performed by the Commissioner it should be left to him in the first instance to come to a decision. The variation of the Kohuwela–Pettah service or any other service, if such was necessary, should properly have been considered by the Commissioner. If he did decide to vary the conditions it seems doubtful whether anyone else, except the holder of the licence and the Commissioner, had any *locus standi* before the Tribunal.

It was argued that the Tribunal could justify its order under section 14 (3) of the Ordinance. I cannot agree. What the Tribunal did in effect was to vary an existing licence and not to grant a licence substantially for a route applied for by Gamini.

It is clear that the point of jurisdiction raised by Ebert Silva and High Level must succeed and I answer the question on that point in the two cases stated in favour of these companies and set aside the order of the Tribunal.

It must be understood that I express no opinion on the relative merits of the competing claimants. I understand that the legal difficulties which stood in the way of the Commissioner finding an operator to serve on route No. 4 do no longer exist—section 55 of the Motor Traffic Act, No. 14 of 1951.

As agreed I reserve for further argument what order for costs I should make.

Order of Tribunal of Appeal set aside.

1954 *Present :* **K. D. de Silva J.**

S. BOTEJU *et al.*, Appellants, *and* MOORTHY (S. I. Police), Respondent

S. C. 19–20—M. C. Colombo, 33,453

Criminal Procedure Code—Joinder of charges—Different offences committed in same transaction—Splitting up of charges—Indictable offence—Assumption of summary jurisdication by Magistrate—Adequate material a condition precedent for forming necessary opinion—Sections 152 (3), 178, 180.

Under section 180 of the Criminal Procedure Code it is not obligatory that all the offences committed by a person in the course of the same transaction should be tried at one single trial. The word "may" in the section renders possible, unless substantial prejudice is caused to the accused, the institution of separate cases in accordance with the general rule in section 178 which provides for separate trials for distinct offences.

Before a Magistrate assumes summary jurisdiction under section 152 (3) of the Criminal Procedure Code in respect of a non-summary case, there must be adequate material available to him to form the opinion that the case is one which may properly be tried summarily.

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APPEAL from a judgment of the Magistrate's Court, Colombo.

Colvin R. de Silva, with *P. B. Thampoe*, for the accused appellants.

V. S. A. Pullenayagam, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 28, 1954. K. D. DE SILVA J.—

The two accused-appellants are brothers. Between them and one Dharmadasa, who is also called "Navaloka Mudalali" there was considerable animosity. Shortly after 8.30 p.m. on November 12, 1952, Dharmadasa was driving his car along the Negombo road. Two other persons, namely, Simon and Julis were also travelling in the same car. When the vehicle approached the house of the appellants at Peliyagoda, it is alleged, the appellants rushed on to the road in front of the car each carrying a bomb or dashing-cracker. Then, according to the prosecution, the 1st appellant saying "ado Navalokaya, this is to kill you" flung the explosive at the car. Almost simultaneously the 2nd appellant did likewise. In the resulting explosion all the three occupants of the car were injured. Both Dharmadasa and Simon sustained injuries which endangered life while Julis received some minor abrasions and superficial punctures.

The two appellants were arrested by the Police the same night and they were produced before the Chief Magistrate, Colombo, on the following day. It would appear from the report furnished by the Chief Magistrate at the request of this Court that the appellants were produced before him as suspects on a report under Section 131 of the Criminal Procedure Code filed in M. C. Colombo case No. 33,293. The Magistrate remanded the appellants till 18.11.52 and on that day the Police filed a plaint against them, in this case charging them under Sections 317 and 315 of the Ceylon Penal Code in respect of the injuries caused to Simon and Julis. On 25.11.52 the Magistrate recorded the evidence of the sub-Inspector of Police, Peliyagoda, and decided to try this case summarily in terms of Section 152 (3) of the Criminal Procedure Code. On that occasion he was informed by the Police that a plaint would be filed in case No. 33,293 charging the appellants with the attempted murder of Dharmadasa and accordingly he sent that case before an Additional Magistrate to record non-summary proceedings. The plaint in that case was filed on 4.12.52.

The trial of the present case was concluded on December 23, 1952, and the learned Magistrate convicted both the appellants and sentenced them to two years' rigorous imprisonment on the charge under Section 317 of the Ceylon Penal Code and to six months' rigorous imprisonment on each of the 2 counts under Section 315 of the Ceylon Penal Code, the sentences to run concurrently. This appeal is from that conviction.

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The non-summary case in which the appellants were charged with the attempted murder of Dharmadasa came up for trial before the Supreme Court on November 30, 1953, and the jury brought in a verdict of not guilty and the appellants were accordingly acquitted and discharged.

At the argument of this appeal Dr. Colvin R. de Silva, the learned Counsel for the appellants, raised the following two points :—

(1) The appellants should not have been charged in two cases but they should have been prosecuted on one indictment.

(2) The Magistrate should not have assumed jurisdiction under Section 152 (3) of the Criminal Procedure Code as there was no material before him at that stage for the assumption of such jurisdiction.

In regard to the first point raised by him, Dr. de Silva conceded that it was not illegal to charge the appellants in two cases but he contended that to do so was unjust as the appellants were prejudiced in their defence. The general rule laid down in Section 178 of the Criminal Procedure Code is that for each distinct offence there should be a separate charge and every such charge should be tried separately. That section, however, makes provision for the joinder of charges mentioned, *inter alia*, in Section 180. According to Section 180, if in the course of the same transaction more offences than one are committed by the same person he *may* be charged with and tried at one trial for every such offence. The words used in this Section are " may be charged " and therefore it is clear that it is not obligatory that all the offences committed by a person in the course of the same transaction should be tried at one trial. That the injuries caused to Dharmadasa, Simon and Julis constitute distinct and separate offences cannot be denied. Therefore the institution of two cases in respect of these offences is in accordance with the general rule, making provision for separate trials for distinct offences, appearing in Section 178, and it also does not offend the terms of Section 180 which enable more offences than one committed in the course of the same transaction being tried together. It is true that it was this one act of throwing the explosives which caused the injuries on all the three persons. The evidence in support of all the charges would be the same. That the appellants could have been charged in respect of all the offences on one indictment must be conceded. That procedure would have been more convenient and less expensive to both parties. It would certainly have been more desirable in the circumstances of this particular transaction if the appellants were charged in respect of all the offences on one indictment. But I am not prepared to hold that the institution of two proceedings was unjust or caused prejudice to the appellants in their defence as submitted by their Counsel. In both cases the defence put forward and, in my view, the only defence available was one of mistaken identity. It was suggested by their Counsel that if the appellants had to stand their trial before a higher court after a non-summary inquiry, they had a better opportunity of knowing how the case stood against them, which would be a distinct advantage in the preparation of their defence. Assuming, but not conceding, that the summary trial placed the appellants at a disadvantage in the matter of their defence,

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any such disadvantage, in my view, is not one which could not have been overcome by due care and vigilance on the part of the appellants and their legal advisers.

On 25.11.52, when the Magistrate decided to try this case summarily, the appellants were represented by a Proctor. On that day no objection was taken either to a separate plaint being filed in respect of the injuries to Simon and Julis or to the assumption of summary jurisdiction by the Magistrate to try those offences. If any such objection had been taken, the Magistrate would, no doubt, have given his careful consideration to it. It was only in the address of the defence Counsel at the conclusion of the trial that any reference was made to two plaints being filed. Before that stage was reached, probably, it did not enter the minds of those who were in charge of the defence that separate trials would in any way be prejudicial to the appellants. An acquittal by the Magistrate in this case is likely to have strengthened the defence in the Supreme Court trial. That may probably have been the reason why no objection was taken to the splitting up of the charges or to the assumption of summary jurisdiction by the Magistrate. The prosecution was entitled in law either to file two plaints or to charge the appellants in one proceeding. Where two alternative procedures are available in law to the prosecution and one of them is more desirable than the other, the adoption of the latter cannot be held to be irregular unless substantial prejudice was caused to the accused as a result. As no such prejudice arises in this case, I hold that the first point raised by the appellants' Counsel fails.

The second submission made by the appellants' Counsel, that at the stage the Magistrate assumed jurisdiction under Section 152 (3) of the Criminal Procedure Code there was no material before him to hold that the facts were not complicated, merits serious consideration.

It is true that Section 152 (3) does not say on what material the Magistrate is to base his opinion that the case may properly be tried summarily, but it is undeniable that unless there is adequate material before him he cannot correctly form that opinion. Indeed, it is very desirable that when a Magistrate proceeds to act under Section 152 (3) he should state in writing on what material he decides to take that step. That would facilitate this Court, where the assumption of summary jurisdiction by the Magistrate is questioned, in deciding whether or not the Magistrate's opinion is well-founded. In the Divisional Bench Case of *Silva v. Silva* [1], the applicability of Section 152 (3) came up for consideration. There, in dealing with cases in which this section should not be resorted to, Middleton J. said " Any case which cannot be tried shortly and rapidly in point of matter and time, which involves any complexity of law, fact or evidence, and double theory of circumstances, a very difficult question of intention or identity or in which the punishment ought really to exceed two years, is one that is not properly triable summarily ".

Apart from the question of the suitability or otherwise of the application of Section 152 (3) in the circumstances of this case, I have come to the conclusion that there was no adequate material available to the Magistrate —at least the record does not show it—at the time he assumed summary

[1] *(1904) 7 N. L. R. 182.*

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jurisdiction, to form the opinion that the case is one which may properly be tried summarily. The Magistrate proceeded to record the evidence of the Sub-Inspector of Police and immediately thereafter he decided to assume jurisdiction under Section 152 (3). Obviously it is on this evidence of the Sub-Inspector of Police that he formed the opinion that the case was one which may properly be tried summarily. That evidence runs to only six lines and is entirely colourless. It is not possible to say on that evidence that any complicated question of fact would not arise in the case. It was held in the case of *Simon Wijeratne v. Ratnayake* [1] that a Magistrate was entitled to take proceedings under Section 152 (3) on a perusal of a Police report (B report) furnished in terms of Section 121 (2) of the Criminal Procedure Code. In the present case there is no reference to such a report, nor is one filed of record. Therefore, I hold that there was not sufficient material before the Magistrate to enable him to assume summary jurisdiction under Section 152 (3). Nor can it be rightly said that the facts are not complicated. Indeed, the verdict of the Jury in the non-summary case supports the contrary view. In these circumstances, the most desirable course to follow is to direct the Magistrate to take non-summary proceedings in the case. I set aside the convictions and sentence and order the Magistrate to take non-summary proceedings against the appellants.

Sent back for non-summary proceedings.

1952 *Present :* **Swan J.**

P. M. SILVA, Appellant, *and* L. B. M. J. PERERA, Respondent

S. C. 52—C. R. Kanadulla, 3,850

Execution—Mandatory decree—Application for enforcement of it—Separate action not maintainable—Damages claimable—Civil Procedure Code, ss. 334, 335, 344, 839.

A separate action cannot be maintained when it claims relief for which the appropriate remedy is an application for execution under section 334 of the Civil Procedure Code.

Ismail v. Ismail (1920) 22 N. L. R. 190, doubted.

Vindictive damages cannot be awarded under section 335 of the Civil Procedure Code in an application made under section 334 for enforcement of a mandatory decree.

APPEAL from an order of the Court of Requests, Kanadulla.

H. W. Tambiah, for the defendant appellant.

W. D. Gunasekera, for the plaintiff respondent.

Cur. adv. vult.

[1] *(1950) 51 N. L. R. 496.*

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November 7, 1952. SWAN J.—

This appeal raises an important question as to whether rules of Civil Procedure can be brushed aside in order that substantial justice may be done. Justice must always be done, it must always be substantial, but it must be done according to law.

Undoubtedly the recently introduced Section 839 of the Civil Procedure Code copied from Section 151 of the Indian Code states that :—

> " Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders *as may be necessary for the ends of justice*, or to prevent abuse of the process of the Court. "

But do the inherent powers of the Court extend so far as to ignore or set at nought the rules laid down in the Code ?

The facts relevant to this appeal are as follows. In case No. 3,523 of the Court of Requests of Kanadulla the plaintiff had sued the defendant for declaration of title to a right of cartway, for the removal of an alleged obstruction and for damages. That case was settled, and of consent decree was entered declaring the plaintiff entitled to a right of footpath from the point B to the point A marked in plan No. 4162 dated 20. 2. 50 and made by D. D. Gunasekera, Licensed Surveyor. The decree ordered the defendant to " remove the brick wall at the point B due south to a width of 3 feet to permit the plaintiff to enter his rear garden through the said gap ". The decree also provided that there should be no costs or damages.

On 10. 9. 51 the plaintiff instituted this action bearing No. 3,800 of the same Court pleading the decree in the earlier case and alleging that the defendant had refused to allow him the use of the footpath, and had failed and neglected to remove the brick wall as ordered and decreed.

The defendant filed answer admitting the terms of settlement and the decree in the earlier case but denying that he had failed to comply therewith. He denied that the plaintiff had suffered any damages, and specially pleaded that the decree was *res judicata* and precluded the plaintiff from claiming damages.

On the date of trial it was admitted that the defendant had removed the brick wall only on 12. 11. 51. There is a note in the record, apparently made by the learned Commissioner, that the only matters for determination were damages and costs. The case proceeded to trial on the following issues :—

1. What damages is the plaintiff entitled to as a result of the defendant refusing to remove the brick wall as agreed in case No. 3,523 ?
2. Was the plaintiff placed in possession of the footpath in terms of the decree in case No. 3,523 ?
3. Does the decree in case No. 3,523 operate as *res judicata* barring the plaintiff from claiming any damages ?

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Certain evidence was led for the plaintiff. The defence called no evidence, but authority was cited in support of the contention that the plaintiff was precluded from claiming damages, and the learned Commissioner reserved his judgment.

On 12. 12. 51 the learned Commissioner delivered an " order " in which he upheld the defendant's plea of *res judicata*, but proceeded to treat the action as an application under Section 334 of the Civil Procedure Code and purporting to act under Section 335, awarded the plaintiff a sum of Rs. 300 as " pecuniary loss " sustained by him by reason of the defendant's default in obeying the decree in case No. 3,523. In so doing the learned Commissioner said he was relying on *Ismail v. Ismail* [1]. In that case Bertram C.J. (with whom Sampayo J. agreed) held that when an action is brought claiming relief for which the appropriate remedy is an application under Section 334 the Court has power to deal with the action as though it were such an application.

The Indian case which was cited to the learned Chief Justice and which he followed as establishing a salutary principle was *Biru Mahata v. Shyama Churn Kawas* [2]. In that case a suit had been brought for restitution of property wrongly taken in execution of a decree in a previous suit. It was held that a separate suit did not lie because Section 244 of the Code (corresponding to Section 344 of our Code) required that all questions relating to the execution of a decree should be determined by order of the Court executing the decree and not by separate action. It should be noted that the District Munsif found for the plaintiff, and that it was only on appeal that the question was raised for the first time whether the suit was not barred by Section 244. The Appellate Tribunal took the view that inasmuch as the suit had been instituted in the Court which had jurisdiction to execute the decree in the previous suit it might be regarded as an application under Section 244.

I am doubtful whether the order made in *Ismail v. Ismail* [1] is correct. I have not been able to find a single case in which it has been followed. But assuming that the principle therein laid down is sound I find that the facts of that case are not even remotely similar to the facts that confront us here. In that case the defendant in the previous action had been ordered to effect certain repairs to a boiler within a specified period. The defendant failed to execute the repairs and the District Judge punished him for contempt of Court. The plaintiff then brought his second action claiming damages because the defendant had not complied with the order of the Court in the previous action. A preliminary issue was raised as to the maintainability of the second action and the District Judge answered this issue in the affirmative. On appeal it was held that the action could not be maintained. This Court also pointed out that the District Court had no power to punish the defendant for contempt. The case was sent back so that the District Judge might treat the action as though it had been an application under Section 334. I think this Court was merely indicating what was the plaintiff's appropriate remedy. What happened when the case went back to the lower Court I do not know. I imagine that action would have been taken in the earlier suit and not in the second suit which this Court held to be not maintainable.

[1] (*1920*) *22 N. L. R. 190.* [2] (*1895*) *22 Calcutta 484.*

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Even if the learned Commissioner felt in the present case that he was bound by the decision in *Ismail v. Ismail* [1] he should have made order dismissing this action and dealt with the plaintiff's claim for relief now transformed into an application under Section 334 in case No. 3,523.

In any event the order awarding the plaintiff Rs. 300 as "pecuniary loss" cannot be sustained. The award appears to me to be more in the nature of vindictive damages than *pecuniary loss* which must be strictly compensatory. The plaintiff himself gave no evidence. The only witness called was the plaintiff's conductor. Although he stated that great inconvenience and damage resulted from the defendant's act he did not set out any specific damage or pecuniary loss; and it transpired that the "great inconvenience" was that the lavatory labourer had to go through the house.

I set aside the order appealed from and direct that the plaintiff's action be dismissed. I would, however, make no order as to the costs of the action which was clearly misconceived, or of this appeal.

Order set aside.

1953 *Present :* **Swan J.**

W. SOMAWATHIE, Appellant, *and* E. JOHN FERNANDO, Respondent

S. C. 315—M. C. Rakwana, 28,063

Maintenance—Illegitimate child—Quantum of evidence.

Where a Magistrate dismissed an application for the maintenance of an illegitimate child without considering whether the defendant was the father of the child and solely on the ground that there was no evidence to prove that the child had been maintained by the defendant within one year of its birth—

Held, that the paternity of the child was a relevant factor in deciding the question whether or not the child had been maintained by the defendant.

APPEAL from a judgment of the Magistrate's Court, Rakwana.

M. M. Kumarakulasingham, for the applicant appellant.

A. L. Jayasuriya, with *B. E. de Silva*, for the defendant respondent.

[1] (*1920*) *22 N. L. R. 190.*

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March 13, 1953. SWAN J.—

I do not think that the learned Magistrate has approached this case from the correct angle. There were two questions he had to consider, namely, whether the defendant was the father of the child for whom the applicant asks for maintenance, and secondly, whether the defendant had maintained the child within one year of its birth. Instead of answering the first question, the learned Magistrate decided the case on the second, namely, that there was no evidence to prove that the child had been maintained within one year of its birth. The learned Magistrate seems to have entirely ignored the circumstance that paternity of the child was a relevant factor in deciding the question whether the child had been maintained or not because, if the defendant was in fact the father of the child, it would have been more probable than not that he would have maintained the child.

I set aside the order made by the learned Magistrate dismissing the application. The case will go back for retrial before another Magistrate. In the circumstance, I make no order as to the cost of this appeal.

Sent back for retrial.

1954 *Present :* **Gratiaen J. and Gunasekara J.**

FREDA WICKREMASINGHE, Appellant, *and* D. H. KIRIMUTTU *et al.*, Respondents

S. C. 80—D. C. Kegalle, 7,194

Kandyan Law—Kandyan widow—Diga *association with another man after death of husband—Forfeiture of her rights in former husband's property.*

A Kandyan widow (whose husband died before the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, came into operation) forfeits her life-interest in her husband's acquired property if, without contracting a valid marriage, she forms a *diga* association with another man.

APPEAL from a judgment of the District Court, Kegalle.

B. H. Aluwihare, with *W. D. Gunasekera*, for the 3rd defendant appellant.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the plaintiff respondent.

Cur. adv. vult.

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March 9, 1954. GRATIAEN J.—

The only question which calls for consideration in this appeal is whether a Kandyan widow (whose husband died before the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, came into operation) forfeits her life-interest in her husband's acquired property if, without contracting a valid marriage, she forms a *diga* association with another man.

In *Ukkubanda v. Heenmenika* [1] a Divisional Bench of this Court authoritatively decided that a Kandyan widow's remarriage in *diga* is visited with forfeiture of her rights over the acquired as well as the *paraveni* property of her former husband. It has now been argued that no such forfeiture takes place unless the subsequent *diga* association is regularised by formal registration as a marriage under the Kandyan Marriage Ordinance (Cap. 96). In my opinion, however, the *ratio decidendi* of *Ukku Banda's case* (*supra*) is of wider import.

As Garvin J. points out, the principle underlying the rule of forfeiture on remarriage is that it generally results in " the quitting of the family house by the widow . . . . involving a severance of the family tie ". Similarly, Dr. Hayley observes that " the essence of the offence seems to have been the departure from the home rather than the remarriage "—*Sinhalese Laws and Customs p. 359.* According to the *Niti Niganduwa*, a Kandyan woman's " marriage right " entitles her to be maintained and supported from the profits of her husband's property even after his death, but only so long as she retains her connection with the " home " into which she was admitted on her marriage.

It seems to me that the test which ought to be applied in cases of this kind is whether all the circumstances in which a widow has " quitted the family home " and formed a *diga* association with another man are sufficient to justify the inference that she thereby intended finally and completely to sever " the family tie " which previously subsisted. An analogy may be found, *mutatis mutandis*, in the cases where a person voluntarily abandons his existing place of domicile *animo non revertendi*, and, by permanently settling in another country, acquires a new domicile of choice.

If we apply this test to the facts of the present case, we find that, shortly after her husband Punchi Banda died in 1937, his widow Dingiri Menika returned to the home of her mother and her brothers in the village of Maneloluwa. Not long afterwards, she and a man called Ukkubanda formed an association which, though not registered as a formal marriage was intended (and has so far proved) to enjoy a permanent character. Ever since then, they have lived together in Ukkubanda's house in Bamunugedera as if they were man and wife, and three children have been born to them. Should their association, even at this late stage, be formally regularised under the Kandyan Marriage Ordinance, it would be recognised retrospectively as a valid *diga* marriage, and their children would be legitimated—*Dissanayake v. Punchi Menike* [2]. But,

[1] *(1928) 30 N. L. R. 180.* [2] *(1953) 55 N. L. R. 108.*

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in the meantime, the severance of her tie with the family of her former husband and the consequential forfeiture of her rights in respect of his property are already complete. Her position is in no way better than that of a Kandyan daughter who forfeits her paternal inheritance by " going out in *diga* " without contracting a valid marriage.

For these reasons, I am of the opinion that the appeal should be dismissed with costs.

GUNASEKARA J.—I agree.

Appeal dismissed.

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1954 *Present :* **Gratiaen A.C.J. and Gunasekara J.**

RALIYA UMMA, Appellant, *and* MOHAMED *et al.*, Respondents

S. C. 133—D. C. Galle (Testy.) 8,454

Will—Loss of original document—Presumption of destruction by testator—Protocol—Not a duplicate—Prevention of Frauds Ordinance, s. 6—Evidence Ordinance, s. 114.

If a will is shown to have been in the testator's possession, and is not forthcoming at his death, it is presumed to have been destroyed by him *animo revocandi*. The presumption is applicable even where the missing document is a joint will.

The protocol preserved by the attesting Notary under the provisions of the Notaries Ordinance cannot be regarded as an original document capable as such of being propounded.

APPEAL from a judgment of the District Court, Galle.

H. V. Perera, Q.C., with *M. I. M. Haniffa*, for the appellant.

S. Nadesan, with *M. Rafeek*, for the respondent.

Cur. adv. vult.

February 19, 1954. GRATIAEN A.C.J.—

Abdul Mohamed Kafee died on 2nd October, 1951, and the appellant, who is his widow, made an application to administer his estate under the terms of a notarially-attested joint will which they had admittedly executed on 21st May, 1949. The original of the will could not be produced, and the deceased's brother objected to probate. He relied on the presumption that the will had been destroyed *animo revocandi*, and asked instead for letters of administration on the footing of an intestacy.

It is common ground that after the will had been executed and attested, it was handed to the deceased and placed by him in an iron safe which was in his bedroom. He kept the key of the safe, although it may be accepted as true that the appellant herself had access to it from time to time.

If a will is shown to have been in the testator's possession, and is not forthcoming at his death, it is presumed to have been destroyed by him *animo revocandi*.—*Atapattu v. Jayawardena*[1]. "Whether this should be called a presumption of law or of fact does not seem material"—*per* Lord Davey in *Allen v. Morrison*[2]. In Ceylon, the correct view, I should imagine, is that it is a presumption based on the provisions of section 114 of the Evidence Ordinance.

[1] *(1921) 22 N. L. R. 497.*

[2] *(1900) A. C. 604.*

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The learned Judge expressly rejected that part of the appellant's evidence, which, if true, would have established that the disappearance of the will did not take place until after her husband's death. I see no reason for disturbing this finding of fact, and am therefore satisfied that the learned Judge properly applied the presumption relied on by the respondent, because the allegation that the respondent was given the key of the safe in connection with the funeral arrangements has been disbelieved. As the appellant herself did not destroy the will, the only person who could have done so during the testator's lifetime was the testator himself. The alternative theory of a fraudulent abstraction by the respondent after the testator died must be ruled out. I also accept the conclusion that the appellant has failed to rebut this presumption. No general rule can be laid down as to the nature of the evidence required to rebut such a presumption, and each particular case must be determined on the strength of the evidence laid before the Court which (whenever the presumption applies) must refuse probate unless it is "morally convinced that the will was not destroyed by the testator *animo cancellendi*"—*ex parte Slade*[1].

It has been suggested for our consideration (1) that there is no room for applying the presumption where the missing document is a *joint* will and (2) that in any event the protocol preserved by the attesting notary under the provisions of the Notaries Ordinance ought to be regarded as an original document capable as such of being propounded. I am unable to accept either proposition. A joint will, although it is contained in a single document, operates in truth as the separate wills of both executants (unless it purports to be the will of the first-dying only)—*Steyn on Wills p. 11.* It can be revoked unilaterally by either executant, *in so far as his own part of the will is concerned,* by any mode of revocation (including destruction *animo revocandi*) recognised by section 6 of the Prevention of Frauds Ordinance. If, therefore, the original joint will was traced to the possession of the first-dying executant during his lifetime but cannot be discovered after his death, there is room for applying the presumption that he was the person responsible for its destruction.

As to the argument concerning the protocol, I concede that a testator may, for greater security, execute his will in duplicate—either retaining both instruments himself, or retaining one and committing the other to the custody of someone else. In such cases, the disappearance of the duplicate retained by the testator would give rise to "various gradations of presumption" according to the circumstances of the particular case—*Jarman on Wills (8th Ed.) pp. 168–169.* But a protocol is not a duplicate in that sense, for it is intended only to serve as a formal authenticated record of the transaction in which the notary concerned had been professionally employed. Under our law, it is not an original document but only a copy of one.

I would dismiss the appeal with costs.

GUNASEKARA J.—I agree.

Appeal dismissed.

[1] *(1922) T. P. D. 220.*

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1954 *Present :* **Gratiaen A.C.J. and Gunasekara J.**

S. L. SUWARIS *et al.*, Appellants, *and* E. D. SAMARAJEEVA, Respondent

S. C. 471—D. C. Colombo, 5,778

Servitude—Habitatio—*Its precise nature—Grant to a person and "his heirs, executors, administrators and assigns"—Effect of such grant.*

If an owner of immovable property conveys it to A but, in the same instrument, purports to grant to B "the buildings" standing on it (exclusive of any soil rights), the instrument *prima facie* operates under the Roman Dutch law as a grant of the ownership of the land and buildings to A subject only to a personal servitude of *habitatio* in favour of B.

The servitude of *habitatio*, i.e., the right of inhabiting the house of another, is a personal servitude and terminates on the death of the grantee.

Where a servitude of *habitatio* was granted in favour of a husband and wife and "their heirs, executors, administrators and assigns"—

Held, (i) that two different personal servitudes were created, one of which was subsequently acquired by the immediate heirs of the first grantees. The term "heirs" in such a case is restricted to the first generation only, and so long as one of the heirs is alive the servitude is not terminated.

(ii) that the words "executors, administrators and assigns" must in the context, be regarded as "a notarial flourish".

(iii) that the servitude of *habitatio*, though "personal" in character, nevertheless confers on the *habitator* for the time being a real right and entitles him to bring a *rei vindicatio* action for the recovery of that right even against the true owner of the property.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, with *M. L. de Silva*, for the defendants appellants.

E. G. Wikramanayake, Q.C., with *O. M. da Silva*, for the plaintiff respondent.

Cur. adv. vult.

March 2, 1954. GRATIAEN A.C.J.—

Four persons (being the predecessors-in-title of the plaintiff) together with Mr. and Mrs. Suwaris (a married couple) at one time enjoyed various interests collectively comprising full *dominium* over a property situated in Wellawatte. Lot 195c depicted in survey plan P9 dated 26th June, 1921, is a divided allotment of that property.

Lot 195c was caused to be sold by the Municipal Council of Colombo for non-payment of rates in 1920, and it became absolutely vested free of all encumbrances in the Council, as purchaser, under a vesting certificate P8 dated 1st June, 1922.

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In 1929 the Council reconveyed Lot 195c to the six persons previously referred to for valuable consideration ; the intention of the Council (as expressed in the deed P6) was to restore to each grantee the title or interest which he or she claimed to have enjoyed in the property before the forfeiture for non-payment of rates had taken place. There is a recital in the conveyance P6 to the effect that (as jointly represented by all the grantees) the predecessors-in-title of the plaintiff had been co-owners of the property in certain specified shares, whereas Mr. and Mrs. Suwaris were only "*entitled to the house and outhouse exclusive of any portion of the land on which they stand*". The Council accordingly conveyed Lot 195c "*to the said grantees, their heirs, executors, administrators and assigns . . . . to hold the same in the manner hereinbefore particularised*".

Mr. and Mrs. Suwaris died before the present action commenced, leaving the defendants as their intestate heirs. The title of the other grantees ultimately passed to the plaintiff on 2nd August, 1949. Two months later he sued the defendants, who were admittedly in possession of " the house and shed " standing on Lot 195c, for a declaration of title to the entire property including the buildings, and also for ejectment. He admitted in paragraph 22 of his plaint that Mr. and Mrs. Suwaris were during their lifetime " entitled to the said house ".

Lot 195c is only 21·64 perches in extent, and has been valued by the plaintiff (inclusive of the buildings) at Rs. 3,000. The buildings alone (which are substantially in the same condition as they were in 1920) were separately assessed by the learned Judge at Rs. 1,000. There are a few coconut trees standing on the rest of the land which serves as a compound of the main building.

The case for the plaintiff is that, whatever description might have been given to the interests of Mr. and Mrs. Suwaris in respect of the buildings during their lifetime, the defendants (as their heirs) enjoy nothing more than a right to be compensated for their value. He claims that as he is now the sole owner of Lot 195c, he is entitled to eject them whenever he chooses to do so on payment of such compensation.

The defenadants completely over-stated their case in the Court below. They attempted to prove that the right of occupation conveyed to Mr. and Mrs. Suwaris and to them under the conveyance P6 had long since been enlarged into full ownership of Lot 195c by virtue of adverse prescriptive user. I agree with the learned Judge that this plea was not established by the evidence, and I accept his finding that Mr. and Mrs. Suwaris' enjoyment of the produce from the few trees standing on the compound had been merely permissive. On the other hand, their occupation of the buildings was referable to the exercise of the legal rights conferred on them by P6, and could not therefore be relied on as a mode of acquiring further rights of ownership by prescription.

The learned Judge awarded the plaintiff a decree for declaration of title and ejectment against the defendants as prayed for, but directed the plaintiff to pay to them a sum of Rs. 1,000 as compensation for the value of the buildings. It is but fair to the learned Judge to state that the trial had throughout proceeded on the assumption that, as a matter of law, this was the necessary consequence of a decision adverse to the defendants on the

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issue of prescription. In my opinion, however, the true legal position arising from the established facts calls for a closer analysis than it had received in the lower Court.

Absolute *dominium* over Lot 195c, including the buildings standing on it, had without doubt passed to the Council in 1922 under the vesting certificate P8, which operated to extinguish all prior rights enjoyed over the property by the plaintiff's predecessors-in-title and by Mr. and Mrs. Suwaris—*vide* section 145 of the Municipal Councils Ordinance (Cap. 193). Similarly, the subsequent grant of the soil rights in favour of the plaintiff's predecessors-in-title also vested in them the ownership of the buildings which, in accordance with the maxim *omne quod inaedificatur solo cedit*, had acceded to the soil and become part and parcel of it. " If in a conveyance of land the alienor purports to convey the soil apart from the surface, this does not prevent the surface passing with the soil, for by its nature it is one with it "—*Digest 44.7.44.1.* This is the converse case.

To what extent was the totality of these proprietary rights conveyed by P6 reduced by the contemporaneous grant to Mr. and Mrs. Suwaris and their heirs of the " house and outhouse exclusive of the land on which they stand " ? That the ownership of the buildings themselves did not pass to Mr. and Mrs. Suwaris or their heirs under P6 has already been made clear ; and it is equally clear that the ownership of the bare materials with which the building had originally been constructed did not pass to them either, for those materials had long since lost (and have never reacquired)the character of " movable property ". The conveyance does not purport (even by implication) to authorise Mr. and Mrs. Suwaris or their heirs to demolish the buildings (to the ultimate prejudice of the other grantees who owned the property) and to remove the materials from the site.

Two alternative theories as to the true meaning of the conveyance P6 have been submitted for our consideration : the first is the view which had been tacitly assumed at the trial to supply the only true answer, and the other was raised for the first time during the hearing of this appeal. The alternatives suggested are :

(1) that the grant of the " house and outhouse exclusive of the land they stand on " operated only to restore to Mr. and Mrs. Suwaris a *jus retentionis* coupled with a right under the common law to be compensated for the improvements previously effected by them either as co-owers or as *bona fide possessors* of Lot 195c ;

(2) that it operated as a grant to Mr. and Mrs. Suwaris and also to their " heirs " of a personal servitude (*habitatio*) entitling them to occupy the buildings which, upon the execution of P6, passed into the ownership of the other group of grantees.

I agree with Mr. Wikramanayake that we should not at this stage entertain the argument based on this latter proposition if the problem involves consideration of a mixed question of fact and law. In other words, we must be satisfied that the true meaning of the words of P6 can and must be ascertained exclusively from the language of P6 itself and without an investigation of extraneous facts.

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If an owner of immovable property conveys it to A but, in the same instrument, purports to grant to B "the buildings" standing on it (exclusive of any soil rights), the instrument *prima facie* operates under the Roman Dutch law as a grant of the ownership of the land and buildings to A subject only to a personal servitude of *habitatio* in favour of B. By this interpretation, what would otherwise be two inconsistent grants are logically reconciled.

The precise nature of the servitude of *habitatio* is explained in *Voet 7.8.6–9*. It is "the right of inhabiting the house of another, its substance being preserved intact, and he who has this granted to him cannot give it but can let it to another. . . . It perishes by the death of him to whom it was granted". The maxim *res servit personae* is fundamental to the nature of such a servitude—*Willoughby's Consolidated Co. Ltd. v. Copthall Stores Ltd.* [1]. On the other hand, there is nothing to prevent the grant of a personal servitude to an immediate grantee and also to "his heirs", in which event, there are created "two different (personal servitudes), one of which is afterwards acquired by the heirs of (the first grantee) . . . . But though under the name of 'heirs', also 'heirs of heirs' *ad infinitum* are usually comprehended, yet in this case the first generation only is to be considered included, lest otherwise the ownership might be of no use whatever to the owner, the (personal) servitude being severed from it in perpetuity"—*Voet 7.4.1*. What the jurist has there expressly stated in regard to the servitude known as *usufruct* is equally applicable to all other personal servitudes. Vide also *Kanagalingam v. Kamalawathie* [2]. (The addition of the words "executors, administrators and assigns" appearing in the conveyance P6 must in this context be regarded as "a notarial flourish".)

If, therefore, in the present case, the conveyance P6 did in truth grant a personal servitude in favour of Mr. and Mrs. Suwaris, a similar servitude must also have been created by the same instrument in favour of the defendants as their immediate heirs. It must also be emphasised that the servitude of *habitatio*, though "personal" in character, nevertheless confers on the *habitator* for the time being a real right "comprising a part of the *dominium*" and entitling him to bring a *rei vindicatio* action for the recovery of that right even against the true owner of the property—*Galant v. Mahonga* [3].

The suggested alternative interpretation of P6 must now be considered. Can we rule out the view that (having regard to the recitals in P6) the conveyance conferred on Mr. and Mrs. Suwaris and their heirs only a *jus retentionis* terminable by payment of compensation in respect of the buildings (the full ownership of which had contemporaneously passed to the other grantees) ?

Even if it had been permissible to interpret P6 by reference to evidence extraneous to the document, I would have rejected the argument that, before the date of the vesting certificate P 8, Mr. and Mrs. Suwaris had possibly enjoyed the rights of *bona fide possessors* who had improved property belonging to its true owners. It is completely negatived by

[1] *(1913) A.D. 267 at 282.*

[2] *(1948) 49 N. L. R. 357.*

[3] *(1922) E. D. L. 79.*

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the particulars of the chain of title pleaded in the plaint, and in any event I fail to see how an owner of property can confer by notarial deed a bare *jus retentionis* over it in favour of someone else.

According to paragraph 3 of the plaint, Mr. and Mrs. Suwaris had themselves been co-owners of the larger property (including Lot 195c) at a stage when the buildings under discussion had already been erected. It is apparent, therefore, that the only logical basis of the subsequent joint representation (if true) made to the Municipal Council by all the prospective grantees under P6 was that Mr. and Mrs. Suwaris had at some later point of time parted with their soil rights in the property, reserving to themselves only some limited right to occupy the buildings standing on it. Those rights necessarily fell short of rights of unqualified ownership. I am not aware of any principle of law under which, *apart from contract*, a former co-owner who subsequently retains only a right to occupy a building standing on what had once been common property can maintain a claim to be compensated for the value of that building. No such contract has been suggested in the pleadings and, even if it did exist, it could only have created rights *in personam* with which the Municipal Council was not in any way concerned.

Let us however assume that Mr. and Mrs. Suwaris, *as former co-owners who had improved the common property*, enjoyed at an earlier point of time a *jus retentionis* over the buildings until they received compensation from the plaintiff's predecessors-in-title. Even then, the property itself was released by operation of law from the impact of this assumed right when Lot 195c passed into the absolute ownership of the Municipal Council in 1922. Thereafter, the Council continuously enjoyed (until P6 was executed) the entire "bundle of rights" comprising *plena proprietas* over Lot 195c, and the conveyance was directly intended only to transfer that "bundle of rights" to a group of persons (including Mr. and Mrs. Suwaris) *in accordance with the scheme of distribution specified in the document*. There is no room for looking beyond the language of the conveyance itself for the details of this "scheme of distribution". The intention was to restore to the grantees such real rights as they claimed to have enjoyed previously, not unspecified rights which they may have enjoyed in fact.

Let us not forget that the problem before us falls within a very narrow compass. Our duty is to interpret the conveyance P6 in accordance with well-established principles prescribed by law for the interpretation of written instruments. By P6, the rights of ownership previously vested in the grantor were distributed among a group of persons in the manner specified in the instrument itself. Before the conveyance was executed the grantor owned the buildings and also therefore enjoyed the right to occupy them. The effect of the conveyance was to pass the ownership of the land and buildings to one group of grantees, and the right to occupy the buildings to another group. In other words P6 operated primarily as a conveyance (by distribution) of proprietary rights, and not as an instrument for the creation or revival of extraneous rights and obligations. The language of P6 does not justify even the theory that it operated as a grant of unqualified ownership of the land and buildings to the plaintiff's predecessors-in-title subject to their acceptance of an obligation to make a payment of

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money (by way of compensation) to Mr. and Mrs. Suwaris. If that had been the intention, the conveyance should have been very differently worded.

In my opinion, the only permissible interpretation of the conveyance is that the Council's ownership of the buildings passed to the plaintiff's predecessors-in-title, but subject to a personal servitude (*habitatio*) in favour of Mr. and Mrs. Suwaris and of the defendants as their immediate heirs. The property cannot therefore, except by renunciation, be released from this servitude so long as one of the defendants is alive—*vide* in this connection the observations of Gardner J.P. in *Arend v. Est. Nakiba*[1]. It follows that the claim to eject the defendants is premature. For these reasons, I would vary the decree entered in the Court below by granting a declaration of title in favour of the plaintiff as prayed for, but subject to a servitude of *habitatio* in favour of the defendants. I would also delete the order for ejectment and the order for compensation. As each party has partially succeeded in the action and in this appeal, there will be no order for costs in either Court.

GUNASEKARA J.—I agree.

Decree varied.

[COURT OF CRIMINAL APPEAL]

1953 *Present :* **Rose C.J. (President), Nagalingam S.P.J. and K. D. de Silva J.**

S. S. FERNANDO, Appellant, *and* THE QUEEN, Respondent

APPEAL NO. 46, WITH APPLICATION NO. 82

S. C. 3—M. C. Panadure, 24,458

Evidence—Indictable offence—Statement made by a witness at non-summary inquiry—Evidentiary value of it at trial.

When a statement made by a witness at a non-summary inquiry is denied by him at the trial of the accused, it cannot be used as substantive evidence.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

A. C. Nadarajah, with *H. L. de Silva*, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

[1] (*1927*) *C. P. D. 8.*

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September 13, 1953. NAGALINGAM S.P.J.—

At the conclusion of the argument of this appeal we set aside the conviction and acquitted the accused and stated that we would give our reasons later. We now proceed to do so.

The prisoner was indicted on a charge of murder. The evidence relied upon by the prosecution was that of three witnesses each of whom was put forward as an eye-witness, but during the course of the trial it became apparent that not one of them was a credible witness and that the evidence of each one of them was so full of infirmities and improbabilities that no reliance could safely have been placed upon their testimony; in the result the learned trial Judge took the view which was expressed by him thus after dealing specifically with the nature and character of the evidence given by each of them :

> " Then you have no evidence of an eye-witness to say that it was the accused who committed this offence. "

The learned trial Judge would seem to have formed this opinion of these witnesses, if not earlier, at least at the stage when from the Crown point of view all the material evidence which the prosecution could with advantage place before the Court had been led ; for when all that remained to be done by the prosecution was to close its case, the learned Judge intervened and recalled Mitchel, one of the alleged eye-witnesses, and questioned him with regard to certain statements made by him at the Magisterial inquiry. In answer to Court that witness said :

> " I remember that the accused put to me that I and the deceased went to his house to assault him . . . . It was put to me that the deceased had a crow bar in his hand when he went. I denied that. *It was not suggested that the accused snatched the crow bar and struck the deceased on his head. I do not remember the suggestion being put in the form that the deceased had a crow bar and that the accused snatched it and struck the deceased on his head with it.* "

With a view to contradict this evidence the Clerk of Assize was called to prove the following statement made by the witness at the Magisterial proceedings :

> " I deny that the deceased had a crow bar in his hand, and that the accused snatched the crow bar and struck the deceased with it a blow on the head. "

In the course of his address to the Jury the learned trial Judge, after having indicated to the Jury that the evidence of the eye-witness was unacceptable, proceeded to charge them as follows :

> " If on a consideration of the evidence of the witnesses you are not prepared to accept that evidence, you are left with other evidence to which I shall refer. "

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And the " other evidence " the learned Judge referred to was no other than the statement made by the witness Mitchel in the Magistrate's Court, to which he adverted in the following words :

> " When the Magistrate started the inquiry at the hospital, the accused who was undefended cross-examined Mitchel, and in the course of that cross-examination the accused suggested to Mitchel that he (Mitchel) and the deceased entered the accused's house, the deceased being armed with a crow bar, and when they were about to assault the accused, the accused snatched the crow bar from the deceased and struck the deceased with it. "

Emphasis was further given to this aspect by another passage in the summing up :

> " The suggestion made, or at least the reasonable inference one may draw (from the statement made to the Magistrate) is that the accused took the weapon which the deceased had . . . . and struck the deceased with it on the head. That statement was elicited by me, and it was no part of the Crown case. "

The ground urged on appeal is that the use of this " other evidence " was improper and not warranted by law for more than one reason, and that the Jury were swayed in arriving at their verdict by this " other evidence ". To put it at the lowest, clearly an improper use was made of the statement given by the witness before the Magistrate. It is to be remembered that the witness denied that any suggestion was made to him by the accused that he (the accused) had snatched a crow bar from the deceased and struck the deceased with it. Notwithstanding this denial, which was the only evidence of the witness before Court, the contrary was sought to be established by drawing two deductions successively from the statement proved to have been made by the witness before the Magistrate. The first deduction was a postulation of the form of the question in answer to which that statement was deemed to have been made. The second deduction was an inference that was said to arise from the form of the question so deduced.

The learned Judge dealt with this topic in this way :

> " The question put by the accused must have been, ' Did not the deceased have a crow bar in his hand and I snatch it and strike the deceased with it a blow on his head ? ' If that was the question put, is it not an admission by the accused that he was the person who struck the deceased ? Is that not the reasonable inference to be drawn ? "

The statement made by the witness before the Magistrate could have been proved at the trial only for the purpose of contradicting him, but the statement itself could not have been used as substantive evidence ; but that was precisely the effect of what was done. It was only on the basis that that statement was legal evidence upon which the Jury could act, that it was possible to hypothesize the form of the question therefrom (which was the first deduction made) and then to infer from the form of the question so hypothesized an admission on the part of the accused that he had inflicted the injuries on the deceased (the second deduction).

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Furthermore, it is needless to say that a variety of reasons may underlie the propounding of a question in cross-examination, and the cross-examination conducted by an accused in person should not receive less favourable treatment than if it had been conducted by counsel on his behalf.

We do not therefore think that in the first place the statement made by the witness at the Magisterial inquiry should have been treated as substantive evidence in the case, nor do we think that it was proper for the first and second deductions to have been drawn therefrom.

The next point to which attention has to be directed is as to what the effect of the use of the evidence in this manner has been on the trial of the prisoner. The ultimate position was that while the evidence of the prosecution witnesses other than what was objected to failed to establish that it was the accused who inflicted the injuries on the deceased, the second deduction referred to above was placed before the Jury as establishing " an admission by the accused that he was the person who struck the deceased". That the Jury laid very great emphasis on the statement made by the witness before the Magistrate and that that statement must have loomed large in their deliberations is fairly obvious from what transpired after the learned Judge had concluded his summing up. The only admissible evidence in the case is such that a reasonable Jury properly directed could not but have come to the conclusion that the charge against the prisoner had not been established.

Having regard to these considerations, we arrived at the view that the conviction could not be sustained.

Appeal allowed.

1954 *Present :* **Pulle J.**

W. A. DON THOMAS SINGHO, Appellant, *and* S. I. POLICE, GAMPAHA, Respondent

S. C. 494—M. C. Gampaha, 8,129

Motor Traffic Act, No. 14 of 1951—Regulations 15 and 45—Section 216 (2) (b)—Meaning and effect of expression " in contravention of ".

Driving an omnibus not fitted with an accurate speedometer or with seats not fitted with cushions does not amount to a use of the vehicle in contravention of regulations 15 and 45 of the regulations made under sections 19 and 239 of the Motor Traffic Act so as to render the driver guilty of an offence under section 226 read with section 216 (2) (*b*).

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APPEAL from a judgment of the Magistrate's Court, Gampaha.

H. W. Jayewardene, for the accused appellant.

C. N. Goonewardena, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 1, 1954. PULLE J.—

The appellant was convicted on three charges under the Motor Traffic Act, No. 14 of 1951. The conviction on the first charge that he, being the driver of omnibus No. Z–9944, failed to keep the vehicle to the left or near side of the road when being overtaken by other traffic is clearly right. The convictions on the remaining charges raise the broad question whether the driver of a motor vehicle is guilty of an offence under section 226, read with section 216 (2) (*b*), where the vehicle does not conform to the Regulations made under sections 19 and 239 and published in *Gazette* No. 10,360 of February 27, 1952.

Regulation 15 provides as follows :—

" A speedometer shall be fitted in such a position in every motor coach or lorry to indicate readily at all times to the driver the speed at which he is driving the motor coach or lorry. Such instrument shall be sufficiently accurate to within 10 per centum of the correct speed at which the vehicle is travelling. "

Regulaton 45 provides :—

" Every seat of a motor coach shall be fitted with cushions. "

On the second and third charges the evidence was that the speedometer of the omnibus was not in working condition and the seats were not fitted with cushions.

It was argued on behalf of the appellant that, in the absence of a *prohibition against the user* of a motor vehicle which does not conform to the regulations quoted above, it could not be said that the user in the present case was in *contravention* of these regulations within the meaning of section 216 (2). In the forefront of the argument reliance is placed on the absence of a provision in the Motor Traffic Act corresponding to section 5 of the Motor Car Ordinance, No. 45 of 1938, which expressly prohibited the user on any highway of a motor vehicle not complying with any regulation in the first schedule to that Ordinance as to construction, weight, dimensions or equipment. Section 5 has its counterpart in section 3 of the Road Traffic Act, 1930 (20 & 21 Geo. 5, Cap. 43) sub-section 3 of which provides,

" If a motor vehicle or trailer is used on a road in contravention of this section, any person who so uses the vehicle or causes or permits the vehicle to be so used shall be guilty of an offence. "

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It will thus be seen that both in the repealed Ordinance of 1938 and in the English Act provision is first made prohibiting user and, thereafter, a user contrary to the prohibition is made an offence. Undoubtedly, the person on whom the obligation lay to have the omnibus fitted with an accurate speedometer or the seats therein fitted with cushions was in breach of the regulations but, in my opinion, it cannot be said that the driver used the omnibus in *contravention* of those regulations.

I have not found it profitable to speculate on the reasons for the Legislature omitting to include in the Act a provision similar to section 5 of the repealed Ordinance. It is possible, as was argued for the appellant, that the regulations made under section 19 of the Act were intended primarily to lay down the conditions for registration under Part 1. A failure, after the registration, to comply with the conditions would attract the provisions of section 196 which enables the Registrar to prohibit the user of a motor vehicle, which, by reason of lack of equipment, is not in a serviceable condition. Whatever might have been the reason for omitting to reproduce section 5 of the repealed Ordinance I feel I would be straining unduly the language of section 216 (2) were I to hold that the act of the appellant in driving an omnibus with a defective speedometer or with seats not fitted with cushions amounted to the using of a motor vehicle in contravention of the regulations as that expression is used in the opening sentence of section 216 (2).

I affirm the conviction and sentence on the first charge and quash the convictions and sentences on the second and third charges.

Appeal partly allowed.

1953 *Present :* **Pulle J.**

E. DAVID APPUHAMY, Appellant, *and* K. SUBRAMANIAM, Respondent

S. C. 46—C. R. Gampaha, 5,446

Rent Restriction Act—Deposit held by landlord—Right of tenant to set off monthly rent against the deposit.

Where a monthly tenant deposits a sum of money with the landlord on the agreement that it is to be held by the landlord and paid back to the tenant when the premises are handed over to him, it is not open to the tenant to set off the rent, as it falls due each month, against the deposit held by the landlord. If he does so set off, he is liable to be held to be in arrears of rent.

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APPEAL from a judgment of the Court of Requests, Gampaha.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the plaintiff appellant.

Frederick W. Obeyesekere, with *Felix Dias*, for the defendant respondent.

Cur. adv. vult.

November 23, 1953. PULLE J.—

The appellant in this case is the landlord who sought to eject his tenant on the ground that he required the premises for the purposes of his trade and business and on the further ground that the tenant was in arrears of rent. The landlord failed before the Commissioner on both grounds and the only question which has to be decided in this appeal is whether the decision that the tenant was not in arrears of rent was wrong in law.

The premises were taken on rent in 1947 at a monthly rental of Rs. 45. The tenant paid to the landlord two months' rent in advance and also deposited a sum of Rs. 500 on the agreement that it was to be held by the landlord and paid back to the tenant when the premises are handed over to him.

The present action was instituted on the 21st April, 1952. The Commissioner having found on the evidence that the tenant had paid rent up to the end of April, 1951, proceeded to hold that he was not in arrears because the advance for two months together with the deposit of Rs. 500 was well within the sum required to liquidate the rent due from 1st May, 1951, up to date of action.

Leaving aside for the moment that the tenant, in an answer filed by him in person, admitted that he was in arrears, it seems to me that the Commissioner was wrong in setting off the rent as it fell due each month after 30th April, 1951, against the deposit held by the landlord. There was no extinguishment of the obligation to pay rent as it fell due because the holding of the deposit by the landlord to be returned in terms of the tenancy agreement did not constitute a debt which could be set off against the rent.

The decree appealed from is set aside and the case will go back for a decree of ejectment to be entered up against the tenant, writ not to issue till 31st December, 1953. The decree will also embody the amount of damages, if any, that the tenant is liable to pay till 31st December, 1953.

The landlord will be entitled to the costs of appeal but each party will bear his own costs in the court below.

Appeal allowed.

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1953 *Present :* **Pulle J.**

IN RE SOUTH WESTERN BUS CO., LTD., *et al.*

S. C. 48, 64, 65, 71—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, ss. 4 (b), 13 (8)—Case stated—Instance when a case may be stated—Route licence—Past representation by local authority—Relevancy—Certain other factors for consideration.

In a case where a route licence is revoked by the Tribunal of Appeal, the Commissioner of Motor Transport may, under section 4 (6) of the Motor Car Ordinance, No. 45 of 1938, read with section 13 (8) of the Omnibus Service Licensing Ordinance, assist the licence holder to place his case before the Supreme Court by himself moving to have a case stated. This does not necessarily mean that from the point of view of the executive the licence must be restored to the licence holder.

A communication addressed by a local authority drawing the attention of the Commissioner of Motor Transport to the congestion of traffic on a road within its area can be regarded as a representation under section 4 (*b*) of the Omnibus Service Licensing Ordinance, even though the communication was not addressed in connexion with the selection of a route of which that road forms a part.

A Tribunal of Appeal should not interfere in matters left purely to the discretion of the Commissioner of Motor Transport.

A company providing an omnibus service exclusively within an urban area has no overriding claims as against a company operating both within and outside the urban area.

CASES stated by the Tribunal of Appeal under the Omnibus Service Licensing Ordinance.

H. V. Perera, Q.C., with *Colvin R. de Silva, H. W. Jayewardene, J. W. Subasinghe* and *A. C. de Zoysa*, for the South Western Bus Co., Ltd.

Stanley de Zoysa, with *C. Manohara*, for the Gamini Bus Co., Ltd.

C. Thiagalingam, Q.C., with *Sylvan Fernando, P. Somatilakam* and *T. Parathalingam*, for the High Level Bus Co., Ltd.

D. D. Athulathmudali, with *L. Gunaratne*, for the Colombo Omnibus Co., Ltd.

N. E. Weerasooria, Q.C., with *N. M. de Silva* and *W. D. Gunasekera*, for the Ebert Silva Bus Co., Ltd.

V. Tennekoon, Crown Counsel, for the Commissioner of Motor Transport, as *amicus curiae*.

Cur. adv. vult.

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September 11, 1953. PULLE J.—

*This judgment relates to four cases stated by the Tribunal of Appeal under the Omnibus Service Licensing Ordinance, No. 47 of 1942, and bearing Supreme Court Nos. 64, 65, 71 and 48. Learned Counsel desired that they should be heard together for the reason that they are all concerned with the competing claims of four omnibus companies to be granted an exclusive road service licence under the Ordinance referred to to ply omnibuses on what will be called hereafter as route No. 2. There were three other groups of cases stated in respect of routes Nos. 1, 3 and 4 and I was specially requested not to record my decision until the arguments in all the cases concerning the four routes had been heard.

In order to understand the issues which arise for determination it is necessary to set out the facts in the first instance in a condensed form. In 1947 about fifty applications for licences to run omnibuses along various routes in the City of Colombo were under consideration by the Commissioner of Motor Transport. The Commissioner selected four routes of which route No. 2 was from Bambalapitiya Railway Station to Maradana via New Bullers Road Museum Road, Alexandra Place and Dean's Road. The Commissioner then made an order dated the 10th July, 1948, granting a licence to operate on this route to a company which will be referred to as Ebert Silva. Three companies which will be referred to as South Western, High Level and Gamini were among rival claimants in the sense that they too wanted to operate between the termini Bambalapitiya and Maradana. The rival claimants appealed to the Tribunal of Appeal under section 13 (3) of Ordinance No. 47 of 1942. By its order dated the 26th March, 1949, the Tribunal of Appeal directed that a licence be granted to High Level for the route running from Bambalapitiya coast road at its junction with New Bullers Road to the Pettah via Thurstan Road and Darley Road. Darley Road leads directly to Maradana along a small stretch named Sutherland Road which at the time of the hearing by the Tribunal of Appeal was closed to omnibus traffic. Sutherland Road was opened to traffic on the 15th July, 1949, so that in terms of the Tribunal's order High Level obtained a licence to ply on the route Bambalapitiya–New Bullers Road junction to Maradana via Darely Road and Sutherland Road. In this connexion reference may be made to the case of *Ebert Silva Bus Company Limited v. High Level Road Bus Company Limited.* [1]

Section 4 sub-section 6 of the Motor Car Ordinance, No. 45 of 1938, read with section 13 (8) of Ordinance No. 47 of 1942 gives a remedy only to an " appellant " before the Tribunal or the Commissioner of Motor Transport to have a case stated by the Tribunal either on a question of law or fact to the Supreme Court. In Supreme Court Nos. 64 and 65 the cases have been stated at the instance of South Western. It is not material to enter into the reasons why two cases were stated on the application of South Western. Supreme Court No. 48 was stated at the instance of the Commissioner. Few words of explanation are necessary to shew why in certain instances the Commissioner moves the Tribunal to state a case. It will be seen that Ebert Silva who succeeded in first getting the licence

[1] *(1949) 51 N. L. R. 162.*

* Application made to the Privy Council for special leave to appeal from this judgment was refused.—Ed.

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lost it in appeal. There is no provision under which Ebert Silva could have got a case stated. It is not unusual in a case where a licence is revoked by the Tribunal for the Commissioner to assist the licence holder to place his case before the Supreme Court by himself moving to have a case stated. It does not necessarily mean that from the point of view of the executive the licence must be restored to the licence holder. Learned Crown Counsel who appeared for the Commissioner made this plain. His position was that of *amicus curiae* and I am greatly indebted to him for presenting his arguments in a spirit of fairness to all competing claimants. Ebert Silva appeared in the role of a respondent but that company was for all practical purposes the appellant in case No. 48.

The difficulties confronting me in deciding these cases are manifold. There is no procedure for taking evidence either before the Commissioner or the Tribunal. The record consists of a transcript of the speeches of Counsel and the documents marked by them. In selecting either a route or a licensee the Commissioner is not required to give a detailed statement of the reasons on which his decisions are based. It is comparatively easy on a given statement of facts to decide purely a point of law arising from them, but when it comes to deciding whether on a question of fact the Tribunal of Appeal was wrong in reversing the Commissioner the principles that this Court should apply are by no means clear when, as said before, there is not a detailed statement of reasons for the Commissioner's decision. The Commissioner, the members of the Tribunal and Counsel who appeared before them were familiar with the highways comprised in the routes and I must say that as a resident of Bambalapitiya for the last eighteen years I have travelled almost daily from my residence to the Law Courts (via Maradana) both along Darley Road and Dean's Road.

There are yet some other preliminary matters to be noticed. In case No. 48 the Commissioner moved the Supreme Court for an order on the Tribunal to state an amended case but that application was withdrawn. In Nos. 64, 65 and 71 amended cases were sent by the Tribunal. In Nos. 64 and 65 the appellant is South Western. It would unduly lengthen this judgment were I to state in detail the grounds for not disturbing the concurrent decisions of the Commissioner and the Tribunal not to give route No. 2 to South Western. Thus the three main contestants are Ebert Silva, High Level and Gamini. Gamini supported High Level in the submission that having regard to the services provided by them they (Gamini and High Level) had a superior claim to Ebert Silva's but Gamini supported Ebert Silva to this extent that there was no reason for the Tribunal to disturb the Commissioner's selection of the route to Maradana via Dean's Road. High Level's contention was that if a service from Bambalapitiya to Maradana had to be provided it was in the public interest that the last stretch from the Eye Hospital junction to Maradana should be via Darley Road and not via Dean's Road. Once this route was selected it was argued that High Level's claim to be granted the licence was incontestable.

At the time the Commissioner selected route No. 2 (i.e., via Dean's Road) Ebert Silva was operating on the route Turret Road to Maradana via Eye Hospital junction and Dean's Road. Eight buses were plying on

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this route. Both Gamini and High Level operated two services which took them along a common stretch of the highway between a point on Havelock Road where it is intersected by Link Road and the Eye Hospital junction. At this junction Gamini proceeded along Dean's Road and thence to Pettah and High Level proceeded along Union Place and Darley Road and turned off to Pettah along McCallum Road. Both Gamini and High Level could not, by reason of section 7 (1) of the Ordinance, operate on substantially the same section of highway and hence Gamini was diverted at the Eye Hospital junction to Dean's Road, a condition being inserted in the licence requiring Gamini to charge a fare along the Dean's Road stretch double that charged by Ebert Silva.

The reasons given by the Commissioner for fixing the route and for selecting Ebert Silva are stated as follows :

" A service from Bambalapitiya to Maradana is essential in order to provide travelling facilities to the students of the University and the schools and to officers of Government departments in the area. Ebert Silva Bus Company are operating the section from Maradana to Union Place and from there to Colpetty. Although they have not applied for the identical route mentioned by me but from Maradana to Bambalapitiya via Turret Road I consider that they are the most suitable to run a service on the route. I therefore allow them the route Bambalapitiya Railway Station to Maradana via New Bullers Road, Thurstan Road, Cambridge Place, Albert Crescent, Museum Road, Baptist Chapel Road and Dean's Road."

In the course of the hearing before the Tribunal the Commissioner furnished a memorandum dated the 15th October, 1948, in which he elaborated the grounds for selecting the route via Dean's Road and for granting to Ebert Silva the licence to operate on this route. He says, " Route 2 was selected by me as it is the shortest and direct route ". Further he states that if the route is divided into two sections, one from Maradana to Alexandra Place (i.e., a short distance from the Eye Hospital junction) and the other from Alexandra Place to Bambalapitiya (via Museum Road and Thurstan Road) then the position is that Ebert Silva alone is providing already a service (remembering that Gamini is required to charge double fare on Dean's Road) on the first section while no service is provided on the second. Another point which the Commissioner thought was in favour of Ebert Silva is set out in paragraph 4 of the memorandum. It reads, " People living in the south of the city in places such as Bambalapitiya, Wellawatte, Dehiwela, Mt. Lavinia, &c., want a short service to Maradana instead of travelling to Pettah and thence to Maradana. Such a service is at present provided by the Ebert Silva Omnibus Company Limited ; people get down at Kollupitiya, take this company's buses and go to Maradana ". The Commissioner concluded his memorandum with the statement that if Maradana to Bambalapitiya via Darley Road and Thurstan Road is selected the claims of either High Level or Gamini would appear to be greater than the claim of Ebert Silva.

The Tribunal was not prepared to assent to the statement of the Commissioner that residents of Bambalapitiya or Wellawatte whose houses lie between the coast road and Havelock Road and Thurstan Road would in going to Maradana take a coastal bus as far as Turret Road junction

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and there catch an Ebert Silva bus to Maradana. It is difficult to controvert the statement of the Tribunal that a large number of these residents may well patronize the High Level or Gamini buses which are constantly plying along Havelock Road and Reid Avenue. Some support for the Tribunal's view is furnished by the Commissioner himself in his memorandum of 15th October, 1948, wherein he states that if Ebert Silva is allowed route No. 2 that would substantially affect the services provided by Gamini and High Level along Reid Avenue.

I come now to what the Tribunal has described as a decisive objection against Ebert Silva. The regulations made in pursuance of the Motor Car Ordinance, No. 45 of 1938, specifically provide that a Tribunal of Appeal may during the hearing of any appeal call for such evidence, oral or documentary, as it may consider necessary for the decision of any matter in issue in the appeal. At the hearing High Level produced two documents marked HLR 2 and HLR 3. HLR 2 is a communication dated 12th March, 1947, addressed to the Commissioner by the Secretary, Municipal Council, Colombo, stating that the Council at its meeting of 5th March, 1947, considered the question of the congestion of traffic on Dean's Road owing to its narrowness and decided to request the Commissioner that the service provided by Gamini along Dean's Road be diverted to Union Place and Darley Road and through McCallum Road to Pettah and that Ebert Silva, being a city service, be allowed to remain. To this the Commissioner replied on the 1st April, 1947, that only one service of Gamini is allowed to run along Dean's Road, i.e., the Colombo–Kohuwela service, while all the other services run along McCallum Road. This was allowed by the Commissioner as under section 7 of Ordinance No. 47 of 1942, the service from Kohuwela to Colombo cannot be allowed to run along McCallum Road. Kohuwela is a hamlet about a mile outside Colombo to the south.

I would pause here to make a few observations. To begin with the representation was not made in connexion with the selection of route No. 2 by the Commissioner. It was made earlier with reference to two existing services, namely, the Colpetty–Maradana service of Ebert Silva and the Kohuwela–Pettah service of Gamini via Dean's Road. Now a local authority is entitled under section 4 (*b*) of Ordinance No. 47 of 1942 to make representations to the Commissioner in regard to the suitability of a route within its administrative limits. The argument for High Level is that at the time the Commissioner selected route 2 he had either overlooked or ignored the opinion of the Municipal Council that far from putting a third service on Dean's Road there should not be more than one service operating on that Road. I understand that the result of a third service along Dean's Road would be to increase the number of buses by eight. Whatever be the figure the congestion on Dean's Road was bound to worsen. The Tribunal said,

> "There is a second and decisive objection to this order. It sets up a new stream of traffic along Dean's Road, whereas most of the companies sought the route along Darley Road. Now the Municipal Council of Colombo has passed a resolution (HLR 2) protesting against increase of traffic on Dean's Road. Such resolutions are matters which the statute specially directs us to consider in making these orders."

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The Tribunal proceeded further to state,

"It is common knowledge that Dean's Road is far more narrow than Darley Road and traffic on it is twice as congested. I (the Chairman) have travelled on these two routes twice or thrice a month for many years and that is the fact about traffic as I met it.

"I think it is dangerous and wrong to increase the number of buses plying on Dean's Road."

A carefully prepared statement was handed to me by learned Counsel setting out the case for Ebert Silva. The first point taken by Ebert Silva, to which I have already adverted, is that no duty was cast on the Commissioner to consider under section 4 the representation contained in HLR 2 because it was not made in connexion with the fixing of the route Bambalapitiya to Maradana. There is no statutory machinery for bringing applications for route licences to the notice of local authorities. It is not suggested that in the present case any notice was given by the Commissioner to the Municipal Council of any of the fifteen applications for linking Bambalapitiya with Maradana. In actual practice all that a local authority can do is to draw the attention of the Commissioner to the dangerous condition of road transport within its area. I am of opinion that it would be too technical a view to take that the document HLR 2 cannot, for purposes of determining route No. 2, be regarded as a representation under section 4 (*b*). The Commissioner may without incurring any blame have overlooked it, but it is clear that in any event if the Commissioner did not consider it the Tribunal of Appeal could regard it as an important and relevant piece of evidence in the course of a re-hearing. Be it noted that the Tribunal has not uncritically accepted the implications of HLR 2. All the members of the Tribunal are agreed that it is "dangerous" to increase the number of buses plying on Dean's Road. I cannot with any degree of confidence say that the Tribunal erred in preferring Darley Road as the last lap to Maradana.

It is argued that HLR 2 and HLR 3 were produced from the files in the Commissioner's Department and, therefore, one must assume that the Commissioner selected Dean's Road with full knowledge of their contents. Neither in his order selecting route 2 nor in the memorandum of 15th October, 1948, does the Commissioner refer to these documents, nor was any reference made to these documents by any of the Counsel who appeared before the Commissioner. In fact, I believe, it was produced by Counsel for High Level before the Tribunal on the 23rd October, 1948. The probabilities are that these documents came to the Commissioner's notice when they were produced by High Level on the 23rd October, 1948. In these circumstances it was quite competent for the Tribunal to set aside the selection of the Dean's Road route.

I hope I am not disrespectful to learned Counsel if I do not consider in detail their arguments in regard to the relative merits of Dean's Road and Darley Road, arguments to which I have had to listen for several days. These were really matters for assessment by the persons appointed by the statute to judge, namely, the Commissioner and the members of the Tribunal. My function is to correct errors of law and fact committed by

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the Tribunal and in discharging that function I have borne in mind that in matters left purely to the discretion of the Commissioner the Tribunal would be wrong in interfering with it.

It is not argued that Darley Road as a means of access to Maradana is objectionable. Counsel for High Level repeated what he urged strenuously before the Tribunal that while the Darley Road route to Maradana is about quarter mile longer there are many more commercial houses and public institutions on the lap between Eye Hospital junction, Union Place, and Darley Road up to its junction with McCallum Road than there are on Dean's Road. If the Tribunal took this also into account I would say that they did so properly.

In selecting the operator the Tribunal said,

> "It remains to select which company shall hold the licence. Two already ply buses along Darley Road, viz.: High Level Company and Gamini Company. The statute plainly contemplates a preference to companies already using a route and forbids grant of licence to others except under specific circumstances."

I have heard a good deal of argument on the following questions :—

(*a*) whether the provisions of section 7 of Ordinance No. 47 of 1942 would be a bar to the grant of a licence to Ebert Silva to operate on route 2 as selected by the Tribunal, having regard to the existing services of High Level and Gamini ?

(*b*) whether these provisions would be a bar to the grant of a licence to High Level or Gamini to operate on that route having regard to the existing services of Gamini or High Level respectively ?

No material has been placed before me on which I could answer either question in the affirmative. Hence I answer that there is no legal bar to the grant of the licence to any of these companies.

I think I ought to say a few words on one of the submissions made on behalf of Ebert Silva. It is said that he operates three services within the Municipal limits of Colombo and that High Level and Gamini operate from points many miles outside Colombo. It is true that places like Horana, a terminus of Gamini, and Ingiriya a terminus of High Level are far from Colombo ; but on the other hand both companies operate on sections with Pettah as one terminus and Nugegoda (in the case of High Level) and Kohuwela (in the case of Gamini) as the other terminus, the two latter places being on the south eastern outskirts of Colombo. I am averse in any event to giving effect to an argument which would result in restricting competition and enlarging the field of monopoly. That Ebert Silva is operating only within Colombo may be relevant but cannot be overriding. In his memorandum of 15th October, 1948, the Commissioner stated that if Darley Road was selected he would prefer the claims of Gamini and High Level to Ebert Silva's. The Tribunal has concurred in this view apparently for the reason that route 2 is more in the neighbourhood of the routes on which Gamini and High Level have been operating.

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Left with selecting either High Level or Gamini the Tribunal preferred the former on the ground that in their opinion it could give a better service. They say that High Level owns a very much larger number of Nelson type buses and they are superior to open buses. I am unable to find any material on which I could say that the Tribunal has erred in giving weight to this fact. If it be the fact that the proportion between the new and old buses is the same in the case of both companies, it does not still vitiate the basis of the Tribunal's preference.

I think I have substantially answered the issues of fact and of law arising on the four cases stated. In the ultimate analysis the position is that the Tribunal thought Darley Road was more suitable than Dean's Road in the last lap of the route to Maradana. Both the Tribunal and the Commissioner thought that in that event High Level and Gamini had better claims than Ebert Silva. Ebert Silva's claim was not dismissed *in limine* on any ground of law arising under section 7. The Tribunal preferred High Level's claims for reasons which I have stated. In the result I see no reason to interfere with the decision of the Tribunal and I accordingly affirm it.

As agreed the question of costs is left over for further argument.

Decision of Tribunal of Appeal affirmed.

1953 *Present :* **Swan J. and K. D. de Silva J.**

W. S. PETER *et al.*, Appellants, *and* W. S. CAROLIS, Respondent

S. C. 69–70—D. C. (Quasi-Criminal) Galle, 5,115L

Civil Procedure Code—Section 326—Appeal from order thereunder—Civil in nature —Scope of jurisdiction of Court under s. 326—Proceedings against minor— Requirement of appointment of guardian ad litem *under s. 480.*

Proceedings under section 325 *et seq.* of the Civil Procedure Code are not criminal in their nature but are steps in aid of execution, and an appeal under these sections should be constituted as an appeal in a civil case.

A minor may be dealt with under section 326 for obstructing a Fiscal's officer although he is not represented by a guardian *ad litem*. Section 480 can only apply to actions or applications in which the civil rights of minors are affected and not in any matter where only their personal liberty is at stake.

In committing a person under section 326 the Court should merely order him to be committed to jail for a specified period. The terms " simple imprisonment " or " rigorous imprisonment " cannot be used. Nor can such person be ordered to enter into a bond to be of good behaviour for any period.

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APPEALS from certain orders of the District Court, Galle.

S. W. Jayasuriya, for the appellants.

No appearance for the respondent.

Cur. adv. vult.

December 4, 1953. SWAN J.—

The chief point that arises for decision in this appeal is whether any order can be made against unrepresented minors for having obstructed the fiscal's officer in the execution of a writ of possession. Before dealing with this matter I should like to point out that this appeal has been wrongly designated a quasi-criminal matter. It should have been marked, numbered and listed as an ordinary D. C. Interlocutory appeal.

The plaintiff-respondent had obtained a decree against the two defendants for declaration of title to a certain allotment of land and for ejectment. Writ of delivery of possession was duly taken out and when the fiscal's officer went to eject the defendants it was alleged that he was obstructed by the 1st defendant and the present appellants who are the children of the 1st defendant. The plaintiff thereupon filed an application under Section 325 of the Civil Procedure Code making the defendants the 1st and 2nd respondents and the appellants the 3rd and 4th respondents. No application was made to have the 3rd and 4th respondents who were stated to be minors represented by a *guardian ad litem* nor did the court *ex mero motu* do so. It should be noted that the 2nd defendant was formally made a respondent to the application. In the fiscal's report it was not alleged that he had resisted the execution of the decree. At the inquiry held under Section 326 of the Code the court discharged the 1st respondent but found that the 3rd and 4th respondents had obstructed execution of the writ at the instigation of the 1st respondent and committed the 3rd respondent to two weeks simple imprisonment and ordered the 4th respondent to enter into a bond in Rs. 100 to be of good behaviour for a period of six months.

Mr. Jayasuriya appearing for the appellants drew our attention to the case of *Kumarihamy v. Banda*[1] in which Bertram C.J. pointed out that proceedings under Section 325 *et seq.* were not criminal in their nature but were steps in aid of execution and that an appeal under these sections should be constituted as an appeal in a civil case. By a parity of reasoning the term " simple imprisonment " could not properly have been used by the learned District Judge when he committed the 1st appellant to jail. Simple and rigorous imprisonment are terms which are appropriate to penal offences and even when a person is sentenced to a term of simple imprisonment there are certain consequences that follow while he is in jail. In committing a person under Section 326 a District Judge or Commissioner of Requests should merely order

[1] *(1918) 1 C. L. Rec. 53.*

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him to be committed to jail for a specified period which of course could not exceed thirty days. I would therefore so far as the 3rd respondent is concerned delete the words simple imprisonment and order that he be committed to jail for two weeks. In ordering the 4th respondent to enter into a bond to be of good behaviour for six months the learned District Judge was clearly acting without jurisdiction. I would therefore delete that order and direct that she be discharged.

This, however, is not the substantial point. The real question is whether the minors should have been represented by a guardian *ad litem*. Chapter 35 of the Civil Procedure Code deals with actions by and against minors and persons under other disqualifications. Section 480 in that chapter is as follows :—

> " Every order made in an action or on any application before the court in or by which a minor is *in any way concerned or affected* without such minor being represented by a next friend or guardian for the action, as the case may be, may be discharged on application made on summary procedure for the purpose ; and, if the proctor of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, it may on such application be discharged with costs to be paid by such proctor, provided he was duly made a respondent to the application. "

It was stressed that an application made by the decree holder under Section 325 of the Code was one in which the minors were concerned or affected. I think the Section can only apply to actions or applications in an action in which the civil rights of minors are affected and not in any matter where only their personal liberty is at stake. It would have been different if the learned District Judge had found that the appellants were claiming in good faith to be in possession of the property and had made an order under Section 327. Then undoubtedly representation of the minors would become necessary.

I would therefore hold that the minors need not have been represented in these proceedings. Subject to the variation in the orders made by the learned District Judge the appeal is dismissed.

K. D. DE SILVA J.—I agree.

Orders varied.

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[Privy Council]

1954 *Present:* **Lord Oaksey, Lord Keith of Avonholm and Sir Lionel Leach**

MURIEL AMARASEKERA *nee* WIJESINGHE, Appellant, *and* H. D. ADLIET RATNAYAKE *et al.*, Respondents

Privy Council Appeal No. 34 of 1952

S. C. 56 Inty.—D. C. Colombo 10,504

Privy Council—Fresh evidence—Admissibility in appeal.

Where application was made, in appeal, to introduce fresh evidence by a handwriting expert—

Held, that the application could not be entertained as it disregarded the well-known rule as to the introduction of fresh evidence.

APPEAL from a judgment of the Supreme Court.

Sir Frank Soskice, with *R. O. Wilberforce,* for the appellant.

Dingle Foot, with *Carl Jayasinghe,* for the respondents.

March 22, 1954. [*Delivered by* Lord Oaksey]—

This is an appeal from the judgment of the Supreme Court of Ceylon dated 23rd January, 1950, dismissing an appeal by the appellant from the judgment of the District Court dated the 25th January, 1949, by which probate of the will dated 23rd May, 1943, of James Albert Ratnayake was granted to the respondent Adliet Ratnayake.

The only issue in the petition has been and is whether the will was a forgery. Their Lordships have listened with attention to the argument addressed to them by Sir Frank Soskice, all, or nearly all, of which had been carefully considered and dismissed by the District Judge, and they agree with the Supreme Court of Ceylon that there is no reason to interfere with the decision of the District Judge, and that a Court of Appeal would be wholly unjustified in interfering. The District Judge who saw the witnesses disbelieved the appellant's husband and found as a fact that he had attempted to suborn one of the witnesses to the will on the question of forgery. The dispositions of the will appear to their Lordships to be just, and the appeal to their Lordships' Board after concurrent findings of fact to be without any merits.

An application was made to introduce fresh evidence by a handwriting expert, but as such application disregarded the well-known rule as to the introduction of fresh evidence it could not be entertained.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs.

Appeal dismissed.

2——J. N. B 36105-1,592 (6/54)

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1954 *Present :* **Gratiaen J. and Gunasekara J.**

JAYASINGHE, Appellant, *and* JAYASINGHE, Respondent

S. C. 29—D. C. Gampaha, 1179/1182D

Divorce action—Requisite standard of proof—Condonation of adultery—No issue raised at trial—Circumstances when Court is put upon inquiry—Civil Procedure Code, s. 602.

In an action for divorce on the ground of adultery—

Held, (i) that the words "satisfied on the evidence" in section 602 of the Civil Procedure Code mean that in actions for divorce the Court must demand the same general standard of proof beyond reasonable doubt as is required to support a conviction in a criminal court.

(ii) that, even in the absence of an issue as to condonation of the alleged adultery, the trial judge is put upon inquiry as to whether there has been condonation or not if the evidence discloses that the parties had resumed living together under circumstances which would justify the belief that a reconciliation had taken place. "Conjugal cohabitation" within the meaning of section 602 (2) of the Civil Procedure Code can be resumed even without a renewal of sexual intercourse between the spouses after reconciliation.

APPEAL from a judgment of District Court, Gampaha.

Plaintiff sued the 1st defendant for divorce on the ground of adultery. They were married in May, 1920. It was alleged that during the period April to August, 1945, the 1st defendant committed adultery with the 2nd defendant. Although no issue as to condonation was raised at the trial, the plaintiff conceded in his plaint and evidence that he forgave his wife and lived with her in the same house until 30th May, 1946, after he became aware, in April 1946, of the alleged adultery.

H. W. Jayewardene, with *Ivor Misso* and *D. R. P. Goonetilleke*, for the 1st defendant appellant.—On the facts it is submitted that the conclusions of the trial Judge are not warranted by the evidence led in the case.

There are more fundamental misdirections on the law. In regard to the burden of proof in a divorce case, it is now settled law that the Court must demand the same strict standard of proof—proof beyond reasonable doubt—as is required to support a conviction in a criminal court—*Preston Jones v. Preston Jones* [1]. See also *Ginesi v. Ginesi* [2], *Bater v. Bater* [3] and *Davis v. Davis* [4].

The trial Judge has failed to address his mind to the plea of condonation appearing in the pleadings and evidence. It was the clear duty of thel Court to have raised it as an issue even though the parties or their Counse, failed to do so—*Moosbrugger v. Moosbrugger* [5]. In Roman Dutch law condonation implies "forgiveness" and "complete reconciliation"

[1] *(1951) A. C. 391; (1951) 1 A. E. R. 124.* [3] *(1951) P. 35 ; (1950) 2 A. E. R. 458.*
[2] *(1948) P. 179 ; (1948) 1 A. E. R. 373.* [4] *(1950) P. 125 ; (1950) 1 A. E. R. 40.*
[5] *(1913) 29 T. L. R. 715.*

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(*Voet 24.2.5*, *Young v. Young*[1], *Dias v. Mensaline Hamine*[2]) or, in the words of section 602 (2) of the Civil Procedure Code, "conjugal cohabitation".

There is no such thing in law as conditional cohabitation—*Henderson v. Henderson*[3]. Assuming, therefore, that the 1st defendant was guilty of adultery, the plaintiff has completely condoned it.

There is the further point that the Court has no power to award the plaintiff Rs. 150 a month out of 1st defendant's property as permanent alimony—*De Silva v. De Silva*[4], *Lorriman v. Lorriman*[5]. The circumstances under which such permanent alimony should be granted to the husband are discussed in *Rayden on Law of Divorce, p. 441 (4th ed.)*.

Issadeen Mohamed, with *M. L. de Silva*, for the plaintiff respondent.—It may be admitted that the first part of the judgment of the trial Judge on the question of the burden of proof does not contain a correct statement of the law. But the Judge in effect tries to reconcile conflicting English decisions which were placed before him at the trial. Taking the totality of his ruling on the question of the burden of proof it appears to be clear that he was applying the same standard of proof as that necessary to support a conviction in a criminal trial.

Condonation in itself has a special significance of (*a*) Forgiveness, (*b*) Complete reconciliation, which are two distinct and separate things. In the present case there is only forgiveness but no complete reconciliation. For complete reconciliation there must be subsequent marital intercourse—*Keats v. Keats.*[6] Mere shelter given by wife to husband does not amount to a complete reinstatement—there must be a manifest consent. See *Niemand v. Niemand*[7], *Dias v. Mensaline Hamine*[8], *De Hoedt v. De Hoedt*[9], *Henderson v. Henderson*[10]. In this case, therefore, there was only a promise of forgiveness, nothing more.

On the facts, there is overwhelming evidence to support the findings of the trial Judge.

Cur. adv. vult.

May 10, 1954. GRATIAEN J.—

The plaintiff (then 23 years of age) and the 1st defendant (aged 16) were married with her father's consent on 27th May, 1920.

The 1st defendant was possessed of fairly considerable means, but the plaintiff, who had no fixed employment, was impecunious and extravagant. He squandered a good portion of his wife's wealth, and the learned District Judge was satisfied that during the period 1940 to 1945 alone she had paid over Rs. 33,000 in settling his debts, and that frequent quarrels arose because he "pestered her for more and more money for his speculative ventures and betting".

Nevertheless, the plaintiff and the 1st defendant seem to have been fond of one another after their fashion. They were both prolific letter writers, and the correspondence produced at the trial indicates that,

[1] *25 S. C. 428.*
[2] *(1945) 46 N. L. R. 193.*
[3] *(1944) A.C. 484 ; (1944) 1 A.E.R. 44.*
[4] *(1925) 27 N. L. R. 289.*
[5] *(1908) P. 282.*
[6] *48 L. J. R. 57 at 61.*
[7] *(1898) 15 S. C. 217.*
[8] *(1945) 46 N. L. R. 193 at 197.*
[9] *(1910) 4 Leader 66.*
[10] *(1944) A. C. 484 ; (1944) 1 A. E. R. 44.*

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whenever they were separated by force of circumstances, they took undisguised pleasure in subjecting each other's misdemeanours and faults to minute analysis.

In 1944 the husband and wife lived together in her ancestral home at Kanampella, but when his mother fell ill early in 1945, he began to spend most of his time in the latter's house at Weboda (14 miles away). The mother's illness was eventually diagnosed as tuberculosis, and, until she died in September 1945, he more or less adopted Weboda as his permanent residence in order to attend to the patient. The 1st defendant remained at Kanampella, but it is common ground that they visited each other from time to time and that, until at least April, 1945, marital intercourse often took place on these occasions. The 1st defendant was on cordial terms with her mother-in-law.

In or about June 1945 another " misfortune " brought them specially close together. Their only child Ena (a girl of education and culture) fell in love with the young man who is now her husband. The plaintiff and the 1st defendant objected to this association, and they jointly and severally made unsuccessful (and sometimes hysterical) attempts to break it off. Ena eventually married the young man without her parents' consent on 31st January 1946. She was promptly disinherited by her mother, and on 8th February 1946 she received a letter 1D10 from the plaintiff (obviously written on his wife's behalf as well) in which it was made quite clear to her that her overtures with a view to reconciliation with her parents were resented.

There is another person to whom reference must now be made. The 2nd defendant, when he was a lad of ten, had been engaged by the plaintiff and the 1st defendant as their domestic servant in Colombo (where they then resided) in or about the year 1924. The plaintiff later arranged for him to receive a course in mechanical training at the Government Technical College, and in due course the 2nd defendant obtained employment in the Postal Department. In spite of the improvement in his status, he retained a close connection with the household. In the words of the learned judge " he used to drive a car for the plaintiff and the 1st defendant and continued to do odd jobs for them. He acted as a servant who was grateful to his master and mistress for the help they had given him to secure better employment ".

In 1929 the 2nd defendant was transferred to Avissawella, and from that time he lived at the 1st defendant's house at Kanampella (which is not far from Avissawella). The evidence shows that he continued, as before, to be of assistance to the plaintiff and the 1st defendant in various ways. To all outward appearances, his behaviour towards his former employers was beyond reproach. When the plaintiff's mother died in September 1945, the 2nd defendant was (so the plaintiff admits) of great help in attending to certain details connected with the funeral arrangements. Even in April 1946 he and the plaintiff were jointly interested in a land transaction from which the latter hoped to earn a commission.

I must next refer to an incident which ultimately led to the institution of this action for divorce. The events of 26th October 1945 have been described by the witness Cyril Ekanayake (an apothecary) whose credibility the learned judge accepted without hesitation.

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Mr. Ekanayake and his wife had been on calling terms with the 1st defendant ever since the early part of 1945 when he was the Government Apothecary of Kosgama (another neighbouring village). He visited her house professionally on the morning of 26th October 1945, and found that she was suffering from a menstrual discharge which, so she told him, had been delayed by "about two months": she had "passed clots" when she "started bleeding profusely" on the previous day.

Upon this scanty information, and assuming, no doubt, that the 1st defendant was on terms of normal intimacy with her husband, Mr. Ekanayake formed the opinion that the case was one of "abortion" which he defined as "a discharge of the ovum from the uterus before the formation of the placenta and before the beginning of the fourth month". He added in the course of his evidence that he "would place the probable date of conception of that foetus as two months or two and a half months prior to October 26th 1945". He prescribed certain medicines and told the patient that he would call the District Medical Officer in consultation if there was no improvement in her condition by the next day. But his treatment proved beneficial. She was advised, however, not to exert herself for a fortnight. He does not appear to have communicated his diagnosis to the 1st defendant at that time.

I would certainly hesitate to decide that there was sufficient material upon which a Court of Law, exercising jurisdiction in a matrimonial action, could confidently accept Mr. Ekanayake's theory that the 1st defendant had in fact had sexual relations with a man during the month of August or September 1945. Be that as it may, this incident is the basis of the plaintiff's allegation that his wife had committed adultery with the 2nd defendant "during the period April to August 1945" (issue 1*a*). It is important to note that no evidence was offered in support of his further allegation of adultery at Nawalapitiya "between 5th February 1946 and 10th March 1946" (issue 1*b*) or "at Embulgama between 10th March 1946 and 10th April 1946" (issue 1*c*). Nor was any issue raised as to whether, as alleged in paragraph 6 of the plaint, the defendants were "still continuing to commit adultery". The charge of adultery was therefore confined to the period specified in issue 1*a*.

The plaintiff says that on information received from Ekanayake, his suspicion of an adulterous association between the 1st defendant and the 2nd defendant was confirmed in April 1946, but that thereafter (*vide* paras 4 and 5 of the plaint) he "continued to live in the same house as the 1st defendant on her undertaking not to misconduct herself in future"; he later "failed to break off the intimacy" and therefore left her finally on 30th May 1946.

The institution of this action was delayed until 20th February 1948. On 17th February 1949 interrogatories were served on the plaintiff requiring him to furnish particulars of the acts of adultery on which he relied. On 1st March 1949, before these interrogatories were answered, his proctor made an application to Court to postpone the fixing of the date of trial "*as a reconciliation was possible*". The 1st defendant's proctor, however, objected to this proposal, and the action was therefore taken up in due course.

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The learned judge granted the plaintiff a divorce on the ground that the 1st defendant had committed adultery with the 2nd defendant at Kanampella " in or about August 1945 ", but he decided that there was insufficient evidence to establish this charge *against the 2nd defendant.*

I have come to the conclusion that the decree for divorce against the 1st defendant on the ground of adultery cannot be supported, and must be set aside. The judgment under appeal is unsatisfactory in many respects, but it is unnecessary to consider those matters in detail because of a fundamental misdirection as to the standard of proof to be observed by a Court in proceedings for the dissolution of a marriage on the ground that adultery (or, for that matter, any other matrimonial offence) has been committed by one of the spouses.

In an action for divorce, the court must be " satisfied on the evidence " that the case of the plaintiff has been proved—section 602 of the Civil Procedure Code. These words have been taken over from section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925 of England, and we ought therefore to be guided by authoritative pronouncements of the English Courts as to their true meaning in the context of divorce law. Ceylon's recent attainment of Dominion status has not affected this salutary principle—*Cooray v. The Queen* [1].

In England, it has always been recognised that the same strictness of proof is required to establish a charge of adultery as in the case of a criminal charge—*Churchman v. Churchman* [2], *Ginesi v. Ginesi* [3], and *Gower v. Gower* [4]. In later judicial pronouncements, made particularly by Denning L.J. and with special reference to matrimonial offences other than adultery, it was suggested that this long-established principle ought to be relaxed. But all controversy on this subject has now been brought to an end by the ruling of the House of Lords in *Preston-Jones v. Preston-Jones* [5], and it is now settled law that the words " satisfied on the evidence " in the English Act mean that in actions for divorce the Court must demand " *the same general standard*—proof beyond reasonable doubt " *as is required to support a conviction in a criminal court.* The reason is that " the jurisdiction in divorce involves the status of parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry "—*per* Lord MacDermott.

The ruling in the *Preston-Jones case* (*supra*) has equally fixed the standard of proof required in this country under the provisions of section 602 of the Civil Procedure Code. There is no longer room for the earlier theory that in actions for divorce there are various gradations of the concept of " reasonable doubt " such as Denning L.J. had previously recommended in *Bater v. Bater* [6]. Since the *Preston-Jones case* (*supra*), attempts to revive the controversy have met with no success—*England v. England* [7], *Galler v. Galler* [8]. In divorce, as in crime, the standard of proof is precisely the same. There is no reason at all to assume that, when the parties are governed by the Roman-Dutch Law, the rule ought to be relaxed in the slightest degree. If adultery has been committed,

[1] *(1953) 54 N. L. R. 409 P. C.*
[2] *1945 P. 44.*
[3] *1948 P. 179.*
[4] *(1950) 1 A. E. R. 804.*
[5] *(1951) A. C. 391.*
[6] *1951 P. 35.*
[7] *1953 P. 16.*
[8] *(1954) 2 W. L. R. 395.*

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" the innocent spouse is not permitted to break off the bonds of matrimony by private authority, but must enter into a civil action for the dissolution of the marriage, so that, *all requisite things having been proved*, the judge himself may by his decree order the severance of the nuptial tie "—*Voet 24.2.8.*

The decision in the *Preston-Jones case* (*supra*) had unfortunately not become known in Ceylon at the time that the judgment now under appeal was pronounced. In consequence, the learned Judge's opinion as to the requisite standard of proof seems to have been largely influenced by the propositions suggested by Denning L.J. in *Bater's case* (*supra*). At the end of his judgment, he summarised the grounds on which he decided that the plaintiff's charges of adultery against the 1st defendant had been established to his satisfaction. He said :

> "*Keeping in mind that a civil court* (*even in divorce proceedings*) *does not require the same strict standard of proof as a criminal court in a charge of a similar nature*, and that divorce proceedings are of great importance to the parties (specially on charges of adultery) and to the community, and as such *a high degree of proof is required* and that this court must be satisfied *beyond reasonable doubt* in a matter of such importance, I come to the conclusion on the evidence as against the 1st defendant that the charge of adultery with the 2nd defendant in or about August and September 1945 has been proved. "

This can only mean that, if the learned Judge had adopted the strict standard of proof which is equally required in matrimonial actions and in criminal cases, he would not have been " satisfied on the evidence " that the charges of adultery had been established *against either defendant*. The words " beyond reasonable doubt " have a very clear connotation in the context of criminal law, and must receive the same meaning whenever the alleged commission of a matrimonial offence is made the ground of a prayer for divorce in matrimonial proceedings. It is quite wrong, therefore, to approach the evidence led in support of a charge of adultery on the assumption that the standard of proof, though higher than in an ordinary civil suit, falls short of what is necessary to support a conviction on indictment in criminal proceedings. The House of Lords has finally rejected the theory suggested in *Bater's case* (*supra*) that the phrase " beyond reasonable doubt " has an elastic connotation which varies with " the particular subject matter ", or that " the divorce court should not adopt the rules and standards of the criminal court ".

The case for the plaintiff was based entirely on circumstantial evidence, and the proper test to be applied was whether the totality of the evidence which the learned judge confidently accepted was " inconsistent with any other reasonable hypothesis " than that the 1st defendant had committed adultery—*Gower v. Gower* [1]. The introductory words from the extract of the learned District Judge's judgment which I have quoted indicate that, if adultery had been a criminal offence in this country, he would have acquitted the 1st defendant because the evidence fell short of

[1] (*1950*) *1 A. E. R. 804.*

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" the strict standard of proof " required in criminal cases. It was therefore his duty to answer issue 1*a* in favour of the 1st defendant in the present action.

The circumstantial evidence relied on by the plaintiff was not, in my opinion, of such a quality that a judge of first instance, having properly directed himself as to the standard of proof and in other respects, could confidently have excluded the hypothesis that the 1st defendant was innocent of the serious charge of adultery. According to the plaintiff :

1. the apothecary has proved that the 1st defendant did have sexual intercourse with a man about two months before 26th October 1945 ;
2. the plaintiff himself had by that time ceased to have marital relations with her ;
3. his own evidence of " non-access " during the relevant period was confirmed by her oral and written confessions made to him in April and May 1946 ;
4. certain statements which she made to the apothecary and the Village Headman when they tried to bring about a reconciliation between the parties after May 1946 were also tantamount to confessions.

I shall assume that item 1 was established beyond reasonable doubt, although the 1st defendant's admission at the trial that a so-called " abortion " had taken place might well have been induced by a temptation to fall into line conveniently with the apothecary's evidence which was based on inference.

Items 2 and 3 must necessarily be assessed together. The learned judge did not expressly accept the plaintiff's evidence concerning an oral confession of adultery, presumably because it was not found possible to reject the suggestion that the subsequent written " confession " (P4) was a fabricated document. In that view of the matter, the plaintiff's evidence of " non-access " could not but be regarded as extremely unreliable. Finally, I take the view that the statements made by the 1st defendant in 1946 to Ekanayake and the Village Headman were at best equivocal and did not constitute conduct or behaviour inconsistent with her innocence. As against this, the court was confronted with the important circumstance that the 1st defendant had led a chaste life for 25 years and there was no evidence against her of any acts of undue familiarity with the 2nd defendant.

The judgment under appeal is also vitiated for another reason. The 1st defendant's lawyers (no doubt for tactical reasons) did not specifically raise an issue at the trial as to condonation. But having regard to the plaintiff's own pleadings and to certain portions of his evidence, the learned trial judge was himself put upon inquiry as to whether the alleged adultery, even if established beyond reasonable doubt, had been condoned by the plaintiff after (as he says) he became aware of it in April 1946.

Section 602 (1) of the Civil Procedure Code does not entitle an innocent spouse to obtain a decree for divorce on the ground of adultery which has subsequently been " condoned ", provided of course that the

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" condonation " has been accompanied by a resumption of " conjugal cohabitation "—*section 602 (2)*—that is to say, if a reconciliation has taken place " by the full restoration of the offending spouse to his or her former position "—*Bell v. Bell* [1], *Elliot v. Elliot* [2]. " Conjugal cohabitation " can be resumed even without a renewal of sexual intercourse between the spouses after reconciliation

" It is of great importance that the question of condonation should be gone into . . . . and the fact that it is not pleaded must not shut the judge's eyes to the necessity of a full investigation " —*per* Du Parcq L.J. in *Bertram v. Bertram* [3]. A decree for divorce is a judgment *in rem*, and is not merely concerned with the rights and obligations of the parties *inter se*. The gravity of the issues involved therefore imposes a special obligation on the trial judge whenever there is material " of sufficient cogency to raise a provisional presumption of condonation " which the innocent spouse must displace before he can be granted a divorce on the ground of adultery. If, therefore, the evidence discloses that " the parties had been living together or were re-instated in one household, the judge is put upon inquiry as to whether there has been condonation or not "—*Tilley v. Tilley* [4]. Similarly, under the Roman-Dutch law, " a decree for divorce should not be granted at the suit of a husband who, knowing of his wife's adultery, continued to live under the same roof with her . . . . . *under circumstances which would justify the belief that a reconciliation has taken place* ".— *Niemand v. Niemand* [5].

In this case the plaintiff concedes that he forgave his wife and lived with her in the same house until 30th May 1946 after he had " discovered " in April that she had been guilty of infidelity. He no doubt pleaded that this temporary reconciliation had been influenced by her " undertaking not to misconduct herself in future ", but he withdrew at the trial his allegation that she had broken her pledge by committing further acts of infidelity. In these circumstances, it would perhaps be understating the position to say that the facts admitted by the plaintiff merely raised a " provisional presumption " that he had condoned the only matrimonial offence which ultimately formed the basis of his action for divorce. The learned judge has not directed his mind at all to this aspect of the case and the judgment under appeal cannot be allowed to stand for this additional reason.

In my opinion, the decree (and the consequential order for maintenance in favour of the plaintiff) must be set aside because (1) the evidence relied on in support of the allegations of adultery was found by the learned judge to have fallen short of the strict standard of proof which (in the correct view of the law) ought to be required in proceedings for divorce, and (2) the learned judge has not found as a fact that " the provisional presumption of condonation " raised by the evidence has been displaced. The trial was incomplete because no inquiry was held as to whether or not, according to the plaintiff's own version, " forgiveness was confirmed or made effective by re-instatement " in the months of April and May 1946—vide *Henderson v. Henderson* [6].

[1] *(1909) T. S. 500.*
[2] *(1925) C. P. D. 286.*
[3] *(1944) P. 59.*
[4] *(1949) P. 240.*
[5] *(1898) 15 S. C. 217.*
[6] *(1944) A. C. 484.*

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Learned Counsel for the appellant made no submissions to us with regard to the first defendant's counter-claim for a divorce on the ground of malicious desertion. I would therefore set aside the judgment of the learned judge and dismiss the plaintiff's action with costs in favour of the 1st defendant in both courts. In so far, however, as the 1st defendant's claim in reconvention has been refused, the judgment will stand, but there will be no further order as to costs in favour of either party as to that part of the case.

GUNASEKARA J.—I agree.

Appeal allowed.

1953 *Present :* **Weerasooriya J.**

G. G. PONNAMBALAM, Objector, *and* S. V. KUNASINGHAM *et al.*, Respondents

Preliminary Objections by Respondent to Election Petition No. 19 of 1952 (Jaffna)

Election Petition—Several petitioners—Appointment of agent—Amount of stamp duty payable—Security for costs, etc.—Persons who should deposit and receive it—Amendment of petition—Determination of date of amendment—Validity of amendment—Power of trial Judge to question it—Quantum of security to be deposited in case of amendment—Parliamentary Election Petition Rules, 1946, Rules 9, 12, 13 (1)—Ceylon (Parliamentary Elections) Order in Council, 1946, s. 83 (2).

Two petitioners on a single election petition "jointly and severally" appointed an agent under Rule 9 of the Parliamentary Election Rules. Both of them had a common interest in obtaining a declaration in terms of the prayer that the election of the respondent be declared void.

Held, that the instrument of appointment of agent should be stamped with the duty payable on a single power of attorney and not three powers of attorney.

"Where a power of attorney is granted in one document by several grantors in favour of one person, the question whether the document constitutes one power of attorney or several distinct powers has to be determined by reference to the interest which each grantor has in the matter in respect of which the grant is given, and where such interest is common to all the grantors the position in law would seem to be that the document constitutes a single power of attorney."

Held further: (i) In regard to deposit of security for costs, etc. of an election petition, payment of it by the petitioner's appointed agent which is expressly stated to be made on behalf of the petitioner is a payment by the petitioner within the meaning of Rule 12 (3) of the Election Petition Rules.

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(ii) Where an election petition is sought to be amended by the addition of a new paragraph the terms of which are set out in the application for leave to amend, the date of amendment of the original petition—for the purpose of determining whether it was amended within the time specified in section 83 (2) of the Parliamentary Elections Order in Council—is the date on which the application for leave to amend it is allowed by the Judge. No further act on the part of the petitioner by way of amendment is necessary.

(iii) The validity of an order allowing an application for leave to amend an election petition cannot be questioned by the Judge who subsequently tries the election petition.

(iv) When an election petition is amended, the petitioner need not give security afresh in respect of the charges included in the original petition. The only fresh security which he must give within three days after the amendment is in respect of the additional charges.

(v) Where the Commissioner of Elections has given authority to his Office Assistant to receive on his behalf deposits of security in connection with election petitions, payment of security made to the Office Assistant is payment to the Commissioner within the meaning of Rule 13 (1) of the Election Petition Rules.

ORDER made in respect of certain preliminary objections taken by the respondent to Election Petition No. 19 of 1952 (Jaffna).

N. E. Weerasooria, Q.C., with *E. B. Wikramanayake, Q.C.*, *H. Wanigatunga*, *H. W. Jayewardene*, *F. R. Dias* and *R. R. Nalliah*, for the respondent-objector.

C. S. Barr Kumarakulasinghe, with *C. Vanniasingham*, *G. T. Samarawickreme*, *A. I. Rajasingham* and *J. C. Nathaniel*, for the petitioners respondents.

H. N. G. Fernando, Acting Solicitor General, with *R. S. Wanasundera*, Crown Counsel, as *amicus curiae*.

Cur. adv. vult.

October 26, 1953. WEERASOORIYA J.—

This is an enquiry into certain objections taken by the respondent in his application dated the 2nd October, 1953, to the hearing of the original petition dated the 23rd June, 1952, and the amended petition dated the 18th August, 1952, and filed on the 19th August, 1952.

Although in the respondent's application twelve grounds of objections are set out, Mr. Weerasooria, who appeared for him at this inquiry, restricted his submissions to only four grounds which may be formulated as follows :—

(1) The appointment of an agent by the petitioners by their writing dated the 23rd June, 1952, is bad in law in that the said writing has not been duly stamped in terms of Rule 9 of The Parliamentary Election Petition Rules, 1946 ;

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(2) Security in a sum of Rs. 5,000 in respect of the original petition has not been deposited by the petitioners in terms of Rule 12 of the said rules ;

(3) The petition dated the 23rd June, 1952, has not been amended within the time specified in s. 83 (2) of the Ceylon (Parliamentary Elections) Order in Council, 1946, in that the amendment thereof by the petitioners filed on the 19th August, 1952, was effected out of time ; and

(4) Security in respect of the petition as amended has not been deposited by the petitioners in terms of Rule 12 and Rule 13 of the said rules.

Rule 9 of the rules provides for the appointment of an agent by the petitioners on an election petition by a writing to be left at the office of the Registrar of the Supreme Court, and the rule also requires that the writing " shall be stamped with the duty payable thereon under the law for the time being in force ". The writing which has been filed by the petitioners at the office of the Registrar appointing Proctor V. Navaratnam as their agent bears stamps of the value of Rs. 6. It is common ground that the law for the time being in force relating to the stamp duty payable on a writing appointing an agent under Rule 9 is Item 37 (1) under Part 1 of Schedule A of The Stamp Ordinance (Cap. 189), according to which the stamp duty is Rs. 5. Mr. Barr Kumarakulasingham explains that the reason for the writing in the present case bearing stamps of the value of Rs. 6 was in order to meet a possible contention that the duty payable is under para (1) of Head F of Part 2 of Schedule A of the Stamp Ordinance which provides for a stamp duty of Rs. 6. He, however, now agrees that the writing in question is stampable under Item 37 (1) already referred to. For the respondent it is contended that while under Item 37 (1) the stamp duty of Rs. 5 is payable on a single or joint power of attorney, where two grantors join in giving separate powers of attorney, even though the grantee be one and the same person and the grants are embodied in one document, there are in reality two powers of attorney and the stamp duty payable would be Rs. 10. Mr. Weerasooria concedes that it was open to the two petitioners under Rule 9 to have made a joint appointment of an agent and that in such an event the stamp duty payable on the instrument would be only Rs. 5. But he submits that in the present case the petitioners not only made a joint appointment but each of them went further and granted a separate power of attorney as well, and in support of his argument he points to the language used in the instrument whereby the petitioners " jointly and severally nominate, appoint and authorise Mr. Vaithianathapillai Navaratnam . . . . to act as our and each of our agent . . . . and to appear for us or either of us . . . . " His submission is that in this single instrument are incorporated three powers of attorney, one of which is a joint power while the other two are separate powers granted by each petitioner, and that a stamp duty of Rs. 15 is payable thereon. In this connection he referred me to the case of *The British Ceylon Corporation, Ltd. v. The United Shipping Board et al.* [1], and the case

[1] (*1934*) *36 N. L. R. 225.*

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of *James v. Karunaratne* [1]. Both these cases dealt with the filing of appeals by more than one appellant through the medium of a single petition of appeal which was stamped as for one petition of appeal. It was held in each case that the petition of appeal was insufficiently stamped and the appeal was rejected. In the case of *Bilindi et al. v. Wellawa Attadasi Thero* [2], however, it was held by the Privy Council that several defendants in an action who put forward a common defence may grant a joint proxy in favour of the same Proctor. Where a power of attorney is granted in one document by several grantors in favour of one person, the question whether the document constitutes one power of attorney or several distinct powers has to be determined by reference to the interest which each grantor has in the matter in respect of which the grant is given, and where such interest is common to all the grantors the position in law would seem to be that the document constitutes a single power of attorney. It was held in the case of *Allen v. Morrison* [3] that a power of attorney by all the members of a mutual insurance club nominating an attorney to execute policies on behalf of the club required only a single stamp. It is clear that Rule 9 contemplates a joint appointment of an agent by several petitioners on a single election petition. The petition which has been filed in the present case shows that both the petitioners have a common interest in obtaining a declaration in terms of the prayer that the election of the respondent be declared void. In my opinion the use of the words " jointly and severally " in the appointment, having regard to the context in which these words occur, does not have the effect contended for by Mr. Weerasooria, and I, therefore, hold that the appointment has been duly stamped. The first ground of objection accordingly fails.

The second ground of objection deals with the security in a sum of Rs. 5,000 deposited in respect of the three charges contained in the original petition. Mr. Weerasooria draws attention to the terms of the receipt filed by the petitioners under Rule 13 (1) in respect of this deposit, according to which the deposit was made by Proctor Navaratnam (who is the agent appointed under Rule 9) " on behalf of " the petitioners, and he contends that such a deposit was not duly made under Rule 12 (3) which requires that the security should be given by the petitioner. In support of his contention Mr. Weerasooria cited the case of *Costa v. Jayewardene* [4]. But according to the first head note in the report of that case, what was held there was that under the corresponding Rule 12 of the Election (State Council) Petition Rules, 1931, a deposit of money by way of security must be made in the name of the petitioner even when it is made by some other person, which is precisely what has been done in the present case. I have read the judgment in the case cited and am satisfied that the head note correctly sets out the effect of Justice de Kretser's judgment. What happened in that case was that although the security was deposited by the Proctor who filed the election petition in the case, the only information given as regards the deposit, as far as could be gathered from the receipt filed, was that it was security in respect of the election petition. As pointed out by Justice de Kretser,

[1] *(1935) 37 N. L. R. 154.*
[2] *(1945) 47 N. L. R. 7.*
[3] *8 B. & C. 565.*
[4] *(1943) 44 N. L. R. 341.*

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the receipt did not even state that the deposit was on behalf of the petitioner. In the present case the receipt shows that the deposit was made by Proctor Navaratnam on behalf of the petitioners and " by way of security for payment of all costs, charges and expenses that may become payable by . . . . the petitioners in connection with election petition No. 19 of 1952 filed by them . . . . " There is nothing in the evidence of Mr. de Silva, the Office Assistant to the Commissioner of Elections who was called as a witness by the respondent, to contradict the terms of this receipt, and I hold that the sum of Rs. 5,000 referred to in the receipt was security given by the petitioners as required by Rule 12 (3). This ground of objection, therefore, fails.

The third and fourth grounds of objection remain to be considered. The third ground of objection raises the question whether the original petition was amended within the time specified in s. 83 (2) of the Ceylon (Parliamentary Elections) Order in Council 1946, and in this connection it is necessary to refer briefly to the steps taken by the petitioners towards the amendment of the original petition by the addition of a new paragraph 3 (*d*) containing a charge of corrupt practice based on the allegation that the respondent knowingly made the declaration as to election expenses required by s. 70 of the Order in Council falsely.

On the 24th July, 1952, the petitioners filed, *inter alia*, an application for leave to amend the original petition by the addition of the paragraph 3 (*d*) referred to above. The application contained a prayer that " leave . . . . to amend their said petition dated 23rd June 1952 " be granted, and that " their said petition dated 23rd June 1952 be amended " by the addition of a new paragraph 3 (*d*), the terms of which were set out. It is common ground that under s. 83 (2) of the Order in Council the last day for amending the original petition in the manner proposed was the 30th July, 1952. This application came up for inquiry before Justice Gratiaen on the 28th July, 1952, but it did not proceed to inquiry on that date in view of an agreement arrived at between counsel for the parties. The terms of the agreement as placed on record by Justice Gratiaen were that " whatever order that is made upon the application in terms of the petitioners' prayer shall be regarded as though it had been made today ". It is fairly clear that one of the considerations which induced counsel to arrive at this agreement was that even if the application were to be taken up for hearing on the 28th July the order of the Judge could not conveniently be given earlier than after the last day (the 30th July, 1952) for amendment of the original petition. In view of this agreement the hearing of the application was deferred for a later date and in due course it came up before Justice Gunasekara on the 6th, 7th and 8th August, 1952, and on the 18th August, 1952, he made his order that the " application for leave to amend the petition in the manner proposed is allowed ". Mr. Weerasooria stated that in raising the objection now under consideration the respondent was not trying to resile from this agreement on the ground that it was not a valid agreement. His submission, however, was that s. 83 (2) of the Order in Council contemplated the effecting of an amendment by the petitioners after leave to amend had been obtained, and that even if leave to amend

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be deemed to have been obtained on the 28th July, 1952, a further act on the part of the petitioners was necessary by way of amendment of the original petition, that such act had not been performed by the petitioners within the time allowed by law and that therefore there was no amended petition which the Election Judge has jurisdiction to try. In this connection he drew my attention to a document, dated the 18th August, 1952, but filed by the petitioners on the 19th August, 1952, which purported to be a " fair copy of the amended petition ". He submitted that in so far as the filing of this document may be regarded as the act of the petitioners amending the original petition, it was done too late. The submission of Mr. Barr Kumarakulasingham, on the other hand, is that on Justice Gunasekara making his order that the " application for leave to amend the petition in the manner proposed is allowed ", the original petition stood amended as from the date of that order in the manner indicated in the application to amend filed by the petitioners on the 24th July, 1952, and that no further act on their part by way of amendment was necessary. The Acting Solicitor General, who represented the Attorney General as *amicus curiae* in these proceedings, also adopted this submission, and on a consideration of the matter I agree with the submission of the counsel for the petitioners, and I hold that the order of Justice Gunasekara is tantamount to an amendment of the original petition by the addition of the charge contained in the proposed paragraph 3 (*d*) set out in the petitioners' application dated the 24th July, 1952, and such amendment must be deemed to have been made on the 28th July, 1952. If my view that the order of Justice Gunasekara is tantamount to an amendment of the original petition in the manner indicated is correct, a question may, perhaps, arise whether it was open to him to make an order of this nature after the lapse of the time provided by law for the amendment, but this is not a question which I feel it is within my competence, either as an Election Judge or as a Judge of the Supreme Court, to go into. It is a well established rule of law that a Judge cannot in the same cause disregard a previous order made by another Judge having superior or co-ordinate jurisdiction—vide the observations of Scrutton J. (as he then was) in *Papworth v. Battersea Borough Council*[1]. When Justice Gunasekara made his order allowing leave to amend the petition it must be regarded as one made on the basis that the application before him was for leave for an amendment which could be effected within the time specified in s. 83 (2) of the Order in Council as I can hardly conceive, if I may say so with respect, that he would have made the order on the basis that what had to be decided by him was the purely acadamic question whether the amendment may be allowed irrespective of whether it could or could not be made within the specified time. If his order amounted to an order of amendment of the original petition, as in my view it did amount to, the validity of that order cannot be questioned in these proceedings. I accordingly hold that leave to amend having been obtained on the 28th July, 1952, the amendment for which leave was granted was also effected on that date, and it was therefore within time. The third ground of objection, accordingly, fails.

[1] *1915 L. J. 84 K. B. D. (Part 2) 1881 at p. 1885.*

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The fourth ground of objection deals with the security in respect of the amended petition. The submissions of Mr. Weerasooria under this ground were to some extent linked with his submissions under the third ground of objection. In the first place he stated that if, as contended for by him, the petitioners had, on obtaining leave to amend, to do a further act effecting the amendment, the only thing done by them towards the performance of that obligation was the filing, on the 19th August, 1952, of the document already referred to, and that under Rule 12 (in so far as that rule is applicable to an amendment of a petition by the addition of a new charge where the original petition already contained three charges) additional security in respect of the new charge had to be given within three days after the filing of that document, which the petitioners failed to do. His next submission was that on a petition being amended by the addition of a new charge, there comes into existence a new petition and security in respect of all the charges in that petition would have to be given afresh notwithstanding that security in respect of such of those charges as were contained in the original petition had already been given by the petitioners.

There is, of course, authority for the view that on an election petition being amended by the addition of a new charge, there comes into existence a new petition. In the case of *Clark et al. v. Lowry* [1] Grove J. stated that his judgment was based on the fact that a new charge was added by the amendment and therefore the petition was made a new petition. That was a case where the question considered was the jurisdiction of a Judge to allow an amendment of an election petition by the addition of a new charge after the time had expired within which the petition could have been presented. The matter was governed by the provisions of the *Municipal Corporations Act, 1882* [2], which gave a certain power to amend an election petition by reference to the powers of the High Court in an ordinary action within its jurisdiction subject, however, to the provisions of that Act. It was held that inasmuch as the amendment in question had the effect of converting the petition into a new one, it should not have been allowed after the time had expired within which the original petition could have been presented.

But even if it be that in the present case a " new " petition came into existence by reason of the amendment, the security given in respect of the original petition would also be security in respect of the " new " or amended petition, and it cannot, I think, be contended that on a dismissal of that petition the security given in respect of the original petition would not be liable to meet such costs, charges and expenses as may become payable by the petitioners. In my opinion, therefore, if Rule 12 has any application to a case like the present one where an additional charge is brought in by an amendment of the original petition (and in the consideration of the fourth ground of objection I do not think it necessary for me to express a definite opinion on that question in view of the ruling that I give rejecting Mr. Weerasooria's submission that fresh security in respect of *all* the charges in the " new " or amended

[1] *48 Law Times (N. S.) 762.*

[2] *45 & 46 Vict. C. 50.*

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petition should have been furnished by the petitioners), the only fresh security which the petitioners need have given was in respect of the additional charge, and such fresh security had to be given within three days after the amendment was allowed by the order of Justice Gunasekara.

It is common ground that on the 31st July, 1952, (which is within time if the amendment is deemed to have been effected on the 28th July, 1952) a sum of Rs. 2,000 was deposited by Proctor Navaratnam on behalf of the petitioners as "security for the payment of all costs, charges and expenses that become payable by the petitioners by virtue of the amendment by the addition of a further charge . . . ." as stated in the receipt filed bearing that date. Mr. Weerasooria submits that this sum of Rs. 2,000 was neither paid by the petitioners nor was it paid to the Commissioner of Elections, and that in neither respect, therefore, was there compliance with the relevant provisions of Rules 12 (3) and 13 (1). The first of these two submissions is however disposed of by my earlier ruling that a payment by the petitioners' appointed agent, Proctor Navaratnam, which is expressly stated to be made on behalf of the petitioners, is a payment by the petitioners. As regards the second of these submissions, Mr. Weerasooria relies on the evidence of Mr. de Silva, the Office Assistant to the Commissioner of Elections, that the payment was made to him on the 31st July, 1952, at a time when the Commissioner was away from Colombo on circuit. Under cross-examination Mr. de Silva, however, stated that he had the authority of the Commissioner to receive on his behalf deposits of security in connection with election petitions whenever the Commissioner was away on other duties, and that this particular sum was received by him under that authority.

I am unable to interpret Rule 13 (1) as bearing the meaning that the manual act of receiving the payment should be by the Commissioner himself, even on the basis that receiving payment is a statutory duty falling on the Commissioner. I should think that it would be open to the Commissioner, even if he should be in his office in Colombo, to instruct his office assistant to receive payment on his behalf in an ante-room ; and likewise it would be open to the Commissioner to instruct his office assistant to receive payments on his behalf on any particular day on which the Commissioner may be absent from his office. Mr. Weerasooria brought to my notice the case of *Lieversz v. Kannangara*[1] where it was held that a deposit of a sum of money with an Assistant Shroff of the Colombo Municipal Council was not a compliance with s. 30 of the Colombo Municipal Council (Constitution) Ordinance which required that the deposit should be with the returning officer. But it is to be observed that in the same case it was also held that there would be a sufficient compliance with the requirements of s. 30 if the deposit was so made that the returning officer would have control over the money. In the present case there can be no doubt that the money which was handed over to the Office Assistant of the Commissioner of Elections was money over which the Commissioner himself had control.

[1] *(1943) 45 N. L. R. 55.*

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The fourth ground of objection also, therefore, fails. In the result all the objections raised by the respondent are over-ruled. The trial of the original petition, as amended, will be proceeded with on the four charges contained therein. The respondent will pay to the petitioners their costs of this inquiry, which are fixed at Rupees one thousand eight hundred and thirty seven and cents fifty by agreement of parties.

Objections overruled.

1954 *Present :* **Gratiaen J. and Gunasekara J.**

A. G. SELVAM, Appellant, *and* N. KUDDIPILLAI, *et al.*, Respondents

S. C. 310—D. C. Jaffna, 5,405

Quia timet—*Action for declaratory decree—Scope of such action—"Cause of action"—Civil Procedure Code, s. 5.*

An owner of immovable property is entitled to enjoy it without disturbance and without fear of unjustifiable interference from outsiders. If his enjoyment is disturbed by forcible ouster, the remedies of a *rei vindicatio* action or (in appropriate cases) of a possessory action are available to him ; if it is seriously threatened, he may demand in *quia timet* proceedings a declaration of his rights so as to prevent in anticipation the apprehended invasion of his rights of ownership.

Plaintiff, who claimed to be owner of certain immovable property, alleged that the defendants, disputing his claim to be the sole owner, wanted him to pay them the value of their share of the property. He instituted the present action claiming a declaration that he was the sole owner of the property. He admitted that, notwithstanding the dispute as to title, he had continued to possess the property and enjoy its produce exclusively. The trial Judge dismissed the action on the ground that it was premature.

Held, that the plaintiff had a "cause of action" within the meaning of section 5 of the Civil Procedure Code and was, therefore, entitled to maintain the action.

APPEAL from a judgment of the District Court, Jaffna.

H. W. Tambiah, for the plaintiff appellant.

No appearance for the defendants respondents.

Cur. adv. vult.

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January 20, 1954. GRATIAEN J.—

The plaintiff appellant instituted this action against the 1st, 2nd and 3rd defendants on 20th April, 1949, claiming, by virtue of a conveyance P2 of 1941 and of prescriptive user, a declaration that he was the sole owner of the property described in the schedule to the plaint. He complained that since 1947 the respondents had falsely asserted title to the property in dispute and " were disturbing his possession thereof to his damage of Rs. 100 *per annum* ".

In a joint answer filed on 20th September, 1949, the respondents conceded that the appellant was entitled to an undivided $\frac{1}{4}$ share of the property, but they disputed his claim to be sole owner. They asserted that they owned the outstanding shares in accordance with the chain of title set out in their pleadings, and asked " that the plaintiff's action in respect of a $\frac{3}{4}$ share of the said land be dismissed with costs ".

Fourteen issues clarifying the dispute as to title were framed at the commencement of the trial, and the plaintiff then gave evidence. He stated that he had been in exclusive enjoyment of the property from 1941 (i.e., since the date of his purchase under P2) until 1947, but that the respondents then " disturbed " his possession in the sense that they asserted their disputed claim to the property and " asked (him) to pay money for their share ". He instituted proceedings against them in the Village Tribunal in 1947, but the dispute was referred to a higher Court. " After that ", he explained, " the defendants met me and wanted me to pay the value of their share of the land and therefore I came and filed this action ". He admitted that, notwithstanding this dispute as to title, he had continued to possess the property and enjoy its produce exclusively.

After the plaintiff had concluded his evidence, but before his case had been closed, the respondent's counsel raised an additional issue in the following form :

> " 15. Has the evidence of the plaintiff ' disclosed a cause of action against the defendants inasmuch as in his evidence he has stated that he is in undisturbed possession of the land since 1948 ' ? "

The learned judge answered this issue in the negative and, without trying the rest of the issues, dismissed the plaintiff's action with costs.

In my opinion the learned judge has taken too narrow a view of the meaning of the expression " cause of action " as defined in section 5 of the Civil Procedure Code. The expression " includes the denial of a right ", and, without questioning the correctness in their context of certain *dicta* of Pereira J. and de Sampayo J. in *Lowe v. Fernando*[1], I am satisfied that the respondents' conduct complained of in these proceedings goes far beyond what those distinguished Judges characterised as " a mere verbal denial " which by itself is insufficient to constitute a " cause of action ". In the present case, the plaintiff's evidence (which

[1] *(1913) 16 N. L. R. 398.*

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the learned trial Judge has assumed to be true on this point) makes it clear that the respondents had *not merely denied his title but had positively asserted theirs ;* and, on the basis of that allegedly false assertion, they had, both before and after the institution of the Village Tribunal proceedings in 1947, made demands upon him for a recognition of their claims. In their pleadings, and in the issues framed at the commencement of the trial, the continuation of the outstanding dispute as to title was further emphasised. In such a state of things, it is idle to suggest that the appellant's claim to obtain a final adjudication of the dispute is premature.

An owner of immovable property is entitled to enjoy it without disturbance and without fear of unjustifiable interference from outsiders. If his enjoyment is disturbed by forcible ouster, the remedies of a *rei vindicatio* action or (in appropriate cases) of a possessory action are available to him ; if it is seriously threatened (as the appellant claims it has) he may demand in *quia timet* proceedings a declaration of his rights so as to prevent in anticipation the apprehended invasion of his rights of ownership.

The Civil Procedure Code, even in its present form, does not deny to litigants the benefit of declaratory decrees in certain circumstances for the purpose of settling concrete disputes which have arisen between them —*Hewavitarane v. Chandrawathie*[1] and *Naganathar v. Velauthan et al*[2]. Where an owner of property complains only of a " bare verbal denial of his rights ", a Court may very properly refuse to entertain a declaratory action if no concrete dispute relating to the conflicting interests of the parties can be said to have actually arisen. In the present case, however, the plaintiff's evidence does disclose a cause of action within the strict meaning of section 5 of the Code. The law does not compel an owner to postpone his claim to relief until the dispute as to title has led to physical dispossession (perhaps by violence). With great respect, I think that this is a more accurate explanation of the appellant's right to maintain his action than that suggested in *Ratwatte v. Cumarihamy*[3].

In my opinion, the dismissal of the plaintiff's action was premature. His evidence as to the nature of the " disturbance " complained of certainly destroys his claim to damages or to an order for ejectment. On the other hand, he is entitled to proceed with that part of his action which relates to a bare declaration of his rights of ownership to the property in dispute. I would set aside the order under appeal, and send the record back for a re-trial on all the issues relevant to the dispute between the parties as to title. The appellant is entitled to the costs of this appeal and his costs of the abortive trial in the lower Court. All other costs will be costs in the cause.

GUNASEKARA J.—I agree.

Order set aside.

[1] *(1951) 53 N. L. R. 169.* [2] *(1953) 55 N. L. R. 319 ; 50 C. L. W. 13.*

[3] *(1917) 4 C. W. R. 87.*

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1952 *Present :* **Swan J.**

LOCAL GOVERNMENT SERVICE COMMISSION, Petitioner, *and* URBAN COUNCIL, PANADURA *et al.*, Respondents

S. C. 487—Application for a Writ of Mandamus

Mandamus—*Alternative remedy available—Circumstances when writ would nevertheless lie—Local Government Service Ordinance, No. 43 of 1945, s. 51 (a)—Pension payable thereunder—Remedy for collecting it from local authority.*

Mandamus would lie where an alternative remedy by way of ordinary action would not be convenient or effective.

A writ of *Mandamus* is available to the Local Government Service Commission in order to compel a local authority to pay money due to it under section 51 (*a*) of the Local Government Service Ordinance in respect of a pension granted to a retired member of the Local Government Service. The obligation imposed on the local authority in such a case is in the nature of a public duty and can be enforced by way of *Mandamus* because an ordinary action would not be a convenient or effective remedy.

APPLICATION for a writ of *Mandamus*.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy*, for the petitioner.

E. B. Wikramanayake, Q.C., with *Sam. P. C. Fernando*, for the 1st respondent.

Sam. P. C. Fernando, for the 2nd respondent.

Cur. adv. vult.

November 21, 1952. SWAN J.—

This is an application for a writ of *Mandamus* on the Urban Council, Panadura, and its Chairman to command them to pay to the petitioner all sums of money that have fallen due and all sums that will in the future fall due in respect of the pension granted to one B. P. Ranasinghe.

The petitioner's case is that under the provisions of the Local Government Service Ordinance, No. 43 of 1945, as amended by Ordinances Nos. 56 of 1946 and 37 of 1947 and Act No. 8 of 1949, all employees of Local Authorities including Urban Councils who hold scheduled posts are members of the Local Government Service and, as such, in the service of the petitioner; and that the power to grant pensions to such employees upon retirement is vested in the petitioner. Under section 51 of the main Ordinance as amended by section 19 of Act No. 8 of 1949 all pensions granted by the petitioner to retired members of the Service are payable by the Local Authority concerned to the petitioner out of its funds before the 10th day of each month. Under section 51 (*a*) the pension granted to a retired member is payable by the petitioner to such member. B. P. Ranasinghe

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aforementioned who was Superintendent of Works of the Urban Council, Panadura, and who was a member of the Service of the petitioner retired under the provisions of section 46 of the Local Government Service Ordinance with effect from 15th March, 1950. On 14.12.1950 the petitioner duly approved the payment of a pension of Rs. 142·92 per mensem to the said B. P. Ranasinghe. The respondents were duly informed of this decision and requested to remit all sums due in respect of this pension so that the petitioner could carry out its statutory obligation under section 50 (1) of the Ordinance. For several months the respondents failed to comp y with the petitioner's requests. On 14.7.1950 the respondents remitted to the petitioner only a sum of Rs. 3,029·74 out of a sum of Rs. 3,938·92 payable up to that date, and recommended that a reduced pension of Rs. 95·28 per mensem be granted to the aforementioned B. P. Ranasinghe. This recommendation was considered but rejected by the members of the Commission and on 30.7.1951 the petitioner returned the cheque for Rs. 3029/74 to the respondents informing them that the recommendation to reduce the pension was rejected and requesting them to remit the full amount of Rs. 3,938·92. The respondents, however, failed, and neglected to do so.

This application was made on 22.9.1951. On 25.9.1951 the 1st respondent remitted to the petitioner the full amount, namely, Rs. 3,938·92. That fact is referred to in the statement of objections of the 1st respondent filed on 7.11.1951 and complaint is made that the petitioner's Proctors demanded a large sum by way of costs which sum was described as exorbitant and unreasonable. In this state of things one would have expected an adjustment of the matter but the 1st respondent's Counsel at the inquiry did not concede the right of the petitioner to apply by way of *mandamus* for the performance of the 1st respondent's obligation. In fact, in the 1st respondent's objections it is stated that the petitioner's remedy is by action and that *mandamus* does not lie. The 2nd respondent filed an affidavit in support of the objections of the 1st respondent.

At the inquiry, Mr. Sam. P. C. Fernando appearing for the 2nd respondent submitted an affidavit to the effect that the 2nd respondent had resigned from the office of Chairman on 1st October, 1952. I suggested that he should be dismissed from the case without costs but as his Counsel insisted on an order for costs, the matter could not be settled even as far as the 2nd respondent was concerned.

The question I have to decide is whether the petitioner can ask for a writ of *mandamus*. Counsel for both respondents make common cause in resisting the application. They concede that the petitioner has the right to demand, and the 1st respondent the liability to pay the pension in question. It is, however, contended that *mandamus* does not lie for the following reasons :—

(*a*) it will not be granted except to compel the performance of a public duty. The Ordinance only creates a liability on the part of the 1st respondent to pay the pension ; it does not impose on the 1st respondent an obligation in the nature of a public duty but only a civil liability.

(*b*) there is an alternative remedy, namely, recovery by ordinary action.

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As regards (*a*) I would hold that the obligation imposed on the 1st respondent is in the nature of a public duty. As regards (*b*) undoubtedly the petitioner can sue for the recovery of each month's pension as it falls due ; but that would not be a convenient or effective remedy. The inconvenience is self-evident. The ineffectiveness will be readily understood when one considers the steps that have to be taken in execution under a decree obtained in a civil action. Allen on *Law and Orders* at page 61 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. "

The application of the petitioner against the 1st respondent is allowed with costs. A writ of *mandamus* will issue against the 1st respondent as prayed for in the petition. As the 2nd respondent is no longer the Chairman he is discharged from these proceedings, but I make no order in his favour as to costs.

Application allowed.

1953 *Present :* **Swan J.**

A. HUTCHINSON, Appellant, *and* D. D. WIJESINGHE (S. I. Harbour Police), Respondent

S. C. 688—J. M. C. Colombo, 45,849

Customs Ordinance—Section 158—Prosecution thereunder—Burden of proof.

In a prosecution under section 158 of the Customs Ordinance for possessing an article suspected to have been stolen from any ship, boat, quay, &c., a duty is cast upon the Court to satisfy itself that there were reasonable grounds for suspecting that the article was stolen from any ship, &c. It is only after the Court is so satisfied that it would become incumbent on the accused to give an account as to how he came by the article.

APPEAL from a judgment of the Joint Magistrate's Court, Colombo.

D. S. Jayawickreme, with *E. A. G. de Silva*, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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December 2, 1953. SWAN J.—

I do not think I can allow this conviction to stand. The accused was charged under Section 158 of the Customs Ordinance which makes the possession of certain articles suspected to have been stolen from any ship, boat, quay, warehouse or wharf of any port of this island an offence. The accused was found in possession of a brass valve valued at Rs. 25. There is nothing in the evidence from which the learned Magistrate could have been satisfied that, having regard to all the circumstances of the case, there were reasonable grounds for suspecting this article to have been stolen from any ship, boat, quay, warehouse or wharf in the port of Colombo. It was only after the learned Magistrate was so satisfied that it would have become incumbent on the accused to give an account to the satisfaction of the Magistrate as to how he came by this article. In the case of *Sammie v. Nagoda Police*[1] Nagalingam J. considered Section 16 (1) of the Rubber Thefts Ordinance where a similar duty is cast upon the Magistrate to satisfy himself that there were reasonable grounds for suspecting the rubber to have been stolen, having regard to all the circumstances. In that case the accused actually pleaded guilty, but the learned Judge took the view that the Magistrate was not thereby relieved of the duty cast upon him by the section.

I set aside the conviction and acquit the accused.

Appeal allowed.

[1] *(1951) 53 N. L. R. 255.*

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1954 *Present :* **Gratiaen J. and Fernando A.J.**

W. M. D. D. G. WIJERATNE, Appellant, *and* K. D. GABRIEL, Respondent

*S. C. 451—D. C. Colombo, 19,487*M

Delict—Actio legis Aquiliae—*Computation of prescriptive period—Damage is gist of action—Prescription Ordinance (Cap. 55), s. 9.*

In actions under the lex Aquilia and in other actions in which proof of patrimonial loss is a condition of liability, the period of prescription does not begin to run until some damage has actually occurred.

Plaintiff was the Headmaster, and the defendant an Assistant Master, of a school. Plaintiff alleged that defendant "falsely and maliciously in order to put the plaintiff into trouble and to cause him loss" falsified certain attendance registers of the school on June 15, 1944, and that in consequence of an investigation by his employers into these irregularities his services as Headmaster were discontinued on December 1, 1947. He claimed that a cause of action accrued to him for the recovery of Rs. 7,500 as damages from the defendant. Defendant pleaded that the action, which was instituted on May 28, 1948, was prescribed.

Held, that the date of commencement of the prescriptive period of two years under section 9 of the Prescription Ordinance was December 1, 1947, and not June 15, 1944.

APPEAL from a judgment of the District Court, Colombo.

N. E. Weerasooria, Q.C., with *C. G. Weeramantry*, for the plaintiff appellant.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the defendant respondent.

Cur. adv. vult.

May 26, 1954. GRATIAEN J.—

This is an appeal against a judgment upholding, on a preliminary issue of law, a plea that an action for damages instituted on 28th May, 1948, was prescribed. The defendant had raised a further preliminary issue as to whether the averments in the plaint disclosed a cause of action against him, but this plea was eventually withdrawn.

Section 9 of the Prescription Ordinance admittedly governs the case, so that the action could not be maintained unless it was instituted "within two years from the time the cause of action shall have arisen". The dispute is as to when precisely (assuming the averments in the plaint to be true) the plaintiff's cause of action first accrued to him. In the

2——J. N. B 36491-1,592 (6/54)

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absence of any allegation of concealed fraud, the period of limitation begins to run " from the earliest time at which an action could be brought " —*Reeves v. Butcher* [1].

We must first analyse the averments in the plaint (after discounting its unnecessary and irrelevant flourishes) so as to ascertain the true nature of the cause of action on which the plaintiff based his claim. It is alleged :

(1) that the plaintiff had at all relevant dates been the Headmaster, and the defendant an assistant master, of St. Lucia's Bilingual School in Kotahena (paragraphs 2 and 3) ;

(2) that the defendant " falsely and maliciously in order to put the plaintiff into trouble and to cause him loss " falsified certain attendance registers of the school *on 15th June, 1944* (paragraphs 5 and 7) ;

(3) that in consequence of an investigation by the plaintiff's employers into these irregularities his services as Headmaster were discontinued on 1st December, 1947 (paragraph 6), and he suffered consequential loss and damage which he assessed in a sum of Rs. 7,500 (paragraph 8) ;

(4) that a cause of action had accrued to the plaintiff to sue the defendant for the recovery of such damages (paragraph 8).

The question for our decision is whether, *if these averments be true*, the cause of action originally arose on 15th June, 1944 (as the learned judge has held) or whether it only became complete on 1st December, 1947, when the plaintiff lost his professional employment as Headmaster as a direct consequence of the irregularities maliciously committed by the defendant on the earlier date. If the latter view be correct, the plea of prescription admittedly fails.

The gist of the plaintiff's complaint is that he suffered patrimonial loss on 1st December, 1947, and that the " real and proximate cause of the loss or injury " was the wrongful conduct of the defendant (committed on 15th June, 1944, and specified in paragraphs 5 and 7 of the plaint).

The analogy of the English decisions where in the case of certain torts, " the proof of real damage is the foundation of the plaintiff's right " is instructive, because in such a situation the cause of action arises only when the plaintiff's enjoyment of his rights (whether they be of property or employment or take some other form) has been interfered with " by the actual occurrence of the mischief "—*Backhouse v. Bonami* [2], *Darley Colliery Co. v. Mitchell* [3].

In this country, if an aggrieved party's claim is based on an actionable wrong, the question as to when his cause of action first arose must of course be answered with reference to the Roman-Dutch law. In actions under the *lex Aquilia and in other actions in which proof of patrimonial loss*

[1] *(1891) 2 Q. B. 509 at 511.*
[2] *(1861) 9 H. L. C. 543 (–11 E. R. 825).*
[3] *(1886) 11 App. Cas. 127.*

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is a condition of liability, the period of prescription (as in England) does not begin to run until some damage has actually occurred. Gardiner J.P. summarised the law as follows in *Coetzee v. S. A. R.* [1]:

> "There is no 'cause of action' until everything has happened which would entitle the plaintiff to judgment. Now in delict, a wrongful act or omission does not always by itself entitle a person complaining of it to judgment. There are cases where it does, e.g., where *contumelia* is involved. But there are many cases where the wrongful act does not give the plaintiff a right to judgment unless damage has been sustained, and *the damage need not be contemporaneous with the wrongful act* . . . . There may be a wrong without, at the time, any damage, and after an interval damage may for the first time result."

As the present action was instituted within two years of the date on which the plaintiff claims to have suffered damage through deprivation of his employment as Headmaster of the school, the learned judge was not justified in deciding the preliminary issue of prescription in favour of the defendant.

Certain local decisions were referred to us in which the impact of section 9 of the Prescription Ordinance (and of analogous statutory provisions) on actions for delict has been discussed—*Alla Pitche v. Adams* [2], *Karolis v. Woutersz* [3], *Wadurala v. Sunderland Rubber Co.* [4] and *Suppramaniam Chetty v. Fiscal W. P.* [5]. The true principle is that where an act whether lawful or wrongful at its inception is not actionable *per se*, but becomes so only by reason of consequential damage, prescription runs only from the actual happening of the damage.

The learned judge seems to have assumed that this principle is confined to cases where the conduct complained of was at its inception "lawful" but nevertheless becomes actionable when it subsequently caused damage to the plaintiff. This is not correct. In England, some categories of "wrongful acts" are not actionable unless and until they have caused actual damage to the aggrieved party—e.g., negligence, nuisance and deceit—*Pollock on Torts* (14th Ed.) pp. 150–1. Similarly, under the Roman-Dutch law, "the *actio legis Aquiliae* is only available for an *injuria* resulting in pecuniary loss (*damnum injuria data*)"—*Matthews v. Young* [6].

In the present case, "damage is the gist of the action", and the institution of proceedings by the plaintiff before he actually suffered pecuniary loss would have been premature—because his cause of action was incomplete until the defendant's alleged plan (previously conceived and put into execution) succeeded in its purpose.

I observe that in *Nelson v. Municipal Council, Colombo* [7] this Court went so far as to hold that "where a cause of action accrues to the aggrieved party only at the date of the occurring of actual damage, a fresh cause of action arises in respect of each succeeding damage".

[1] (*1933*) *C. P. D. 565.*
[2] (*1877*) *Ram. Rep. 338.*
[3] (*1888*) *8 S. C. C. 153.*
[4] (*1914*) *18 N. L. R. 76.*
[5] (*1916*) *19 N. L. R. 126.*
[6] (*1922*) *S. A. A. D. 492 at 504.*
[7] (*1909*) *13 N. L. R. 43.*

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This may well be so where the act complained of was *ab initio* lawful, or in the case of a wrongful act which in truth constitutes a continuing cause of action, but not otherwise. " Where a negligent or wrongful act has caused *some damage*, a right of action accrues immediately for all the damage flowing from the unlawful act, *including prospective* damage " —*Oslo Land Co. v. Union Government* [1]. In situations of that kind, the difficulty of assessing the prospective damage cannot alter the fact that the cause of action has in fact already occurred.

In my opinion the judgment under appeal should be set aside and the case remitted for trial according to law on the merits. Should the plaintiff ultimately succeed in establishing a good cause of action, the damages awarded to him must of course be restricted to the pecuniary loss (actual and prospective) sustained or to be sustained on or after 1st December, 1947, by reason of the *injuria* complained of. The averment that the plaintiff had, in addition, " suffered pain of body and mind " is extraneous to the true cause of action and therefore irrelevant to the issue as to damages.

The defendant must pay to the plaintiff the costs of this appeal and of the abortive trial. All other costs will be costs in the cause.

FERNANDO A.J.—I agree.

Judgment set aside.

1954 *Present :* **Gratiaen J. and Gunasekara J.**

H. K. J. APPUHAMY, Appellant, *and* THE ATTORNEY-GENERAL, Respondent

*S. C. 371—D. C. Ratnapura, 8,638*M

Contract—Tender—Execution of a further agreement—Point of time when contract becomes binding.

Plaintiff had been invited to make a tender for certain work on the understanding that, if the tender was accepted, he would be required within a fixed period of time to sign an agreement for the due performance of the work. He accordingly signed an agreement whereby he undertook to complete the work within a certain period.

Held, that the contract automatically became operative as soon as the plaintiff signed the agreement. It was not open to the other party thereafter to change his mind on the ground that he had not signed the agreement himself.

APPEAL from a judgment of the District Court, Ratnapura.

Sir Ukwatte Jayasundera, Q.C., with *V. T. de Zoysa* and *G. T. Samarawickreme*, for the plaintiff appellant.

B. C. F. Jayaratne, Crown Counsel, for the Crown.

Cur. adv. vult.

[1] *(1938) S. A. A. D. 584.*

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April 5, 1954. GRATIAEN J.—

This is an action against the Crown for breach of contract.

In December 1946 tenders were invited for the construction of two abutments for a bridge at Pellakada across the Heenganga. The notices stated that the tenders should reach the Chairman of the Village Committee of Palle Pattu, Kukul Korale, not later than the afternoon of 20th February, 1947, and that the successful tenderer " must be prepared to enter into an agreement *with the Government Agent* for the due performance of the work within 7 days of the notification of acceptance and to furnish cash security in a sum of not less than 10% of the amount of the tender". It is common ground that the printed words " Government Agent " appearing in this clause should have read, and were understood to mean, " Assistant Commissioner of Local Government ".

The Village Committee recommended to the Assistant Commissioner that the plaintiff's tender for Rs. 4,795 should be accepted, and the Assistant Commissioner's acceptance of that tender was in due course notified to the plaintiff. He thereupon deposited at the Ratnapura Kachcheri on 28th April, 1947, a sum of Rs. 480, and he contemporaneously signed in triplicate a printed agreement which was placed before him for signature by the Superintendent of Village Works attached to the Office of the Assistant Commissioner of Local Government. In this document (marked P3) :

1. he bound himself, *inter alia*, to execute the works as set forth in the relative plans, specifications and schedule of rates ;
2. he hypothecated in favour of the Assistant Commissioner the sum of Rs. 480 as security for the due performance of his contractual obligations ;
3. he undertook to complete the work " *within 6 months from date hereof* " and, in default thereof, to pay liquidated damages to the Assistant Commissioner at a specified rate.

After the plaintiff had signed this agreement, the Superintendent of Village Works (whose function it was to supervise contracts of this nature) showed the plaintiff where the work had to be done, and on 16th May, 1947, the plaintiff commenced building operations which the learned Judge assessed at Rs. 2,087.50. On 10th July, 1947, however, he received from the Assistant Commissioner a letter bearing the date 30th June, 1947, instructing him " not to commence work until you hear from me and receive a signed copy of the agreement form ".

The Assistant Commissioner sought to explain his attitude in writing this letter by stating that, shortly after the plaintiff had signed the agreement and deposited his security as required by the notice calling for tenders, departmental consideration was for the first time given to the question whether it would be " more expedient " to call for fresh tenders for the entire work to be undertaken by a single contractor. This new development was not however communicated to the plaintiff until July, 1947, and the authorities should have realised that, having already accepted a tender from the plaintiff for the execution of a part of the work, it was impossible for them to call for fresh tenders on this new basis without committing a breach of contract. Be that as it may,

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other complications followed, and the plaintiff was prevented from proceeding with the work entrusted to him. He therefore instituted this action against the Crown for the recovery of a sum of Rs. 3,067·50 made up as follows :

(*a*) Rs. 2,087·50 being the cost of work already performed under the contract, and which was admittedly of no independent value to the plaintiff ;

(*b*) Rs. 480 being the amount deposited on 20th April, 1947 ;

(*c*) Rs. 500 representing the nett profit which the plaintiff would have earned if the contract had not been broken.

The learned judge dismissed the plaintiff's action because in his opinion :

(*a*) there was no concluded contract between the parties, as the Assistant Commissioner had not yet signed the agreement P3;

(*b*) in any event, the contract, even if concluded, was entered into by the Assistant Commissioner as agent of the Village Committee and not of the Crown.

In my opinion there was no merit in either of these defences.

As for the second line of defence relied on by the Crown, it is quite obvious that the Assistant Commissioner was throughout the transaction acting as an agent of the Crown. He himself explained that the cost of construction of the proposed bridge was to be met from funds belonging to the Central Government and exclusively administered and controlled by the Department of the Commissioner of Local Government (which is a Government Department). Before that Department was established under the provisions of Ordinance No. 57 of 1946, the proper authority for controlling such funds and entering into contracts in connection with expenditure of this kind was the Government Agent. The Village Committee, on the other hand, (beyond making recommendations for the acceptance of tenders by an officer of the Crown) could not and did not enter into contracts of this nature on its own account except in cases where the necessary funds were (by an entirely different procedure) placed under their direct control. The forms of the notices calling for tenders, and also the terms of the printed agreement P3, could not but have been intended to make it clear to the tenderer that he was being invited to negotiate with the Government (which controlled the relative funds) and not with the Village Committee (which had no funds from which payments under the proposed contract could be met).

The question remains whether the omission of the Assistant Commissioner to sign the agreement which the plaintiff had duly signed had the effect of leaving the parties still in the stage of "negotiations", so that there was no concluded contract in force when the plaintiff commenced work under the honest and (according to the evidence) the induced belief that there was.

Let us analyse the position. The plaintiff had been invited to make a tender on the understanding that, if it was accepted, he would be required within a fixed period of time to (1) enter into an agreement for the due performance of the work and (2) furnish cash security in a sum not less than 10% of the tender. The acceptance of his tender would

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(but for these stipulated conditions) have automatically brought the parties into contractual relationship with one another. But in this case, the incidence of contractual rights and obligations was postponed until the plaintiff duly complied with both these conditions—*U. C. Matale v. Weerasinghe* [1]. As soon as that was done, nothing further was required to be done by the Assistant Commissioner to make the bargain binding on the Crown on whose behalf he was acting.

It is important to note that the terms of the formal agreement P3 expressly imposed very onerous obligations on the plaintiff and none (except by implication) on the other party. Moreover, by signing the agreement the plaintiff immediately became bound to complete the work *within six months from that date.* This clause strongly supports the argument that the contract automatically became operative as soon as the plaintiff signed the document. In other words, the unqualified acceptance by the Assistant Commissioner of the plaintiff's offer to complete the work for Rs. 4,795, subject only to the latter's due compliance with the unilateral conditions stipulated in the " notice calling for tenders ", left the former no *locus poenitentiae* to withdraw his acceptance after these conditions had been duly satisfied. The language of the agreement shows conclusively that the security was deposited and hypothecated on the basis that a contract had been entered into, not on the assumption that the other party was still free to change his mind.

I would allow the appeal with costs in both Courts, and enter judgment in favour of the plaintiff for Rs. 3,967.50 together with legal interest on the sum of Rs. 480 from date of action until date of decree and on the aggregate amount of the decree in full.

GUNASEKARA J.—I agree.

Appeal allowed.

[COURT OF CRIMINAL APPEAL]

1953 *Present:* **Rose C. J. (President), H. A. de Silva J. and K. D. de Silva J.**

E. CHANDRADASA, Appellant, *and* THE QUEEN, Respondent

APPEAL NO. 60, WITH APPLICATION 104, OF 1953

S. C. 9—M. C. Kalutara, 16,544

Charge of murder—Plea of self defence—Summing-up—Circumstances when Judge should give adequate direction on sudden fight and provocation—Penal Code, s. 294, Exceptions 1 and 4.

In a trial for murder, questions of sudden fight or grave and sudden provocation should be left to the jury and adequately explained by the trial Judge where the facts, or the necessary inference to be drawn from them, would make it possible for the jury reasonably to form such a verdict. The mere fact that the accused himself, or his counsel, has contended for a complete acquittal on the ground of self-defence does not excuse the jury from considering, or the trial Judge from directing them upon, the question as to whether the true facts would not necessitate a verdict of culpable homicide not amounting to murder.

[1] *(1952) 54 N. L. R. 469.*

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APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

A. B. Perera, with *J. C. Thurairatnam* and *D. A. Jayasuriya,* for the accused appellant.

G. P. A. Silva, Crown Counsel, with *N. T. D. Kanekeratne,* Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 16, 1953. ROSE C.J.—

The appellant was convicted by an unanimous verdict of the jury of the murder of one Egodahettiaratchige Albert Silva. The main point taken by learned counsel for the appellant is that there was no, or insufficient, direction to the jury on the question of grave and sudden provocation or sudden fight, so that in effect the jury were denied the opportunity of returning a verdict of culpable homicide not amounting to murder on the basis that either one or the other of those exceptions had been established.

The case for the prosecution was that excitement prevailed in the village owing to a recent Village Committee Election and that on the day in question the accused and a man called Dionis approached the deceased ; that Dionis struck a blow on the deceased with his hand ; and that the accused delivered one stab blow on the deceased which alighted on the left side of the chest and penetrated the heart. The injury was necessarily fatal. The appellant, who agrees that there was election excitement in the village but who attributes the ill-feeling between the deceased and himself to an episode regarding impersonation which he alleges he detected and in which the deceased was implicated, gave evidence on his own behalf and took up the position that he was set upon by the deceased and two other men and that in the course of the struggle he grappled with the deceased for the possession of the deceased's knife and that in the course of that struggle he inadvertently pressed the knife into the body of the deceased man.

The learned trial Judge appears himself to have formed the view, which logically speaking is of course quite tenable, that the appropriate verdicts for the jury should be either guilty of murder or not guilty of any offence, on the ground that if the defence version was accepted in full it would seem to be quite clear that the appellant was acting in self defence and had not exceeded his right.

The only reference that the learned trial Judge made to the question of grave and sudden provocation was at page 27 of his charge where he said : " Learned Counsel asked you to consider whether the accused acted under grave and sudden provocation. If you hold that the circumstances narrated by the accused were the circumstances in which the accused came to stab the deceased then there is grave and sudden provocation. Why consider that matter ? If the accused acted in the exercise of the right of private defence and if he did not exceed that right, then he is entitled to an acquittal. "

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In effect, therefore, the learned Judge is directing the jury that they should disregard the possibility of their adopting a middle course on the ground that the exception of grave and sudden provocation had been established and that they were limited to the choice of two verdicts only, namely, guilty of murder or not guilty of any offence. Moreover, there is no reference at all at any stage of the charge to the question as to whether or not the accused should be convicted of culpable homicide not amounting to murder on the ground that the injuries on the deceased were caused in the course of a sudden fight.

Counsel for the appellant contended that, as in so many other murder cases of this type, it is open to the jury to come to the conclusion that the true version of what occurred may lie somewhere between the prosecution version and the defence version and that in the event of their forming such a view a verdict of culpable homicide not amounting to murder would be appropriate.

There is a long line of authorities to the effect that questions of sudden fight or grave and sudden provocation should be left to the jury and adequately explained by the learned trial Judge in any case where the facts, or the necessary inference to be drawn from them, would make it possible for the jury reasonably to form such a verdict.

The mere fact that an appellant himself, or learned counsel on his behalf, may contend for a complete acquittal on the ground of self defence does not excuse the jury from considering, or a learned trial Judge from directing them upon, the question as to whether the true facts would not necessitate a verdict of culpable homicide not amounting to murder.

A passage from a judgment [1] of Moseley S.P.J. is relevant :

" The learned Judge did in fact put it to the jury that if they were convinced beyond reasonable doubt by the evidence of the prosecution it was clearly their duty to find the appellant guilty of murder, but that if they believed the defence they should not hesitate to acquit him. No question of culpable homicide not amounting to murder, he said, arose on his defence. It is a fact that no such defence was put forward by him or on his behalf. In *William Hopper* [2] the defence, as in this case, was that of accident. In that case, however, counsel for the defence indicated that, if that defence failed, he should hope for a verdict of manslaughter only. But the court expressed its view that even if counsel had not contended for a verdict of manslaughter, the Judge was not relieved of the necessity of giving the jury the opportunity of finding that verdict. Moreover, in *The King v. Bellana Vitanage Edin* [3], Howard C.J. in referring to a defence that had not been raised nor relied upon at the trial said that that fact was not in itself sufficient to relieve the judge of the duty of putting this alternative to the jury if there was any reasonable basis for such a finding in the evidence on the record. "

[1] *The King v. Vidanalage Lanty (1941) 42 N. L. R. at page 319.*
[2] *11 Cr. App. R. 136.*
[3] *(1940) 41 N. L. R. 345.*

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It is perhaps hardly necessary to refer to other cases in which similar expressions of opinion have been made, but learned counsel for the appellant did refer us to a number of authorities [1] to the same effect.

I consider that had the jury been invited to consider the applicability of either or both the exceptions of sudden fight or grave and sudden provocation they might well have found, as it was open to them to find, that the accused was not guilty of the offence of murder. As they were not so invited I am of the opinion that the appellant must have the benefit of the lesser verdict.

It is perhaps significant that when the foreman of the jury was asked by the Clerk of the Court:" *Q.* Do you find the prisoner guilty of the charge of murder with which he is indicted ? " he replied " Yes ; but five gentlemen of the Jury wish to bring in a rider that mercy should be considered for the prisoner on account of the age of the prisoner. "

We were informed from the Bar that the appellant was 27 years old at the time of the commission of the offence. His youth, therefore, could hardly have been a compelling reason for the jury's rider.

It was for these reasons that we set aside the conviction and sentence and substituted a conviction for culpable homicide not amounting to murder and imposed a sentence of 10 years rigorous imprisonment.

Conviction altered.

1954 *Present :* **Gratiaen J. and Sansoni J.**

HAI BAI, Appellant, *and* P PERERA, Respondent

S. C. 22 (Inty.)—D. C. Kandy, M. S. 3,480

Public Servants (Liabilities) Ordinance (Cap. 88)—Sections 2 and 3—Amending Act No. 10 of 1951—Retroactive effect—Interpretation Ordinance (Cap. 2), s. 6 (3) (b).

The Public Servants (Liabilities) Amendment Act, No. 10 of 1951, does not operate retroactively so as to extend its protection to a public servant in respect of a liability incurred by him prior to March 15, 1951 (the date when the amendment came into force).

Decree was entered in favour of the plaintiff on September 30, 1952, in an action on two promissory notes dated November 19, 1949, and June 30, 1950, respectively. At the time defendant borrowed money on the promissory notes, he was a public servant receiving a monthly salary exceeding Rs. 300. During execution proceedings he pleaded that, inasmuch as the Public Servants (Liabilities) Ordinance, as amended on March 15, 1951, by Act No. 10 of 1951, protected public servants drawing a monthly salary of Rs. 520 or less, he was entitled under section 3 to be discharged from the proceedings.

[1] *(1949) 52 N. L. R. 186; (1947) 48 N. L. R. 200; (1951) 53 N. L. R. 469; (1940) 19 C. L. W. 129.*

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Held, that, by virtue of section 6 (3) (*b*) of the Interpretation Ordinance, the amending Act No. 10 of 1951 did not operate retroactively so as to extend to the defendant a statutory protection which he had not enjoyed at the time when his liability was incurred under the promissory notes sued on.

APPEAL from a judgment of the District Court, Kandy.

C. R. Gunaratne, for the plaintiff appellant.

No appearance for the defendant respondent.

R. S. Wanasundera, Crown Counsel, as *amicus curiae*.

Cur. adv. vult.

May 27, 1954. GRATIAEN J.—

The defendant has at all material times been a public servant in receipt of a monthly salary exceeding Rs. 300 but less than Rs. 520. On 19th November, 1949, and 30th June, 1950, respectively he incurred a liability to the plaintiff on two promissory notes, and was sued by the plaintiff on 17th January, 1952, for the recovery of the aggregate balance sum and interest due on the notes. A decree for this amount and costs was entered against him on 30th September, 1952.

On 30th October, 1952, the learned District Judge allowed the plaintiff's application for execution of the decree in his favour, but shortly thereafter the defendant objected that all the proceedings in the action were void because they contravened the provisions of the Public Servants (Liabilities) Ordinance (Cap. 88) as amended by the Public Servants (Liabilities) Amendment Act, No. 10 of 1951. The present appeal is from an order of the learned judge upholding the objection and recalling the writ.

The question for our decision, shortly stated, is whether the amending Act which passed into law on 15th March, 1951, operates retroactively so as to extend to the defendant a statutory protection which he had admittedly not enjoyed at the time when his liability was incurred under either of the notes sued on. The learned judge, purporting to follow the ruling of this Court in *Fernando v. Khan* [1], took the view that the amending Act does have retroactive operation except only in cases where an action to enforce the liability of a previously unprotected public servant had been instituted before 15th March, 1951. In my opinion this is not the *ratio decidendi* of *Khan's case* (*supra*).

Section 2 (1) of the principal Ordinance protected "public servants" from being sued in Courts of law upon certain classes of transactions, but section 2 (2) expressly limited the scope of this immunity to those who were in receipt of a monthly salary of less than Rs. 300 *at the time when the liability sought to be enforced was incurred*. The defendant admittedly did not belong to the protected income-group when he became indebted to the plaintiff on the promissory notes sued on, and the common

[1] *(1952) 54 N. L. R. 142.*

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law right of the plaintiff to enforce the liability in civil proceedings was therefore unaffected by the impact of the Ordinance. Indeed, it was expressly preserved by section 2 (2).

So matters stood until 15th March, 1951, when the amending Act extended the protection of the principal Ordinance to " public servants " of a higher income-group to which the defendant admittedly belonged at all material times—namely, " public servants " whose monthly salary fell between Rs. 300 and Rs. 520.

The defendant was not represented in appeal, and, as our decision may well affect the rights and liabilities of other creditors and other public servants, we requested the Attorney-General to be good enough to arrange for Crown Counsel to appear before us as *amicus curiae*. We are indebted to Mr. Wanasundera for the assistance he has given us.

The clear answer to the problem under consideration is to be found in section 6 (3) (*b*) of the Interpretation Ordinance (Cap. 2). A repealing Act, unless it expressly so provides, does not affect " any right acquired " under the earlier law. The amending Act does not expressly, or even by necessary implication, purport to destroy or reduce the rights which the creditors of previously unprotected public servants had acquired *on transactions entered into before 15th March, 1951.* In the result, section 6 (3) (*b*) of the Interpretation Ordinance preserves the rights of the plaintiff against the defendant in respect of the promissory notes sued on.

Fernando v. Khan (*supra*) was concerned only with a situation in which a creditor had, before 15th March, 1951, commenced an action to enforce the liability of a previously unprotected public servant who subsequently claimed the protection of the amending Act. In such a case, the rights of the plaintiff in the pending action were clearly preserved by section 6 (3) (*c*) of the Interpretation Ordinance. But the judgment must not be regarded as authority for the proposition that the prior institution of an action is a condition precedent to the preservation of a creditor's right to enforce a liability incurred before the amending Act passed into law. In the present case, it is section 6 (3) (*b*) of the Interpretation Ordinance which keeps the plaintiff's rights alive, and this Court had no occasion in *Khan's case* (*supra*) to consider a situation such as has now arisen.

In my opinion, the judgment under appeal must be set aside. The previous order dated 13th October, 1952, allowing the plaintiff's application for execution of his decree must be restored, and any seizure effected in pursuance of that order must be declared valid. The plaintiff is entitled to the costs of this appeal and to the costs of the inquiry in the Court below.

SANSONI J.—I agree.

Appeal allowed.

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1954 *Present :* **Gratiaen J. and Gunasekara J.**

MRS. W. JAYASUNDERA, Appellant, *and* KATULIYADDE CO-OPERATIVE SOCIETY LTD., Respondent

S. C. 88—D. C. Kandy, X 1,456

Co-operative Societies Ordinance (Cap. 107), as amended by Ordinance No. 21 of 1949, ss. 2, 45—Dispute between co-operative society and ex-officer's heirs—Assistant Registrar's unauthorised reference to arbitration—Validity of award.

Where an Assistant Registrar of Co-operative Societies acted in excess of his powers by referring to arbitration a dispute between a co-operative society and the heirs of an ex-officer of the society—

Held, that the award of the arbitrator was a nullity.

APPEAL from a judgment of the District Court, Kandy.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the 6th defendant appellant.

H. V. Perera, Q.C., with *S. W. Jayasuriya*, for the plaintiff respondent.

Cur. adv. vult.

March 25, 1954. GRATIAEN J.—

A person named J. M. Jayasundera was, until he died intestate on 13th February, 1949, the Treasurer of the Katuliyadde Co-operative Society Ltd. (the respondent to this appeal). His heirs are the appellant (his widow), three minor children, and three children by a former marriage.

After the death of Jayasundera, the respondent Society claimed from the appellant and the other heirs a sum of Rs. 1,571·49 alleged to represent a debt to the Society incurred by Jayasundera as its Treasurer. This claim was not admitted, and a "dispute" accordingly arose between the Society and the heirs of an ex-officer of the Society within the meaning of section 45 of the Co-operative Societies Ordinance (Cap. 107) as amended by the Co-operative Societies (Amendment) Act, No. 21 of 1949.

An assistant Registrar of Co-operative Societies purported to refer this dispute on 8th August 1949 to the decision of an arbitrator in terms of section 45 (2) of the Ordinance ; the arbitrator purported to make an award in favour of the Society on 10th September 1949 ; and the Registrar,

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on appeal, purported to affirm the award on 23rd January 1950. I may add in passing that throughout these extra-judicial proceedings the minor children against whom an adverse decision was successfully obtained were unrepresented.

On 22nd April 1950 the Society made an *ex parte* application in the District Court of Kandy to have the purported award enforced as if it were a decree of Court. In due course the appellant and the other heirs took steps to have the *ex parte* order against them vacated, but the learned District Judge held that their objections to the validity of the award were devoid of merit. The present appeal is from his order dated 2nd August 1951 in favour of the Society.

The arbitrator's purported award has been challenged on various grounds, but it is sufficient for the purposes of this appeal to refer to one fundamental reason for deciding that the award was a nullity from its inception.

In my opinion the Assistant Registrar of Co-operative Societies (Mr. T. D. L. Peiris) had no power to refer the dispute to arbitration under section 45 (2) of the Ordinance on 8th August 1949. The only person who was vested with this statutory power at that date was the Registrar himself.

Section 2 of the Ordinance authorised the (then) Governor of Ceylon to issue a general or special Gazette notification conferring on any Assistant Registrar " all or any of the (statutory) powers of a Registrar ". On 19th July 1946 Mr. Peiris was specifically given power under section 45 to " refer any dispute for disposal to an arbitrator or arbitrators "—*vide* Gazette notification No. 9,581 dated 19th July 1946. This is the power which Mr. Peiris purported to exercise on 8th August 1949.

It is important to note that the Gazette notification empowered Mr. Peiris only to make a reference to arbitration in respect of disputes of the kind particularised in section 45 *in its unamended form ;* a dispute between a Society and the heirs of an ex-officer did not fall within any of these categories, and did not become subject to the special machinery of the Ordinance until the amending Act No. 21 of 1949 passed into law on 24th May 1949. In fact, Mr. Peiris did not receive authority from the Governor-General to exercise the powers of a Registrar in respect of disputes of the latter kind until 30th June 1950—*vide* Gazette notification No. 10,115 dated 30th June 1950. It follows that Mr. Peiris had acted in excess of his powers when he referred this dispute to arbitration. The purported award was therefore a nullity, and could not lawfully be recognised or enforced by a Court of law. I would allow the appeal and order the respondent Society to pay the appellant's costs in both Courts.

SWAN J.—I agree.

Appeal allowed.

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1953 : *Present :* **Rose C.J.**

K. V. SARIS APPUHAMY, Appellant, *and* CEYLON TEA PLANTATIONS CO., LTD., Respondent

S. C. 86—C. R. Nuwara Eliya, 19,155

Rent Restriction Act, No. 29 of 1948—Section 13 (1) (d)—Interpretation

If a tenant of premises to which the Rent Restriction Act applies is convicted of an offence which has been committed on the premises and for the purpose of committing which the premises have been used, he is liable to be ejected by his landlord on the ground that he has been convicted of using the premises for an illegal purpose within the meaning of section 13 (1) (*d*) of the Act.

APPEAL from a judgment of the Court of Requests, Nuwara Eliya.

E. B. Wikramanayake, Q.C., with *D. S. Jayawickreme*, for the defendant appellant.

H. W. Jayewardene, with *D. R. P. Goonetilleke* and *P. Ranasinghe*, for the plaintiff respondent.

October 28, 1953. ROSE C.J.—

In this case the defendant was ejected on the ground that he had been convicted of using the premises in question, a boutique, for an illegal purpose within the meaning of section 13 (1) (*d*) of the Rent Restriction Act, No. 29 of 1948. It appears that the tenant was convicted of an offence contra section 4 of Protection of Produce Ordinance (Cap. 28) in that he was found in possession of three gunny bags containing manufactured tea dust and eight gunny bags containing tea sweepings in such circumstances as it was reasonable to suspect that the same were not honestly in his possession and that he was unable to give a satisfactory account of his possession thereof. The fact of his conviction was not disputed. It appears that these eleven bags were found in the boutique which is in suit.

Now, Counsel for the appellant urges that there is no sufficient evidence that these premises were made use of for an illegal purpose, but it seems to me that the matter falls within the principle which has been laid down by the learned Judges in the case of *Schneiders & Sons Ltd. v. Abrahams*[1]. There Scrutton L.J. says at page 310 " I come to the conclusion that the conviction need not be for using the premises for one or another immoral or illegal purpose and that it is enough if there is a conviction for a crime which has been committed on the premises and for the purpose of committing which the premises have been used ; but that it is not enough that the tenant has been convicted of a crime with which the premises have nothing to do beyond merely being the scene of its commission ".

[1] *(1925) 1 K. B. 301.*

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It seems to me that the learned Commissioner was fully entitled to come to the view that this was a case in which the premises were made use of for the purpose of storing this tea which was reasonably suspected to have been stolen. That being so, the appeal must be dismissed with costs.

Appeal dismissed.

1954 *Present:* **Fernando A.J.**

MRS. C. PREMARATNE, Appellant, *and* M. K. OLIVER DE SILVA, Respondent

S. C. 204—C. R. Galle, 29,123

Rent Restriction Act—Authorised rent—Mode of proof.

Defendant, who was sued for ejectment under the Rent Restriction Act on the ground that rent was in arrear, pleaded that rent was not in arrear considering the fact that he had been paying rent at a higher rate than the authorised rent. He stated that he had paid rent at the rate of Rs. 18 and even Rs. 20 per month when, in fact, the authorised rent of the premises (which were situated within the Municipality of Galle) was only Rs. 12.50. The plaintiff stated that the agreed rent was Rs. 20.

Held, that the burden was on the defendant to prove the amount of the authorised rent by the production of the Municipal assessment register, and secondary evidence could only have been admitted if the best evidence was for some reason not available.

APPEAL from a judgment of the Court of Requests, Galle.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the plaintiff appellant.

M. C. Abeywardene, for the defendant respondent.

Cur. adv. vult.

June 1, 1954. FERNANDO A.J.—

In this case the landlord of certain premises gave notice to his tenant on 23rd November, 1951, terminating the tenancy of the premises on the ground that rent was in arrear from August, 1951. There was evidence that the defendant had in January, 1952, paid the arrears of rent, and on the question whether the acceptance of this payment precluded the landlord from subsequently instituting an action for ejectment

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the learned Commissioner held with the plaintiff. The recent decision of three judges of this Court in *Dias v. Vincent Gomes* [1] makes it clear that the learned Commissioner decided that question correctly.

At the trial the defendant also took up the position that in fact the rent had not been in arrear as alleged by the landlord. The defendant's position was that, although he had paid rent from 1947 onwards at the rate of Rs. 18 and even Rs. 20 per month, in fact the authorised rent of the premises was only Rs. 12·50 per month. The plaintiff stated in evidence that the agreed rent was Rs. 20 per month, but made no attempt to prove the actual authorised rent, and in fact neither the plaintiff nor her son who was apparently in charge of the rent collections from his mother's tenants could make any definite statement as to the amount of the authorised rent of the premises in question. Although the plaintiff had issued summons on the Municipality to produce the assessment register, the plaintiff's case was closed without a Municipal Officer being called at all.

The defendant also made no attempt to prove the authorised rent. His evidence was that the authorised rent in 1946 was Rs. 12·50 per month, but that he did not know the current authorised rent. The learned Commissioner held that on that evidence the authorised rent should be presumed to be Rs. 12·50 per month. He relied on the case of *Perera v. Perera* [2]. That case was one where the plaintiff had filed his action on the basis that the rent was Rs. 12·50 per month, whereas the defendant alleged that he had been asked to pay an excessive rent namely Rs. 22·50 per month. In effect this Court there decided that, in the absence of specific evidence as to what was the authorised rent, the Court would presume that the amount averred by the plaintiff himself to be the rent, i.e., Rs. 12·50, was in fact the authorised rent.

In that case as well as in the judgment of the learned Commissioner in the present case, reference was made to the case of *Keane v. Clark* [3], as a justification for thus acting upon the statement of the plaintiff himself. In fact however the decision in *Keane v. Clark* does not appear to be strictly applicable because of an important difference between the relevant provisions of the English law and of the Ceylon law respectively. Under the English law the "standard rent" as it is there described does not mean an amount calculated by reference to a rating assessment; the standard rent is either—

(*a*) the rent actually paid at the time of the coming into operation of the relevant rent statute, if the premises were let at that time, or

(*b*) if the premises were not let at the time aforesaid then the rent at which they were most recently let prior to that time, or

(*c*) if they were not shown to be let at or prior to the time of the coming into operation of the statute, then the rent at which they were first let after the coming into operation.

[1] *(1954) 55 N. L. R. 337.* [2] *(1951) 53 N. L. R. 359.*

[3] *(1951) 2 A. E. R. 187.*

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In *Keane v. Clark* the premises were not shown to have been let at or before the time when the relevant statute came into operation ; and upon a statement of the plaintiff himself that when he bought the premises the rent was 22*s*. 6*d*. the Court accepted the position that the letting of which the plaintiff spoke was the proper letting by reference to which the standard rent had to be determined. Since under the English law the rating assessment is not the determining factor for calculation of the standard rent, no question arose in the English case as to the need for producing the assessment register as the best evidence of the matters required to be proved, but in view of the definition of " standard rent " in the Ceylon Act, the assessment register would in the case of premises situated in a Municipality or Urban area be the best evidence.

In the present case therefore the amount of the authorised rent of the premises which are situated within the Municipality of Galle should have been proved by production of the Municipal assessment register, and secondary evidence could only have been admitted if the best evidence was for some reason not available ; but no such reason has been put forward.

In any event the present case is distinguishable from the case of *Perera v. Perera* (*supra*) because there the Court construed the plaintiff's averment as to the amount of the rent to be an admission that that amount was the authorised rent. In the present case the plaintiff never averred nor admitted the rent to be Rs. 12·50, and on the contrary his position both in the plaint and in his evidence is that the rent was Rs. 20.

In my opinion therefore the learned Commissioner was mistaken in thinking that on a bare assertion by the defendant that the authorised rent in 1946 was Rs. 12·50 per month, it could be presumed that the authorised rent at the end of 1951 was still Rs. 12·50 per month.

One of the issues framed at the trial in this case was as follows :—

> " Is the defendant in arrears of rent within the meaning of the Rent Restriction Act ? "

Counsel for the respondent in appeal attempted to argue that the plaintiff by raising this issue took upon himself the burden not only of proving that rent had not been paid but also of proving that the rent which he demanded was the proper authorised rent. I regret that I see no substance in this argument ; it is obvious that the object of framing that issue was to raise the question whether the defendant was in arrear despite his subsequent payment.

For these reasons I would allow the appeal and remit the case to the learned Commissioner for decree to be entered against the defendant for ejectment and for payment by him to the plaintiff of the amount of the rent now in arrear. For the purpose of determining this amount the rent per month must be taken to be Rs. 20. The plaintiff is entitled to the costs of this appeal as well as of the proceedings before the Commissioner.

Appeal allowed.

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1954 *Present :* **Swan J.**

S. P. SIMON SINGHO, Appellant, *and* C. B. THORADENIYA (S. I. Police), Respondent

S. C. 1,346—M. C. Matara, 32,038

Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172), ss. 26, 76 (1) (a)—Charge of unlawful possession of seeds, &c., of hemp plant—Mention of wrong person as proper authority—Curable irregularity—Criminal Procedure Code, s. 425—Burden of proof—Evidence Ordinance, s. 106.

Appellant was charged with being in possession of certain quantity of seeds, pods, leaves and flowers of the hemp plant without a licence from the proper authority in breach of section 26 of the Poisons, Opium and Dangerous Drugs Ordinance. The "proper authority" mentioned in the plaint was the Minister of Justice instead of the Minister of Health.

Held, that the mention of the wrong person in the plaint as the proper authority was nothing more than a mere irregularity curable under section 425 of the Criminal Procedure Code.

Held further, that under section 106 of the Evidence Ordinance the burden was on the accused to prove that his possession of the prohibited seeds, &c., was lawful. *Sanitary Inspector, Mirigama v. Thangamani Nadar* (1953) 55 N. L. R. 302, distinguished.

APPEAL from a judgment of the Magistrate's Court, Matara.

Sir Lalita Rajapakse, Q.C., with *M. L. S. Jayasekera* and *D. R. P. Goonetilleke*, for the accused appellant.

P. Colin Thome, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 9, 1954. SWAN J.—

The appellant in this case was charged with being in possession of 89¼ pounds of seeds, pods, leaves and flowers of the hemp plant commonly known as *Cannabis Sativa L* without a licence from the proper authority in breach of section 26 read with section 76 (1) (*a*) of the Poisons, Opium and Dangerous Drugs Ordinance, Cap. 172 of the New Legislative Enactments. The proper authority mentioned in the plaint was the Minister of Justice. The appellant was found guilty after trial and sentenced to 6 months rigorous imprisonment.

Learned counsel for the appellant contends that the conviction is bad for two reasons, namely : (1) the prosecution did not prove that the alleged possession of this stuff was without a licence from the proper authority, (2) that the charge was defective in that it mentioned the Minister of Justice as the proper authority.

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Dealing with the latter point I find that the proper authority under *Gazette* Notifications No. 10,407 of the 2nd June, 1952 and No. 10,605 dated 28th October, 1953, is the Minister of Health and not the Minister of Justice. I cannot however agree with the contention that the defect in the charge is an illegality. In my opinion it is nothing more than a mere irregularity and section 425 of the Criminal Procedure Code would therefore apply and the conviction cannot be set aside on that account. Learned counsel for the appellant referred me to a judgment of Gratiaen J. in *M. C. Negombo No. 3,389*[1] where the conviction was quashed in similar circumstances. But in that case I find that there were other defects, the most vital of which was that the production was not proved to be the identical article on which the Government Analyst had submitted his report. I was also referred to another judgment of Gratiaen J. in *M. C. Colombo A 1,851/B*[2]. In that case the proper authority referred to was the Minister of Home Affairs and not the Minister of Health. Gratiaen J. dismissed the appeals and affirmed the sentences subject to the alteration that the convictions should be recorded as for the commission of the offence charged "without a licence from the Minister of Health". It will thus be seen that Gratiaen J. did not consider the defect in the charge as fatal to the conviction.

I shall now deal with the other point taken, namely that the prosecution had to prove that the accused did not have a licence from the proper authority. Learned counsel for the appellant relied on the decision of Nagalingam A.C.J. in *Sanitary Inspector, Mirigama v. Thangamani Nadar*[3]. That was a prosecution under Regulation 46 of the *Prevention of Diseases Ordinance*. It was there held that the burden was on the prosecution to prove that the accused had failed to inform the proper authority of the presence in his house of a person suffering from a contagious disease. In my opinion that case can have no application to the present case. I find that dealing with the interpretation of the Regulation the learned Acting Chief Justice said :

"Had, for instance, the Regulation in the present instance run as follows :—

> 'No person shall permanently or temporarily reside in any building in which there shall be any person affected with any contagious disease unless he shall forthwith inform the proper authority thereof.'

there can be no question but that the prosecution need only prove (*a*) that the accused person had resided in a building, (*b*) that in that building there was a person affected with the contagious disease, and then it would be upon the accused person to establish that he had informed the proper authority ; for the offence would consist in occupying a building in which a person affected with a disease was present and not consist in a failure to do an act such as to give information of the presence of a

[1] *S. C. No. 1,137—S. C. Min. of 1.2.50.*

[2] *S. C. No. 1,377—S. C. Min. of 1.2.54.*

[3] *(1953) 55 N. L. R. 302 ; 49 C. L. W. 81.*

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diseased person. In these circumstances on his failure to do so he could properly be found guilty of the offence as under section 106 of the Evidence Ordinance the burden of proving the exception would lie on him."

In this case the relevant section reads as follows :—

"No person shall, without the licence of the Governor, sow, plant, cultivate, obtain or have in his possession any poppy plant, cocoa plant or hemp plant, or collect or have in his possession the seeds, pods, leaves, flowers or any part of any such plant."

In my opinion section 106 of the Evidence Ordinance applies and the burden was on the accused to prove that his possession was not in contravention of section 26 and that he had a licence from the Minister of Health to possess the prohibited plant or any of its component parts. It is quite plain from the wording of the section that the law prohibited the sowing, planting, cultivation or possession of the hemp plant or the seeds, pods, leaves and flowers thereof. Any person found in possession of the prohibited stuff is bound to prove that he holds a licence from the proper authority.

The appeal is dismissed and the conviction and sentence affirmed.

Appeal dismissed.

1953 *Present :* **Swan J.**

CICILIN PERERA, Appellant, *and* D. B. SAMARADIWAKARA (S. I. Police), Respondent

S. C. 1,098—M. C. Colombo, 40,090

Excise Ordinance (Cap. 42)—Authority of police officer to prosecute thereunder—Sections 2, 43, 49.

A police officer is an excise officer within the meaning of section 49 of the Excise Ordinance and is therefore competent to institute a prosecution under section 43 of that Ordinance.

APPEAL from a judgment of the Magistrate's Court, Colombo.

B. E. de Silva, with *D. S. Nethsinghe*, for the accused appellant.

E. R. de Fonseka, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 2, 1953. SWAN J.—

The point urged by learned Counsel for the appellant is that there has been an irregularity in these proceedings which amounts to an illegality and that the conviction must be quashed.

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The accused was charged with the sale of *an excisable article, to wit a quantity of arrack*, without a licence from the Government Agent in breach of Section 43 of the Excise Ordinance (Cap. 42) and having thereby committed an offence punishable under Section 43 (*g*) of the said Ordinance. The prosecution was initiated upon a report by Sub-Inspector Samaradiwakara of the Mt. Lavinia Police. Learned Counsel for the appellant contends that the Court could not have taken cognizance of the alleged offence upon that report. He relies on Section 49 of the Ordinance which enacts that no Magistrate shall take cognizance of an offence punishable under Section 43 except on his own knowledge or suspicion *or on the report of an Excise Officer*.

This is not the first time that this point has been taken. It had been raised time and again, very often successfully, until the Crown appealed against the order of acquittal in *Perera v. Nagoor Pitche* [1]. In that case it was brought to the notice of this Court that there was an Excise notification published in the *Government Gazette* of 13.12.1912 which authorized Police Officers not under the rank of Sergeant to perform certain duties under certain sections of the Excise Ordinance. It should be noted that in section 2 the expression *Excise Officer* is stated to mean a " Government Agent, Assistant Government Agent, *or any Officer or person appointed or invested with powers under Section 7* ". Dalton J. in the course of his judgment referred to the case of *Abeygunasekera v. Suwaris Appu* [2] where it was held that an officer or other person appointed or invested with powers under Section 7 was an excise officer within the meaning of Section 49. He also referred to the case of *Sub-Inspector, Mirigama v. John Singho* [3] upon which Counsel for the appellant relies. In that case Garvin J. dismissed an appeal by the Crown against an order of acquittal based on similar grounds. The learned Judge in so doing made reference to the judgment of de Sampayo J. in *Miskin v. Fernando* [4]. As Dalton J. pointed out the proceedings in *Miskin v. Fernando* [4] were instituted by a Police Constable. It is clear that in *Sub-Inspector, Mirigama v. John Singho* [3] Garvin J. did not consider who was an *excise officer* for the purposes of Section 49.

I find that the notification of 13.12.1912 has been superseded by a notification published in the *Government Gazette* of 8.12.1950 in which the authority is extended to all Police Officers. But learned Counsel for the appellant submits that I cannot take judicial notice of these *Gazette* notifications. On this point there cannot be any doubt because the Excise Ordinance has been amended by Ordinance No. 25 of 1938 and a new Section has been added, namely Section 58, which expressly requires a Court to take judicial notice of every excise notification.

The last submission of learned Counsel for the appellant was that the Sub-Inspector who reported the matter to Court should have asserted that he was an excise officer by virtue of the *Gazette* Notification. I do not think so, but even if he should have done that, the omission would be only a mere irregularity that would not vitiate the proceedings.

The appeal is dismissed.

Appeal dismissed.

[1] *(1929) 30 N. L. R. 464.*
[2] *(1913) 16 N. L. R. 510.*
[3] *(1926) 4 T. L. R. 71.*
[4] *(1914) 2 C. A. R. 34.*

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1953

Present : **Pulle J.**

Y. D. BABY APPUHAMY, Appellant, *and* R. SIVAGURU (Additional Colonization Officer), Respondent

S. C. 1,192—M. C. Anuradhapura, 10,917

Irrigation Ordinance, No. 32 of 1946—Section 92 (a)—Prosecution thereunder—Nature of evidence required.

In a prosecution under section 92 (*a*) of the Irrigation Ordinance for wilfully and mischievously blocking up an irrigation channel there must be proof that the channel is part of an irrigation work.

APPEAL from a judgment of the Magistrate's Court, Anuradhapura.

N. E. Weerasooria, Q.C., with *S. C. E. Rodrigo*, for the accused appellant.

E. H. C. Jayetileke, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 18, 1953. PULLE J.—

The appellant in this case was convicted under section 92 (*a*) of the Irrigation Ordinance, No. 32 of 1946, of wilfully and mischievously blocking up or demolishing an irrigation channel. Various submissions have been made in the petition of appeal against the conviction but the one which merits attention is the allegation that there was no evidence that the channel which, admittedly, was blocked up was comprised in an "irrigation work" within the meaning of that expression in the Ordinance.

According to the sketch put in evidence the water which feeds the channel in question comes from Alankulama tank and the channel must have served at one time only a single proprietor named Kanagasabai who owned a large tract of fields. That tract has been divided up. The larger part of it is owned by the brother of the appellant and two others and comparatively small extent of 4½ acres towards the end of the channel is owned by one Somapala who complains of the damage caused to him by the blocking.

It is said in the evidence called for the prosecution that this channel is part of an irrigation work called the Nachchaduwa Scheme. If that be so, it would have been an easy matter to have produced a plan or tracing showing the relevant irrigation works and the proprietors of the lands served by those works. I can well understand that this particular channel is not shown in the plans but if it was constructed by the Irrigation Department or at the expense of the proprietors in pursuance of their statutory powers, reliable evidence ought to have been

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easily forthcoming. If, as it appears to be the case, the intervention of the Assistant Government Agent had been sought successfully to compel the appellant to desist from blocking up the channel sufficient material at the Kachcheri ought to have been available to fix the character of the channel as an irrigation work in respect of which statutory powers could have been exercised.

The only irrigation receipt produced is one dated after the offence. Reliable evidence of previous receipts unambiguously pointing to payments by Somapala for water obtained from the channel in question would have been helpful. He may not have retained the earlier receipts, as he alleges, but records of those payments ought to have been available. The difficulties created by the inconclusive character of the evidence are not diminished by the assertion that Alankulama tank is a private tank fed by the Nachchaduwa tank and that there should be a list at the Kachcheri of shareholders entitled to take water from the tank. Whether Somapala was entitled as a shareholder to take water has not been established by the production of any list.

This is a case in which the best evidence as to whether the channel was comprised in an irrigation work has not been adduced. I do not, therefore, think it safe to allow the conviction to stand. I have anxiously considered whether there should be a re-trial. If at all, only one proprietor has suffered damages recoverable in a Court by the act of the appellant. The civil remedy is available. The offence was in 1951 and it was the duty of the prosecution to prove that the channel was part of an irrigation work.

The conviction and sentence are set aside and the appellant is acquitted.

Appeal allowed.

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1954 *Present :* **Gratiaen J. and Fernando A.J.**

D. H. R. A. COREA *et al.*, Appellants, *and* THE QUEEN, Respondent

S. C. 33–35—D. C. (Criminal) Nuwara Eliya, 279

Arrest without warrant—Cognizable offence—Duty to inform suspect of the charge against him—Criminal Procedure Code, ss. 23 (1), 32 (1) (b), 35, 53—Penal Code, ss. 69, 333, 348.

A police officer acts illegally in Ceylon (as in England) if he arrests a man without a warrant on a mere ' unexpressed suspicion ' that a particular cognizable offence has been committed—unless ' the circumstances are such that the man must know the general nature of the offence for which he is detained ' or unless the man ' himself produces the situation which makes it practically impossible to inform him '. In such a case the police officer is liable to be convicted under the Penal Code for assault and wrongful confinement.

Held further, that a police constable who *bona fide* arrests a person on an order wrongly given by his senior officer is in certain circumstances entitled to claim the benefit of the exception to criminal liability set out in section 69 of the Penal Code.

APPEAL from a judgment of the District Court, Nuwara Eliya.

The 1st appellant, an Inspector of Police, and the 2nd and 3rd appellants, who were police constables, were convicted of using criminal force on, and attempting wrongfully to confine, one M. The evidence showed that the appellants went to the house of M. in order to inquire into a complaint of a cognizable offence. Originally M. was " asked " or " invited " by the 1st appellant to accompany the police party to the police station and M. agreed to do so. Later, however, M. changed his mind and refused to go with the police officers, whereupon the 1st appellant, in the trial Judge's opinion, " took exception to the manner in which M. spoke or behaved " and ordered M 's arrest in order to " teach him a lesson ". The subsequent attempts to remove M. forcibly were made without any further intimation to him of the reasons for his proposed compulsory detention or arrest.

G. E. Chitty, with *O. M. de Alwis*, for the 1st accused appellant.

G. E. Chitty, with *A. S. Vanigasooriar*, for the 2nd and 3rd accused appellants.

A. E. Keuneman, Crown Counsel, for the Crown.

Cur. adv. vult.

2——J. N. B 36679–1,592 (7/54)

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May 28, 1954. GRATIAEN J.—

The 1st appellant was at the relevant time an Inspector of Police in charge of the Nuwara Eliya Police Station, while the 2nd and 3rd appellants were police constables attached to the same station. They were jointly indicted in the District Court of Nuwara Eliya for the following offences :

(1) committing house-trespass by entering the residence of F. D. Munaweera on 30th August 1949 with intent (*a*) to use criminal force on him, (*b*) wrongfully to confine him and (*c*) to annoy him ;

(2) using criminal force on him in attempting wrongfully to confine him ;

(3) attempting wrongfully to confine him.

The 1st appellant was in addition charged in the 4th count of the indictment with having caused grievous hurt to Munaweera in the course of the same transaction by shooting him. They were all convicted on the 2nd and 3rd counts, but orders of acquittal were entered in respect of counts 1 and 4.

A particularly unsatisfactory feature of this case was that, although such serious offences were alleged to have been committed in August 1949, and Munaweera's complaint was brought to the immediate notice of an Assistant Superintendent of Police, non-summary proceedings against the appellants were not commenced until 1st June 1951, and that too at the instance of Munaweera in the exercise of his rights as a private citizen ; the indictment was presented on 10th September 1952 ; the trial was concluded on 25th March 1953 ; and the present appeal listed for hearing only on 19th May 1954. These delays speak for themselves.

In *Muttusamy v. Kannangara* [1] I pointed out that " the actions of police officers who seek to search private houses or to arrest private citizens without a warrant should be jealously scrutinised by their senior officers " and that, in cases of this nature, " it seems preferable that the facts should in the first instance be reported to the Law Officers of the Crown so that, after an impartial examination of all the available material, the real transgressors, whoever they might be, could be brought to justice ". I re-emphasise these observations in connection with the present case. Learned Crown Counsel who appeared before us in support of the convictions under appeal stated that the earliest communication received by his Department with regard to this case was dated 15th February 1952, *i.e. 2-and-a-half years after the incident took place.* And even that communication was a request by the 1st appellant's lawyers for an interview with a view to having the Magistrate's order of committal quashed by the Attorney General.

The learned District Judge gave the 1st appellant the benefit of the doubt on the charge of grievous hurt, although he was perfectly satisfied that the 1st appellant did (as Munaweera alleged) take a double-barrelled

[1] (1951) 52 N. L. R. 324.

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gun into his hands when Munaweera was resisting an illegal attempt to remove him forcibly from his house to the police station. The learned judge was not convinced, however, that the 1st appellant knew that the gun was loaded, and, though confidently rejecting the defence version of this part of the incident, he did not rule out the possibility that the grievous gunshot injuries sustained by Munaweera in the course of his illegal arrest had been accidentally inflicted by the 1st appellant.

The basis of the convictions on the 2nd and 3rd counts—namely, the charges of using criminal force on Munaweera (section 348 of the Penal Code) and attempting unlawfully to confine him (section 333 read with section 490)—was that the 2nd and 3rd appellants, acting on the orders of the 1st appellant, had attempted to arrest Munaweera and to remove him forcibly to the police station in circumstances which made it illegal to arrest a private citizen without the authority of a warrant.

As to the validity of these convictions, I accept as correct the findings of fact recorded by the learned judge who had the advantage (which we lack) of assessing the oral testimony of the witnesses in the light of certain documents almost contemporaneously recording their respective versions of what took place on the night of 30th August 1949. The appellants are without doubt entitled to the benefit of every finding in their favour which formed the basis of the orders acquitting them on the 1st and 4th counts (against which the Crown has not appealed). At the same time, after an independent examination of the evidence on record, I agree with learned Crown Counsel that there is no valid ground for rejecting the findings of fact which were unfavourable to them on the other counts. In the result, the question for our decision resolves itself into a question of law—whether, on the facts as found by the learned judge, the arrest (or attempted arrest) of Munaweera at the instance of the 1st appellant on the night in question was illegal.

On the afternoon of 30th August 1949, a Sanitary Assistant named Viswalingam arrived at the Nuwara Eliya police station and made an oral complaint to the 1st appellant who directed the reserve-sergeant to reduce it to writing. The gist of the complaint (D2) was that, after Viswalingam and Dr. Mendis (the Medical Officer of Health) had completed an official inspection of the premises of F. D. Munaweera's brother in connection with a pending case, Munaweera and his brother "obstructed their passage and threatened bodily harm to them". Viswalingam "felt greatly humiliated and disgraced". (Dr. Mendis, according to his evidence at the trial, did not take the incident so seriously as Viswalingam had done.)

The 1st appellant was satisfied that this complaint called for police investigation. His purpose in visiting Munaweera's house at about 7.30 p.m. is best explained in his own written statement D9 recorded at 8.40 p.m. on the same night :—

> "On a complaint made by Mr. Viswalingam the Sanitary Assistant and supported by Mr. Bowen Sanitary Inspector that they had been *intimidated and obstructed* when on duty at Mahagastota by Munaweera and his brother Thomas, *I went for inquiry* with Police Constables 29 and 418 (the 2nd and 3rd appellants)."

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Munaweera was at home, wearing a sarong and "pyjama coat", when the appellants arrived. The precise nature of the discussions which took place is in dispute, but admittedly some reference was made to the earlier incident in which Dr. Mendis and Viswalingam had been involved. It is also common ground that at a certain stage Munaweera was "asked" or "invited" by the 1st appellant to accompany the police party to the police station, and that originally he agreed to do so. Later, however, he expressed a wish (which was granted) to change into more suitable clothes before leaving his house. The 1st appellant then left the scene for a short while, one of the constables remaining behind with Munaweera. Munaweera also considered it prudent, before leaving for the police station, to write two letters asking a friend and a lawyer to protect his interests in the situation which had arisen. One of these letters (P3b) was addressed to a personal friend in the following terms :

"Dear Aiyah,

I am being called by the Inspector of Police to the police station. I do not know why. They say that there was a complaint made by this M. O. H. *I am going to the station at his (i.e. the 1st appellant's) request.* Please look after my interests."

The subsequent events prevented this letter from being sent to Munaweera's friend. When the 1st appellant returned to the scene, Munaweera had commenced to write another letter (P3c) to a senior Proctor who was also an Unofficial Magistrate. It reads as follows :

"Dear Mr. Modder,

Over the instance I told you today about the M. O. H., *I am now being called by the Inspector of Police to the police station. I am proceeding with him.* Please see about this matter and kindly—"

It will be observed that the last sentence of P3c is incomplete.

The explanation is that Munaweera was not permitted to conclude his letter to Mr. Modder, nor was he allowed an opportunity to send it to Mr. Modder even in its incomplete form. His evidence at the trial was to the following effect :

"The Inspector said, 'Come, let us go'. I said, 'I am just writing these letters ; I will get down somebody to look after my interests and then come'. *Even at this stage I did not refuse to go.* The Inspector said, 'You must come immediately ; otherwise I am going to drag you out'. *Then I refused* . . . . "

This version is substantially supported by his dying deposition which was recorded on the same night (after the shooting incident) by the Magistrate of Nuwara Eliya.

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The 1st appellant's written statement D9 (previously referred to) is to the effect that, when Munaweera ultimately refused to go to the police station, " I told him he would have to come . . . *and to do so without a fuss and he said that he would not. I told him that he must and told P. C. 418 to bring him out* ".

I shall now quote a passage from the 1st appellant's oral evidence as to the events immediately preceding Munaweera's refusal to accompany him to the police station :

> " He wanted time to complete the letters. I said he could complete them. He continued to write. I asked him not to waste time and to come because he was delaying. As he kept on delaying *I said I would give him two minutes more and if he did not come we would have to take him* . I told the two constables to give him two minutes more and if he did not come, to bring him. "

The 1st appellant falsely claimed that he had left the room before the 2nd and 3rd appellants carried out his orders to remove Munaweera from the room, and when they proceeded to " drag " him away by force on his refusal to accompany them " without a fuss ".

I accept the learned judge's findings as to the circumstances in which Munaweera was (perhaps accidentally) shot during the scuffle which ensued. Nor do I see the slightest reason for rejecting the conclusion that *Munaweera was not informed " on what charge or suspicion of what crime he was seized* ". Indeed even if the 1st appellant's intention at that stage had been only to have Munaweera removed by force to the police station in order to have his statement recorded under section 122 of the Criminal Procedure Code, such action would have been equally illegal.

It is not, perhaps, completely impossible to construe Viswalingam's complaint as having alleged facts constituting an offence punishable under section 344 of the Penal Code and for which a police officer, reasonably suspecting the truth of that complaint, may arrest the alleged offender without a warrant under section 32 (1) (*b*) of the Criminal Procedure Code. At the same time, the 1st appellant 's written statement D9 strongly supports the learned judge 's conclusion that " *when he went to inquire into this complaint, he did not suspect anything more than a case of intimidation or obstruction* " (both non-cognizable offences). The learned judge's impression was that, when Munaweera ultimately changed his mind and refused to accompany the police officers to the police station, the 1st appellant " took exception to the manner in which Munaweera spoke or behaved " and accordingly ordered Munaweera's arrest in order to " teach him a lesson ".

Chapter 12 of the Criminal Procedure Code affords many safeguards to a private citizen against whom an allegation of having committed a cognizable offence is made to the officer-in-charge of a police station. For instance, before the officer proceeds to investigate the facts and, if necessary, to arrest the suspect, he must " forthwith " send a report

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to his own immediate superior—section 121 (2). This was not done. In one sense, the omission is favourable to the 1st appellant, because it exonerates him of an intention to act illegally from the very outset. But in another sense, it supports the view that at a later stage he acted from improper motives.

Even on the view which is more favourable to the 1st appellant (namely, that he believed that he was entitled to have Munaweera arrested without a warrant on a reasonable suspicion that an offence under section 344 of the Code had been committed) the arrest or attempted arrest of Munaweera in the particular circumstances of this case was illegal. The charges of criminal force and attempted wrongful confinement were therefore equally established against the 1st appellant on either hypothesis. Let me explain why.

The Crown strongly relied in both Courts on *Muttusamy v. Kannangara* (*supra*). I there held, following the decision of the House of Lords in *Christie v. Leachinsky*[1], that a police officer who would otherwise be justified in arresting a man without a warrant under section 32 (1) nevertheless acts illegally if (subject to certain exceptions which do not here apply) he does so *without informing the suspect of the nature of the charge upon which he is arrested.*

Mr. Chitty has invited us to reconsider this ruling. He argued that, whereas section 53 of the Criminal Procedure Code in terms requires a police officer arresting a man on the authority of a warrant " to notify the substance of the warrant to the person arrested " no such duty is expressly imposed on a police officer who acts without a warrant under section 32. The submission is that in Ceylon the powers of police officers are regulated by statute, and cannot further be circumscribed by any general principles of the English law (on which the greater part of our Code is substantially based).

I have given most anxious consideration to Mr. Chitty's argument, and am very glad to re-affirm my conviction that in this country (as in England) a police officer who arrests private citizens *with or without the authority of a warrant* is equally obliged to notify the arrested person of the reason for interfering with his personal freedom. A recognition of this fundamental rule (which owes its origin to the English common law) is demonstrably implicit in the scheme of our Code.

It is sufficient to refer only to section 23 (1). " In making an arrest the person making the same shall actually touch or confine the body of a person to be arrested *unless there be a submission to the custody by word or action* ". The law does not require a man to consent or " submit " to his detention or arrest unless he knows " the reason why ". As Lord Simon observed in *Christie's case* (*supra*), " the matter is one of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and *is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed* ". It follows as a necessary corollary

[1] *(1947) A. C. 573.*

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that "in normal circumstances an arrest without warrant by a policeman or by a private citizen can only be justified if it is an arrest on *a charge made known to the person arrested* ".

How else can he arrive at a decision whether to "submit" or not? How else can he satisfy himself that his proposed detention is authorised by law?

The judgment of Lord Simonds in *Christie's case* (*supra*) is equally instructive. Having observed that "every citizen is entitled to resist arrest unless that arrest is lawful", he asks, "*How can these rights be reconciled with the proposition that he may be arrested without knowing why he is arrested?*". Similarly, Lord du Parcq points out that "*the right to arrest and the duty to submit are correlative.* A man is entitled to his liberty, and may, if necessary, defend his own freedom by force. If another person has a lawful reason for seeking to deprive him of that liberty, the person *must, as a general rule, tell him what the reason is, for unless he is told, he cannot be expected to submit to arrest, or blamed for resisting*".

A police officer acts illegally in Ceylon (as in England) if he arrests a man without a warrant on a mere "unexpressed suspicion" that a particular cognizable offence has been committed—unless, of course, "the circumstances are such that the man must know the general nature of the offence for which he is detained" or unless the man "himself produces the situation which makes it practically impossible to inform him". I refuse to believe that the legislature intended police officers or private individuals making arrests in this country on their own initiative to enjoy the right to greater reticence than persons who execute warrants issued by a Magistrate after a judicial decision that the evidence before him justified interference with the liberty of the subject *before trial.* Mr. Chitty's argument, if sound, would equally apply to any private citizen purporting to make an arrest under section 35. That cannot be the law of any civilized country.

In *Christie's case* (*supra*) the House of Lords unanimously approved the following propositions laid down by Scott L.J. in the Court of Appeal in (*1946*) *1 K.B. 124:*

"(1) Arrest on a criminal charge always was and still is a mere step on the procedural road to committal, trial, verdict, judgment, punishment or acquittal.

(2) The power of arrest conferred by the law is limited to the purpose of the particular proceeding, namely *the specific charge formulated.*

(3) The arrest must be made *on that charge only, and the person arrested must be told by the constable, at the time of the arrest, what the charge is.*"

These rules are equally applicable in Ceylon. "The law does not allow an arrest *in vacuo,* or without reason assigned, and the reason assigned must be that the arrest is *for the purpose of a prosecution on the self-same charge as is the justification for the arrest*".

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Police officers must also realise that before they arrest without a warrant, " *they must be persuaded of the guilt of the accused.* They cannot bolster up their assurance or the strength of the case by seeking further evidence and detaining the man meanwhile, or taking him to some spot where they can or may find further evidence "—*per* Lord Porter in *John Lewis & Co. Ltd. v. Tims* [1]. In the present case, the 1st appellant asserted (and the learned judge believed) that he had not finally decided to arrest Munaweera at the time that he first entered Munaweera's house.

Munaweera had agreed in the first instance to accompany the police officers for a reason which was not made clear to him (P3b), but he was perfectly justified before leaving his house, in deciding to notify a lawyer of his own selection of what was taking place. The exercise of that elementary right was denied him, and he accordingly refused the " polite invitation " to go to the police station. The subsequent attempts to remove him forcibly *without any further intimation of the reasons for his proposed compulsory detention or arrest* were quite illegal. For these reasons, I would affirm the conviction of the 1st appellant on the 2nd and 3rd counts in the indictment. He was the senior officer present, and he was responsible for the actions of the 2nd and 3rd appellants who were admittedly acting on his orders. The sentences passed on the 1st appellant must also be affirmed. In my opinion, they err on the side of leniency.

As to the convictions of the 2nd and 3rd appellants, however, I take the view, and learned Crown Counsel very fairly conceded, that their acquittal on the 1st count (involving as it did a rejection of the suggested inference that they had entered Munaweera's house in pursuance of a prior conspiracy to commit the offences alleged in the other counts) should as a necessary corollary have led to their acquittal on the chargee of criminal force and wrongful confinement as well. It is not improbabls that, when the senior police officer present eventually ordered Munaweera's arrest at a later stage, they reasonably and in good faith entertained the belief that the order was one which they ought to obey. In these circumstances, they were entitled to claim the benefit of the exception to criminal liability set out in section 69 of the Penal Code. Their case can be differentiated from one where obedience of an order known to be illegal is relevant only to the question of punishment, but not to the issue of guilt. See *Chaman Lal's case* [2]. I would therefore allow the appeals of the 2nd and 3rd appellants and make order acquitting them. Their applications in revision should for the same reason be granted.

FERNANDO A.J.—I agree.

Appeal of 1st appellant dismissed.

Appeals of 2nd and 3rd appellants allowed.

[1] *(1952) A. C. 676 at 691.* [2] *A. I. R. (1940) Lah. 210 at 216.*

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1954

Present : **Pulle J. and Swan J.**

C. N. FERNANDO, Appellant, and M. J. C. FERNANDO, Respondent

S. C. 104—D. C. Colombo, 26,306

Rent Restriction Act—Appropriation of payments—Onerous nature of debt due as rent.

When a tenant who is protected by the Rent Restriction Act owes his landlord not only rent but also money due on certain money lending transactions, any payment made by him must, if its purpose is unspecified, be first appropriated to pay off the arrears of rent. The payment " must be carried to that acccunt which it is most beneficial to the debtor to reduce ".

APPEAL from a judgment of the District Court, Colombo.

S. J. Kadirgamar, for the plaintiff appellant.

No appearance for the defendant respondent.

Cur. adv. vult.

May 10, 1954. PULLE J.—

The landlord who is the appellant in this case sought to eject his tenant on the ground that he was in arrears of rent from October, 1950. The action was instituted on the 1st April, 1952. It is not necessary to go into detailed figures as to how the tenant set up the plea that he was not in arrears. He did not give evidence at the trial and the learned District Judge disposed of the case on the basis of the landlord's evidence, except on one material point to which I shall later advert.

Admittedly there was a payment by the tenant of Rs. 554 on the 29th October, 1951. Giving the tenant credit for this sum and two other sums, namely, Rs. 89·76 being the excess rent recovered during the first sixteen months of the tenancy and Rs. 106 being the amount spent by the tenant in effecting repairs, the learned District Judge held that the tenant was not in arrears and dismissed the action.

It is plain on the evidence, and the Judge so finds, that there were monetary transactions between the parties. In regard to the payment of Rs. 544 the landlord stated,

" Thereafter he paid me Rs. 544. He told me that was all he had and gave me the money and he said it was on account of the loan. "

If this was true then clearly the tenant was in arrears but the finding on this point is specific that the Judge did not believe that the tenant requested the landlord to take this amount in payment of the loans. If Rs. 544 was not paid in payment of the loans, then the inference is reasonable that it was on account of rent. The matter, however, does not rest at this point. The letter P15 of 9th June, 1951, written by the tenant to the landlord and the letter P16 of 24th September, 1951,

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written to the tenant by the landlord's wife and the reply thereto amply support the finding that Rs. 544 was paid on account of rent and accepted by the landlord on that basis.

An argument was addressed to us that the learned Judge wrongly stated the law to the following effect :

> " Arrears of rent was the more onerous debt and this payment of Rs. 544 should have been appropriated to pay off the arrears due at that time. "

I do not think that the Judge intended to convey that he had any doubts as to the accuracy of the finding based on circumstantial evidence that the payment must have been on account of rent. It was argued that if the tenant did not indicate the purpose for which the payment of Rs. 544 was made the landlord had the choice of applying it in reduction either of the rent or the loan. Reliance was placed on the case of *Leeson v. Leeson* [1] and *Wessels on the Law of Contract in South Africa, Vol. I–p. 692.* The English case no doubt lays down that there must be something more than an intention of the *debtor* uncommunicated to the creditor to amount to an appropriation by the *debtor* but it also says that that intention may be inferred from circumstances known to both parties. Wessels says at paragraph 2295, " If the debtor, when he makes the payment, does not apply the money to a particular debt, the creditor is entitled to appropriate the money, within certain limits, to whatever debt he pleases ". Paragraph 2297, however, states that it is not enough to make the appropriation *in praesenti,* he must also communicate it to the debtor so as to give the latter an opportunity of refusing to pay under such circumstances.

In view of the finding by the Judge which was supported by the evidence the authorities relied on do not support the landlord's contention. He took his stand on the positive allegation that the tenant requested him to apply the money to the loan and his evidence has not been accepted owing to the circumstances which surrounded the payment.

Travelling outside the citations at the argument I would refer to *Walter Pereira's Laws of Ceylon at pp. 772 and 773* which refer to two local cases *Ephraims v. Jansz* [2], *Schokman v. Felsinger* [3], in which it was held that where the purpose for which a payment is made is unspecified " it must be carried to that account which it is most beneficial to the debtor to reduce ". There can be no doubt that as between a debt arising from a money lending transaction and one arising out of a contract of tenancy subject to the Rent Restriction Act the latter is the more burdensome.

Whether the debtor was silent as to how the payment should be appropriated or whether the parties well understood that the payment was made on account of rent, I reach the same result, that the appeal fails and should be dismissed.

SWAN J.—I agree.

Appeal dismissed.

[1] *(1936) 2 K.B. 156.*

[2] *(1895) 3 N.L.R. 142.*

[3] *(1872-76) Ramanathan's Reports 317.*

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1954

Present : **Pulle J. and Swan J.**

GENERAL INSURANCE CO., Appellant, *and* C. SOMASUNDERAM, Respondent

S. C. 390—D. C. Colombo, 3,992

Motor Car—Accident—Vehicle damaged beyond repair—Basis of valuation.

Where a motor car is damaged beyond repair as the result of an accident, the value of the car at the time of loss is to be calculated, apart from special factors, upon a basis of depreciation depending on the theoretical life of the car.

APPEAL from a judgment of the District Court, Colombo.

S. J. Kadirgamar, for the defendant appellant.

P. Somatilakam, for the plaintiff respondent.

Cur. adv. vult.

February 25, 1954. SWAN J.—

The appellant was sued by the respondent on two causes of action for the recovery of (1) Rs. 6,000 alleged to be the value of motor car CL 2435 which was damaged beyond repair as the result of an accident that occurred on 6.2.1950, and (2) Rs. 1,275 for bodily injuries sustained. There was no dispute regarding the latter claim. The case went to trial on only one issue, namely :—" What was the value of the car on 6th February, 1950 ? ". The learned District Judge held that the car was reasonably worth Rs. 5,750 at the relevant date ; and judgment was entered accordingly in favour of the respondent for Rs. 5,750 on the first cause of action and Rs. 1,275 on the second cause of action together with costs.

The only point argued before us was that the basis of valuation of the car was wrong. It was a Ford Prefect which at that time could be purchased new for Rs. 6,500. The respondent had bought it second-hand for Rs. 6,000. The car had then done 12,000 miles. Between that date and the date of the accident it had done a further 7,000 miles. The respondent estimated the depreciation of the car during the period he owned it at Rs. 250 and this figure was accepted by the learned District Judge as reasonable. Upon what basis this amount was arrived at one cannot say. The learned District Judge has stated in his judgment that it was " well known that in 1950, the importation of cars was allowed only on a licence " and that therefore the value of second-hand cars had gone up. The only evidence in the case was a statement by the witness called by the appellant that in 1942 there was a scarcity of cars. Mr. Somatilakam who appeared for the respondent admitted that he could not support the learned District Judge's statement that in 1950 cars could not be imported except on a licence. So that the learned District Judge has clearly misinformed or misdirected himself on an important question of fact.

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For the appellant one D. J. Wijesiriwardene gave evidence. He said that he was the Foreman of the Ford Motor Company, Colombo, and counted 17 years of service. His evidence was that in the trade the depreciation of a car was calculated on a mileage basis—10 cents per mile on the first 10,000 miles and 15 cents per mile on the second 10,000. He was not asked, nor did he volunteer to say what the rate of depreciation would be for the third 10,000 miles and thereafter. For the purposes of this case that information was unnecessary.

The learned District Judge seemed to think that the calculation of the depreciation of the car on this basis was arbitrary. I take the contrary view. Depreciation calculated on the theoretical life of a car has been accepted in England and I see no reason why it should not be adopted here. *Shawcross* in his treatise on *Motor Insurance* at page 509 refers to a judgment of the Official Referee in *Edney v. de Rougemont* [1] in which the following principles were laid down (I should mention that the report of this case is not available here).

(1) " The value of the car at the time of loss is to be calculated upon a basis of depreciation ;

(2) The rate of depreciation is to be ascertained by finding upon the evidence in each case what was the theoretical life of the car ;

(3) The depreciation for the first year will be the rate per cent so found plus something in respect of the dealer's commission on the car ;

(4) The depreciation for the last year will be the rate so found less the scrap value of the car at the end of its life ;

(5) The rate of depreciation is to be applied from year to year to the car's value at the beginning of each year, and not yearly to its original cost. "

Of course special factors in each case must be considered, for example the use to which the car has been subjected during its actual life, whether it had been recently repaired or renovated, and the value of any special accessories destroyed or lost with it.

In this case the basis of depreciation although not strictly calculated in accordance with the principles laid down in *Edney v. de Rougemont* (supra) is nevertheless based upon the theoretical life of a car, namely the number of miles it can reasonably be expected to run before it depreciates to mere scrap value. In the absence of any better evidence I would accept the basis of depreciation given by Wijesiriwardene and fix the value of the car at Rs. 4,100 at the time of the accident. In the result judgment will be entered for the respondent for Rs. 4,100 plus Rs. 1,275 and costs of action. The respondent will, however, pay to the appellant the costs of appeal.

PULLE J.—I agree.

Appeal partly allowed.

[1] *28 Ll. L. R. 215.*

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1952

Present : **Swan J.**

D. W. JAYASINGHE, Petitioner, *and* D. G. DAYARATNE (Assistant Government Agent), Respondent

S. C. 128—Application for a Writ of Mandamus on the Government Agent, Kegalle

Excise Ordinance—Local option poll—Voting area—Procedure for defining its boundaries—Rules 5, 10, 11, 12, 13—Mandamus.

By Rule 13 of the Local Option Rules of 1928 :—

" The Government Agent with the advice of the Advisory Committee shall have the power to define the exact boundaries of any area in accordance with the provisions of Rules 10, 11 and 12. "

Held, that Rule 13 would have no application if the boundaries of the villages involved are already definite and well known.

APPLICATION for a Writ of *Mandamus*.

H. W. Jayewardene, with *P. Ranasinghe* and *A. de Silva*, for the petitioner.

E. R. de Fonseka, Crown Counsel, for the respondent.

Cur. adv. vult.

December 17, 1952. SWAN J.—

The petitioner who claims to be entitled to vote at any local option poll in the Kegalle Town area complains that the respondent failed to comply with certain statutory rules in connection with a local option poll held on 26.1.52, which resulted in the closing of the Foreign Liquor Tavern in Kegalle Town and Arrack Tavern No. 1 in the village of Olagama which falls within the Kegalle Town areas. The petitioner has applied to this Court for a writ of *mandamus* on the respondent in the following terms :—

(*a*) " declaring the poll held on 26th January, 1952, to be null and void ;

(*b*) commanding the respondent to report to the proper authority that the said poll has been declared null and void and that the licences for Arrack Tavern No. 1 Olagama and Foreign Liquor Tavern, Kegalle, in the area administered by the Kegalle Urban Council have not been abolished for the rent period commencing next after the date on which the said poll was held ;

(*c*) commanding the respondent to hold a poll only after a fresh application is made and in compliance with law ; "

Learned Counsel for the respondent contends that the first prayer is for consequential relief, that the second prayer is a meaningless request because there is no " proper authority " except the respondent himself

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to whom report would have to be made, and that the third prayer envisages a situation that may never arise, because no one can say whether a fresh application for a poll will be made. Mr. Jayewardene submits that the prayer of the petition is based on the order made by Drieberg J. in *Miller & Co. v. Government Agent, Province of Uva* [1]. It will be necessary to consider what form the writ should take only if the petitioner can satisfy this Court that he is entitled to succeed on his application.

Counsel for the respondent also objected *in limine* that the application should be dismissed because—

(*a*) the petitioner has no real interest in the matter, and

(*b*) there was undue delay in making the application.

As regards (*a*) it is not denied that the petitioner was on the list of voters but it was suggested that in the matter of this application he was a mere figure-head having been set up by some person or persons who were financially interested in keeping these taverns open. On the evidence I am unable to come to that conclusion and I would hold that the petitioner has a demonstrable interest in the matter of this application and that he can maintain the application.

As regards the second objection Mr. Fonseka has pointed out that the preliminary list of voters was prepared and made available for inspection before 31.8.51 and the final list published on 30.10.51. The petitioner, he maintains, should therefore have made this application shortly after the publication of the final list. The petitioner in his evidence stated that he became aware of the alleged irregularity only a few days before the poll was held ; and Mr. Jayewardene has explained that before the petition could be submitted to Court certified copies of certain documents of a voluminous nature had to be obtained. In the circumstances I would hold that there has not been any unreasonable or undue delay in making the application.

I shall now deal with the application on the merits. The complaint of the petitioner is that the respondent failed to comply with Rule 13 of the Local Option Rules 1928 (Subsidiary Legislation, Volume 1, Cap. 42, page 309). This rule provides that " the Government Agent with the advice of the Advisory Committee shall have the power to define the exact boundaries of any area in accordance with the provisions of Rules 10, 11 and 12 ". The petitioner 's case is that the voting area which had to be determined under Rule 11 could not have been determined without fixing the exact boundaries and, therefore, the requirements of Rule 13 had to be observed. The petitioner filed affidavits from two persons on the Advisory Committee to the effect that they had not been consulted for the purpose of defining the correct area. In each of these affidavits the affirmant states—

" According to the best of my information the voting area as fixed for the poll in January, 1950, is not identical with the voting area for the poll in question. "

[1] *(1928) 30 N.L.R. 6.*

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The respondent both in his affidavits and in his evidence in Court admits that he did not seek the advice of the Committee. His position is that he was not acting under Rule 13 because there was no need to define the exact boundaries which were already well known. But learned Crown Counsel in the course of his argument contended that even if the Government Agent were acting under Rule 13 he had a discretion whether to consult the Advisory Committee or not. In other words, the argument was that as the rule did not say that the Government Agent should not, except upon the advice of the Committee, define the exact boundaries of any voting areas it made it optional for him to consult the Committee. With this contention I am unable to agree. The rule as I read it empowers a Government Agent to define the exact boundaries of any voting area, when the need for such definition arises, only with the advice of the Advisory Committee. Any other interpretation of the rule would make nonsense.

The crucial question therefore is whether any need arose before or during the preparation of the voters lists to define the exact boundaries of the voting area laid down by Rule 13. In order to consider this, one has to know what is required to be done when an application is made for a poll. The application itself has to be made under Rule 2 before June 30 in any particular year. Thereupon, the Government Agent has under Rule 5 to prepare a preliminary list of the persons entitled to vote at such poll. That list has to be prepared on or before 31st August, and it must be made available to the public for inspection. Before preparing the preliminary list the Government Agent has to determine the voting area in accordance with the rules. Voting areas fall under two categories—namely, *Urban* and *Rural* and Rules 10 and 11 have to be applied. Rule 10 deals with Urban areas and Rule 11 with Rural areas. But Rule 10A provides that whenever the population of any Urban area according to the latest census report is below 5,000, the voting area is to be determined not according to Rule 10 but according to Rule 11.

It is common ground that the population of the area administered by the Kegalle Urban Council was less than 5000 and so Rule 11 would apply. This rule is worded thus :—

> " *Rural*—In rural areas the voting area shall be, in the case of a single tavern, hotel, or place licensed to sell beer or porter, as nearly as practicable the whole area within a radius of two miles from the licensed premises in question. Where the circumference of the resultant circle cuts a village into two parts, the whole of such village shall be excluded unless more than half of it falls within the said circumference ; but where in any area there is more than one tavern, hotel, or place licensed to sell beer or porter, provided no two of them are more than one mile apart from each other, the voting area for all such taverns, hotels, or places shall be one and the same, but the circle comprising such voting area shall have its centre at as central a point as possible. "

There were two taverns affected by the poll and the Government Agent had therefore to find a point equidistant between them and draw a circle

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with a radius of two miles from that point, and include all those villages the whole of which or more than half of which fell within the circumference of the resultant circle. If the boundaries of the villages were definite and well known it was merely a matter of mathematical calculation. The respondent said he did all that he was required to do under Rule 11 ; that the boundaries of the villages were definite and well known and that acting upon information given him by the District Revenue Officers and the Village Headmen he determined the voting area for the poll and prepared a preliminary list of persons entitled to vote in each of the villages comprising the voting area. This list gave the names of the voters under each village that fell within the voting area as determined by Rule 5. When this list was put up for public inspection any person interested in the poll could have objected on the ground that the names of eligible voters from villages which were wrongly excluded from the voting area should be added to the list or that the names of persons in villages wrongly included should be struck out. The respondent in his evidence has stated that there were no objections and that he prepared and published the final list on 30.10.51 in accordance with the provisions of Rule 5. The concluding part of this rule provides that —

> " No name shall be added to or struck out from such final list after publication, and the local option poll shall be held on such list *which shall be final and conclusive for all the purposes of these rules.* "

This should conclude the question at issue save for the submission that the voting area could not have been determined except with the advice of the Advisory Committee. As I have already said, Rule 13 would have no application if the boundaries of the villages involved were defined and well known. The respondent was cross-examined on this point and he said that although he did not know the boundaries personally, he was satisfied on the information he received from the Headmen and the District Revenue Officers that there was no doubt about the boundaries. It was argued that the respondent could not and should not have determined the voting area upon such information. I cannot see how an administrative officer like a Government Agent could ascertain the boundaries of villages except in this manner. A point was made of the fact that the village of Kolongolla which was included in the list prepared for the poll held in 1951 for the very same two taverns was omitted from the list for the poll of 1952. The respondent explained that on the earlier occasion the circle was drawn on a small scale map whereas on the second occasion the map used was on a very much larger scale, and that upon a careful examination using graph paper and counting the squares he was satisfied that more than half of the village of Kolongolla fell outside the circle.

I accept the evidence of the respondent that the boundaries of the villages that had to be included in or excluded from the voting were definite and well known. No evidence has been led to satisfy me to the contrary, and it seems to me absurd to suggest that the boundaries of villages cannot be readily ascertained even though a survey map does not show them in detail. In the result I would hold that there was no need to ascertain or fix the exact boundaries of the voting area and that

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the respondent, therefore, was entitled to determine the voting area by the application of Rule 5 which does not require him to act upon the advice of the Advisory Committee. Being satisfied that the respondent acted in accordance with Rule 5 and that no occasion arose for the application of Rule 13, I take the view that the list published on 30.10.51 was final and conclusive and that it is not open to the petitioner or any other person to challenge its correctness as regards the poll held on 26.1.52.

The application is dismissed with costs.

Application dismissed.

1953 *Present :* **Nagalingam S.P.J.**

G. F. C. GUILLAIN, Petitioner, *and* COMMISSIONER OF INCOME TAX, Respondent

S. C. 294—Application for revision in M. C. Colombo, 37,624

Income tax—Proceedings for recovery before Magistrate—Stage at which further time will not be granted —Income Tax Ordinance (Cap. 188), s. 80.

In proceedings under section 80 of the Income Tax Ordinance for the recovery of unpaid tax, the assessee cannot ask for further time after the Commissioner issues his certificate under section 80 (3) confirming (or reducing) his assessment. At that stage, there is no other question outstanding which the assessee can urge as a ground for staying further proceedings for the recovery of the tax due from him.

APPLICATION to revise an order of the Magistrate's Court, Colombo.

A. B. Perera, for the petitioner.

G. F. Setukavaler, Crown Counsel, for the respondent.

Cur. adv. vult.

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October 5, 1953. NAGALINGAM S.P.J.—

This is an application to revise an order made by the learned Chief Magistrate of Colombo sentencing the petitioner to a term of six months rigorous imprisonment on his declining to pay a sum of Rs. 4,844 claimed by the Commissioner of Income Tax as excess profits duty due from him. Learned Counsel for the petitioner complains that the Magistrate should have fixed the matter for inquiry on the date on which he made the order imposing the sentence and that by the learned Magistrate declining to accede to the request on the part of the petitioner to fix the matter for inquiry the petitioner has been denied justice.

For a full appreciation of the argument advanced, it will be necessary to go back to the date on which the petitioner appeared in answer to the summons served on him calling upon him to show cause why further proceedings should not be taken against him for the recovery of the excess profits duty assessed to be due from him. On the date the petitioner appeared he was represented by counsel. On that date the learned Magistrate made a minute, " Time granted till 29.4.53 under section 80(2). "

Learned counsel for the petitioner states that in Income Tax cases minutes such as the one made by the learned Magistrate are made as matters of routine without any application therefor being made by the assessee. I am not prepared to act on such a statement without proper material being placed before the Court by way of an affidavit of facts. On the contrary I incline to the view that the order was a considered order made by the learned Magistrate upon the application of the petitioner's counsel.

It is obvious that under the proviso to section 80(1) of the Income Tax Ordinance the Magistrate has no jurisdiction to consider, examine or decide the correctness of any statement in the certificate of the Commissioner, but under section 80(2) the Magistrate is empowered to adjourn the matter where the assessee has not appealed within the proper time against the assessment made upon him. It has not been suggested by Mr. Perera who appeared for the petitioner that in point of fact the petitioner had appealed against the assessment and that the provisions of sub-section (2) did not apply and that the Magistrate's order therefore was one which could be stated to bear intrinsic testimony of the routine nature of the order. But on the contrary the case has been argued on the footing that the petitioner had in fact not appealed against the assessment made on him.

The question arises, how did the learned Magistrate become aware of the fact that there had been no appeal against the assessment, for that is the only foundation upon which the learned Magistrate could have made an order under section 80(2). In fact it does not appear that the petitioner could have shown cause against the summons other than to make an application under section 80(2) in the circumstances of this case. I would hold that it was on an application made to the learned Magistrate that time was granted for representations to be made to the Commissioner. On the date fixed, after the period allowed to

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submit to the Commissioner the objections to the tax, the petitioner's counsel moved that the matter be fixed for inquiry. But apparently the petitioner had made representations to the Commissioner, for the Commissioner had in the meantime issued his certificate under section 80(3), confirming his assessment. At that stage, therefore, there was no other question outstanding which the petitioner could have urged as a ground for staying further proceedings for the recovery of the excess profits duty alleged to be due from him.

Mr. Perera was unable to say even at the argument of the petition what the particular matter was that he desired to be fixed for inquiry. He made an attempt to show that the petitioner being a French subject governed by French Law was not liable to pay duty from profits earned by his wife, who was the person who ran the business of an hotel, the profits of which were the subject of the duty. But that was a subject of controversy that could and should have been taken in the earlier stages of the proceedings culminating in the assessment, and the matter could have been taken up by way of appeal in succession to the Commissioner of Income Tax, the Board of Review, and finally to this Court ; but the petitioner does not appear to have pursued the remedy granted to him by law. On the other hand I can well understand his reticence for not so doing. Whatever may be the rights between husband and wife under the law of domicile of a person, the fiscal laws of the country of their residence are in no way affected thereby. In fact in this country itself there are sections of people where the property rights of husband and wife are distinct and separate ; nevertheless the husband by virtue of the provisions expressly enacted in that behalf becomes liable to pay duty on the income or excess profits earned by the wife.

I do not therefore think that there is any substance in the contention that any prejudice has been caused to the petitioner as a result of the application to fix the matter for inquiry being refused by the learned Magistrate, for in fact there was at that time no matter to be fixed for inquiry. When I make this observation I do not lose sight of the fact that it certainly is open to a party summoned before the Magistrate to show either that he is not a defaulter in the sense that he has in point of fact paid and discharged any duty imposed on him or that he is not a defaulter in the sense that he was not the person who was assessed, but that he was a third party—see *de Silva v. Commissioner of Income Tax* [1]. Those matters relate to questions which cannot fall under the category of questions which a Magistrate is forbidden to consider or examine under section 80 (1) ; those are matters *de hors* the statement contained in the certificate.

I therefore see no reason to interfere with the order of the learned Magistrate, which is affirmed. The application is refused.

Application refused.

[1] *(1951) 53 N. L. R. 280.*

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1954 *Present :* Sansoni J.

P. W. MUNIWEERA, Appellant, *and* COMMISSIONER OF STAMPS, Respondent

S. C. 1,545—M. C. Tangalle, 9,564

Stamp Ordinance (Cap. 189)—Recovery of duty, penalty, &c. —Procedure—Right of appeal—Sections 41 (1) (b), 50, 90.

A clerk in the Department of Income Tax, Estate Duty and Stamps made an application to a Magistrate under section 50 of the Stamp Ordinance for the recovery of certain stamp duty due from the accused. At the foot of the application appeared the words "I authorise this application", and beneath those words was the signature of the Deputy Commissioner of Stamps. The Deputy Commissioner recited under his signature that he was authorised by the Commissioner of Stamps to act on his behalf in respect of section 50. That authority was filed in the record.

Held, that the clerk was not an officer authorised by the Commissioner of Stamps within the meaning of section 50 of the Stamp Ordinance.

Held further, (i) that no appeal lies from a Magistrate's order made upon an application under section 50 of the Stamp Ordinance.

(ii) that a notice issued under section 41 (1) (*b*) of the Stamp Ordinance without the authority of either the Commissioner of Stamps or an officer duly authorised by him in writing is invalid and of no effect.

APPEAL from an order of the Magistrate's Court, Tangalle.

E. A. G. de Silva, for the accused appellant.

Vincent T. Thamotheram, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

June 4, 1954. SANSONI J.—

On the 7th July, 1953, Mr. M. B. E. Peiris, clerk, Department of Income Tax, Estate Duty and Stamps, applied to the Magistrate, Tangalle, to recover a sum of Rs. 58 being the amount of deficiency of Stamp Duty due under Part I Schedule A of the Stamp Ordinance (Cap. 189). He stated in his application that the respondent P. W. Muniweera had omitted to pay this sum although he was requested to do so by a notice dated 14/2/52, and subsequent reminders issued by the Commissioner of Stamps.

The application was made under section 50 of the Ordinance. At its foot appear the words "I authorise this application" and under those words Mr. L. G. Gunasekere, Deputy Commissioner of Stamps, has signed. Mr. Gunasekere recites under his signature that he was

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authorised by the Commissioner of Stamps to act on his behalf in respect of section 50 of the Ordinance. That authority has been filed in the record and it is dated 26th May, 1953.

The respondent was noticed by the Magistrate, he appeared in Court, and as he stated that he had cause to show against the application the matter was fixed for inquiry on 18/9/53. The respondent's proctor raised two objections. The first was that the authorisation of Mr. Peiris to make the application was by the Deputy Commissioner. The second was that the notice under section 41 (1) (*b*) served on the respondent was signed by one B. D. S. de Zilva who was not authorised to issue such a notice. At that stage an authority in favour of Mr. B. D. S. de Zilva to act under section 41 and other sections of the Ordinance issued by the Commissioner of Stamps and dated 26th May, 1953, was produced. The notice issued under section 41 (*a*) (*b*) was dated 14/2/52. It is obvious therefore that if the authority of the Commissioner was necessary to enable Mr. de Zilva to issue a valid notice it was wanting in this case.

The learned Magistrate, however, forthwith made order that he was satisfied that the authority issued was proper and that the application was proper. The respondent appealed from this Order but it is well settled that no appeal lies from such an Order made upon an application under section 50. Learned Counsel for the appellant, however, asked me to act by way of revision, and in view of the importance of the matter and the irregularities to which he drew my attention, I decided to accede to his request.

It is quite true that a Magistrate to whom an application is made under section 50 is only asked to recover the duty which the respondent had failed to pay. But, as Bertram C.J. pointed out in *Gunawardene v. Gunasekere* [1]:

> " There are some things indeed which the Magistrate must consider ; one is whether the case is within his local jurisdiction ; another is whether the authorisation of the Commissioner of Stamps, which is a condition precedent to the exercise of his jurisdiction, has in fact been obtained. Further, in my opinion, it may well be that if it were brought to the Magistrate's notice that a condition which the law regards as fundamental to the whole proceeding of the Commissioner of Stamps had not been fulfilled the Magistrate ought to stay his hand. "

The learned Chief Justice in the same judgment drew attention to the absence of any provision for an appeal against a notice issued under section 41 (1) (*b*) of the Ordinance.

To deal now with the validity of the notice dated 14/2/52, the failure to comply with which is the basis of this application. It is quite clear that this notice was not issued either by the Commissioner of Stamps or by an officer authorised by him in writing to do so. I have no doubt that an authority granted subsequent to the date of the notice is of no effect. For this reason alone this application made to the Magistrate should have been disallowed.

[1] (*1923*) *1 Times of Ceylon Law Reports, p. 90 at p. 92.*

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Another point taken by the respondent's counsel before me was that Mr. Peiris who made the application has not been shown to be an officer authorised by the Commissioner of Stamps. Section 50 requires that the application be made " by an officer authorised on this behalf by the written order of the Commissioner of Stamps ". Section 90 defines the Commissioner of Stamps as including " any officer of his Department authorised by him in writing in respect of any particular matter or any provision of this Ordinance ". No authority has been produced in favour of Mr. Peiris but he presumably relies on the authority signed at the foot of his application by Mr. Gunasekere which reads " I authorise this application ". There is a difference between the authorising of an application and the authorising of an officer to make an application. It is the latter that is necessary under section 50, and not the former. Mr. Gunasekere's authorisation is no authority in favour of Mr. Peiris but only of the making of the application. It is not clear that when Mr. Gunasekere appended his signature to this application he brought his mind to bear on the necessity for authorisation in favour of Mr. Peiris ; if he did, and was satisfied as to its necessity, he should have said so in a way that leaves no room for doubt.

For this reason also, in my opinion, this application should have been disallowed.

I, therefore, set aside the Order of the learned Magistrate.

Order set aside.

1954 *Present :* **Fernando A.J.**

L. W. A. VINCENT, Appellant, *and* K. G. SUMANASENA, Respondent

S. C. 153—C. R. Kandy, 9,613

Rent Restriction Act, No. 29 of 1948—Section 14—Continuance of original contract of tenancy—Retrospective force.

During the pendency of an action for ejectment under the Rent Restriction Act the tenant must continue to pay rent as it falls due. Failure to do so may, by virtue of the retrospective force of section 14 of the Act, render him liable to be sued again for ejectment, in a subsequent action, on the ground of non-payment of rent.

APPEAL from a judgment of the Court of Requests, Kandy.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the plaintiff appellant.

No appearance for the defendant respondent.

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Cur. adv. vult.

June 7, 1954. FERNANDO A.J.—

Plaintiff instituted this action on November 6th, 1952, for the ejectment of his tenant, the defendant, on the ground that rent for June to September 1952 had not been paid. Plaintiff had on September 17th, 1952 given notice to the defendant to quit the premises on or before October 31st, 1952. There had earlier been another ejectment action (C. R. No. 9136) between the same parties and in respect of the same premises on the ground of non-payment of rent for some earlier period and that action had been dismissed on 9th September, 1952. It is clear therefore that the arrears of rent on which the present action is based were in respect of a period during which the first action was pending. The plaintiff apparently served his second notice to quit (on which the present action is based) eight days after the dismissal of his first action. On 26th September 1952 the defendant tendered to the plaintiff a cheque for Rs. 200 in payment of the rent for the four months in respect of which he was in arrears—namely June to September 1952. This cheque was returned by the plaintiff on November 7th, 1952, and immediately thereafter the defendant deposited the sum of Rs. 200 to the credit of the former action which had already been dismissed.

The learned Commissioner dismissed the present second action also on the ground that the defendant had not been in arrears for the months of June to September 1952. The learned Commissioner does not in fact hold that the rent for these months was paid before they fell into arrear, and his view that the defendant was not in arrears of rent is based upon an interpretation of Section 14 of the Rent Restriction Act. Section 14 of the Act provides that, " where an action for the ejectment of any person from any premises occupied by him as a tenant is dismissed by any Court by reason of the provisions of this Act, his occupation of those premises for any period prior or subsequent to the dismissal of such action shall, without prejudice to the provisions of this Act, be deemed to have been or to be under the original contract of tenancy ".

The effect of this Section is that when a plaintiff's action for ejectment is dismissed, then, despite the purported termination of the tenancy by the landlord's prior notice, the original contract of tenancy is kept in force retrospectively, so that in the present case by reason of dismissal of action No. C. R. 9136, the original contract of tenancy between the plaintiff and defendant must be considered as though it had never been terminated. Although the effect of the declaration in Section 14 is retrospective, nevertheless the parties would not know that such a declaration is applicable to their case until the action is in fact dismissed. Apparently for this reason, the learned Commissioner seems to think that the plaintiff cannot rely on the failure of the defendant to pay rent for the period during which the first action No. C. R. 9136 was pending. In short according to the learned Commissioner, " the rents due from a tenant for the period during which an action against him was pending could be described as arrears of rent only after the landlord's action is dismissed ".

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In my opinion the judgment is based upon an incorrect view of the law. Undoubtedly the effect of the dismissal of the first action was to confer retrospectively on the tenant (by reason of S. 14) his rights and status under the original contract of tenancy; but equally so there would be imposed on him also the obligations of the tenant. When a tenant defends an ejectment action he should be aware that *either* he would be liable in damages for his occupation during the pendency of the action, if the plaintiff is ultimately successful, *or* he would by virtue of S. 14 retrospectively continue to be tenant, if the plaintiff fails. If therefore he wishes to secure to himself the full benefit which S. 14 is intended to confer he must regard himself as a tenant during the pendency of the action and pay the rent as it falls due, or else deposit it in Court to the credit of the action. If he does not do so he runs the risk, as in the present case, that the plaintiff can immediately serve him with fresh notice forthwith after the determination of the first action.

I accordingly hold that because of the failure of the defendant to pay into Court in due time the rent for the months of June, July and August 1952 he was in arrears of rent for those months on September 17th, 1952, when notice to quit was given to him. The plaintiff must therefore succeed in his action for ejectment, and decree should be entered accordingly in his favour. The plaintiff will also be entitled to damages at the rate of Rs. 50/- per month until the date of the ejectment of the defendant. Credit will of course be given to the defendant for any payments actually made in the interval. The defendant must bear the costs in the Court of Requests as well as the costs of this appeal.

Appeal allowed.

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1953 *Present:* **Gratiaen J. and Gunasekara J.**

THE ATTORNEY-GENERAL, Appellant, *and* V. RAMASWAMI IYENGAR *et al.* (Administrators of the Estate in Ceylon of Rm. Ar. Ar. Rm. Arunachalam Chettiar, deceased), Respondents

S. C. 235—D. C. Colombo, 37 (Special)

Estate Duty—Hindu undivided family—Way of proving a question of foreign law —Death of "co-parcenary member" in 1934—Liability of his estate to pay estate duty—"Passing" of property—"Executor"—Ordinance No. 8 of 1919, ss. 7, 8, 17(6)—Ordinance No. 1 of 1938 (Cap. 187), ss. 24, 77, 79—Wills Ordinance (Cap. 49), s. 7—Partition Ordinance (Cap. 56), s. 18.

A. C., a Natucottai Chettiar, and his father were the only "co-parcenary members" of a Mitakshara Hindu undivided family which, regarded as an entity, owned considerable "joint property" in various countries including Ceylon. A. C. predeceased his father in 1934. During his lifetime, there had been neither a complete nor a partial division of title or separation of interests in the joint property of the family.

The Crown claimed estate duty in respect of A. C.'s estate in Ceylon. The assessees were the administrators of the estate of his father, who had himself died subsequently in 1938.

Held, (i) that the law governing a Mitakshara Hindu undivided family involved a question of foreign law which must be regarded as a "question of fact" of which the Courts in Ceylon cannot take judicial notice. The decision of the Court must, therefore, be based upon the testimony of the qualified experts who gave evidence and upon the references to textbooks and judicial decisions which were incorporated in their evidence.

(ii) that, under the Mitakshara law, the joint property belonged to the entire family group to the exclusion of its individual members. Upon the death of A. C. no effective change occurred in the title or possession of the joint property belonging to the undivided family. His father who survived him did not, in consequence of the death, receive any "property" which he did not have before. The Crown's claim to estate duty failed, because there was neither an actual nor a notional "passing" of property within the meaning of sections 7 and 8 of the Estate Duty Ordinance, No. 8 of 1919.

(iii) that in regard to the immovable property which formed part of the estate sought to be taxed, section 7 of the Wills Ordinance and/or section 18 of the Partition Ordinance had no relevancy to the "devolution" of a "co-parcener's" interests in any part of the joint property of a Hindu undivided family.

(iv) that the present assessees could not be made accountable in the present case for any estate duty levied under section 8 (1) (*a*) of the Estate Duty Ordinance, No. 8 of 1919, in view of sections 79 and 24, and the meaning of "executor" in section 77, of the later Estate Duty Ordinance (Cap. 187).

APPEAL from a judgment of the District Court, Colombo.

Walter Jayawardena, Crown Counsel, with *V. Tennekoon* and *G. F. Sethukavaler*, Crown Counsel, for the appellant.

H. V. Perera, Q.C., with *S. J. V. Chelvanayakam, Q.C.*, *Peri Sunderam*, and *S. Sharvananda*, for the respondents.

Cur. adv. vult.

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October 12, 1953. GRATIAEN J.—

This is an appeal by the Crown against a judgment of the learned District Judge of Colombo rejecting a claim for estate duty in respect of the estate in Ceylon of a person to whom I shall refer for convenience as " Arunachalam Chettiar (jnr.) ". He died in India on 9th July, 1934, and the assessees are the administrators of the estate of his father " Arunachalam Chettiar (snr.) ", who himself died subsequently in 1938.

The assessees had paid under protest to the Commissioner of Estate Duty a sum of Rs. 283,213·24 representing the duty claimed from them in respect of the son's estate, the property being described in the formal notice of assessment as " the deceased's interest in the business of RM. AR. AR. RM. and AR. AR. RM. " which had been carried on in Ceylon. On the basis of the learned Judge's decision on their appeal against the assessment, he entered a decree ordering the Crown to refund this amount, with interest, to the assessees.

The case for the Crown is that the Commissioner's assessment should be restored, subject to the qualification that, upon a correct valuation of the deceased's property which is claimed to have attracted estate duty in Ceylon, the Commissioner's computation must be reduced to Rs. 214,085·19 together with interest at 4% from 10th July, 1935. Mr. Jayawardena explained that the Commissioner had erroneously taken into account the value of certain assets situated outside this country.

Arunachalam Chettiar (jnr.) predeceased his father at a time when the earlier Estate Duty Ordinance, No. 8 of 1919, was in operation. The property assessed for payment of estate duty on the deceased's estate had, prior to and until the time of his death, been the " joint property of a Hindu undivided family " of which he and Arunachalam Chettiar (snr.) were the only " co-parcenary members " (I have advisedly inserted this phrase within inverted commas for reasons which will emerge in a later part of my judgment). The Crown claims that the deceased had an " interest " in this joint property which " passed " on his death within the meaning of section 7 of the Ordinance or, in the alternative, that an undivided half-share of the joint property must be " deemed to have passed " on his death within the meaning of either section 8 (1) (*a*) or section 8 (1) (*b*). Section 7 of the Ordinance, which corresponds to section 1 of the Finance Act, 1894, of England, is in the following terms :

> " In the case of every person dying after the commencement of this Ordinance, there shall, save as hereinafter expressly provided, be levied and paid, upon the value of all property settled or not settled, which passes on the death of such person, a duty called 'estate duty', at the graduated rates set forth in the Schedule to this Ordinance. "

Sections 8 (1) (*a*) and 8 (1) (*b*), which correspond to sections 2 (1) (*a*) and 2 (1) (*b*) respectively of the English Act, are in the following terms :

> " Property passing on the death of the deceased shall be deemed to include the property following, that is to say :
>
> (*a*) Property of which the deceased was at the time of his death competent to dispose.

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(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest, inclusive of property the estate or interest in which has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was *bona fide* made or effected three years before the death of the deceased, and *bona fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thence forward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise, but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole."

It is also necessary, in order to understand the scope of the provisions of sections 8 (1) (*a*) and 8 (1) (*b*) respectively, to examine section 2 (2) (*a*) [corresponding to section 22 (2) (*a*) of the Act] and section 17 (6) [corresponding to section 7 (7) of the Act]:

"2 (2) (*a*). For the purposes of this Ordinance—A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property; and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself."

"17 (6). The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall—

(*a*) If the interest extended to the whole income of the property, be the value of that property; and

(*b*) If the interest extended to less than the whole income of the property, be such proportion of the value of the property as corresponds to the proportion of the income which passes on the cesser of the interest."

The acceptance or rejection of the argument for the Crown ultimately depends upon the true nature of the interest which a "co-parcenary member" of a Hindu undivided family enjoys in the joint property so long as the family retains its undivided status. Before this question is answered, however, it will be convenient to examine the circumstances in which property *actually* "passes" on a man's death within the meaning

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of section 7, or, in the alternative, *notionally* " passes " on his death so as to attract duty either under section 8 (1) (*a*) or section 8 (1) (*b*). Fortunately, there are authoritative rulings of the English Courts to guide us as to the meaning of the corresponding sections of the English Act. In the quotations which follow, I propose to substitute the sections of the local enactment for the corresponding sections which the Judges had interpreted in England :

(*a*) " The principle on which the (Ordinance) was founded is that whenever property *changes hands* on death, the State is entitled to step in and take toll as it passes without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding. Section (7) gives effect to that principle . . . Section (8) is merely subsidiary and supplemental. If a case comes within section (7), it cannot also come within section (8). *The two sections are mutually exclusive* . . . Section (7) might properly be headed ' With regard to *property passing on death*, be it enacted as follows '. Section (8) might with equal propriety be headed ' And with regard to *property not passing on death*, be it enacted as follows '. . . . . Section (8) does not apply to an interest which passes on the death of the deceased. That is already dealt with in the earlier section ".—*per* Lord Macnaghten in *Cowley v. C. I. R.*[1]

(*b*) " The expression ' passing on death ' (in section 7) is evidently used to denote some *actual change in the title or possession of the property as a whole* which takes place at the death . . . Section (8), by providing that property passing at the death shall *be deemed to include certain kinds of property which do not in fact pass*, artificially enlarges the ambit of the expression ' property passing on death' ".—*per* Lord Parker.

" By sections (7) and (8) a tax is imposed whenever, to use very untechnical language, a death occurs, *and somebody, in consequence, gets property which he had not before ;* and this tax is imposed on the property according to its value, irrespective of the question of the kind of interest which *the new taker* gets, and of his or her relation to the deceased."—*per* Lord Dunedin, in *A. G. v. Milne* [2].

(*c*) " The scheme of the (Ordinance) seems to be this. First of all, when a man dies, a graduated duty is to be laid upon the property passing on his death (section 7). Secondly, it is to be levied on property which does not pass on his death, but which by his death is in some way *either set free or altered in the course of its destination* (section 8) ". —*per* Lord Phillimore in *Neville v. I. L. R.*[3]

(*d*) " For the purpose of fulfilling the word ' passes ' in section (7) . . . there must be at the death the property in existence which, upon the death, *continues and passes on to the successor* ".—*per* Hanworth M. R. in *A. G. v. Quixley* [4].

[1] (*1899*) *A. C. 198.*
[2] (*1914*) *A. C. 765.*
[3] (*1924*) *A. C. 385.*
[4] (*1929*) *98 L. J. K. B. 652.*

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(*e*) " The (Ordinance) is only concerned with *beneficial interests capable of valuation*, since the object of the (Ordinance) is to levy revenue ".—*per* Maugham L.J. in *Scott v. I. R. C.* (1935) Ch. 246, affirmed in (1937) A.C. 174.

(*f*) " In order to test whether it can be said that property ' passed ' on death (section 7), one must *compare the position as regards the persons beneficially interested in the property immediately before the death with the position immediately afterwards* ".—*per* Lord Russell of Killowen in *Burrell v. A. G.*[1] In other words, there must be " *an alteration in rights as distinguished from the mere possibility of an alteration* "—*per* Clauson L.J. in *Re Hodson's Settlement* [2].

(*g*) The phrase " competent to dispose " in section 8 (1) (*a*) " is not a phrase of art, and taken by itself and quite apart from the definition clause, it conveys to my mind the ability to dispose, *including, of course, the ability to make a thing your own* . . . The language of the definition clause seems to me beyond doubt to cover the case of a legatee to whom a legacy has been given and who is in a position *either to take it or to transfer it to somebody else or to disclaim it as he thinks fit* ".—*per* Lord Greene M.R. in *Re Parsons* [3].

(*h*) With regard to the phrase " cesser of interest " in section 8 (1) (*b*), " the (Ordinance) gives some assistance in determining what is meant by an ' interest '. The section comes into operation if the property does not pass under section (7). So, an interest is *some right* with regard to the property, e.g., an annuity payable out of the income to it, *which can cease without the property passing.* Then, a benefit to someone must accrue or arise by the cesser of the interest ".—*per* Lord Reid in *Coatts & Co. v. C. I. R.*[4]

According to the Crown, the property in respect of which estate duty has been claimed is his " share " in the Ceylon assets of the joint property of the Hindu undivided family of which he was a " co-parcener " at the time of his death. That " share ", it is contended, represents " some real and definite proprietary interest which could be the subject of a legal transfer of property ". The argument proceeds on the footing that " the proprietary interest " which the deceased " acquired " by birth into his family (*A. I. R. 1931 P. C. 118 at 120*) was, by operation of the Mitakshara law as it is applied in the Madras Presidency, transmitted on his death to the sole surviving " co-parcener " Arunachalam Chettiar (snr.).

If this fundamental proposition can be established, I do not doubt that the deceased's share " changed hands " in the fullest sense of the term upon his death, and therefore " passed " to his father within the meaning of section 7 of the Ordinance.

The assessees do not dispute that if, as alleged by the Crown, there was an actual " passing " of the property from the deceased to his father upon his death, the father would in the first instance have been accountable for estate duty computed on the value of that property. In that

[1] (*1937*) *A. C. 286.*
[2] (*1939*) *Ch. 343.*
[3] (*1943*) *Ch. 12.*
[4] (*1953*) *2 W. L. R. 364.*

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event, they, as the administrators of the father's estate, concede their liability to the extent of the reduced amount which the Crown now claims to be due from them, namely, Rs. 214,085·19 and interest.

What precisely is the "interest" which a "co-parcenary member" enjoys in the joint property of an undivided Hindu family? The persons concerned were Natucottai Chettiars, and, being Hindus resident in S. India and domiciled in India, were admittedly governed on questions of personal law by the Mitakshara law as it is administered in the Madras Presidency. The problem therefore introduces an extremely difficult question of foreign law which must nevertheless be regarded by us as a "question of fact" of which the Courts in Ceylon cannot take judicial notice. Our decision must be based upon the evidence of the qualified experts who have testified in the actual case, and upon the references to textbooks and judicial decisions which are incorporated in their evidence. —*Lazard Bros. & Co. v. Midland Bank Ltd.* [1]

Two distinguished members of the Madras Bar have given evidence explaining the incidence of the Mitakshara law as it is administered in Madras. Their competency as experts and the honesty of their respective opinions are not challenged. Both agree that the "strict Hindu law" is to be found in the translations of the ancient texts, and that the modifications to which it has been subjected from time to time in Madras are correctly explained in recognised textbooks, and elucidated (in particular contexts) in decisions of the Privy Council and the superior Courts of India. Nevertheless, these two experts have arrived at ultimate conclusions which are in sharp conflict with one another. In the result, we are left in the invidious position of having to "decide as best we can on the conflicting evidence" upon issues with which, I regret to confess, I am completely unfamiliar.—*The Sussex Peerage Case.* [2]

It is necessary, before I proceed further, to place on record the agreement arrived at by learned Counsel who appeared before us, and for whose assistance we are very much indebted, that certain additional decisions of the Privy Council and of the Courts of India concerning the Mitakshara law should be treated as having been incorporated in the evidence already on record. I have examined these authorities and tried to understand them, but do not refer to each of them specifically in the judgment which follows. [A list of the additional authorities has, at our request, been filed of record.]

To describe the deceased as a "co-parcener" in relation to the joint property is but to adopt a convenient term in the process of attempting to analyse a legal concept which has no precise equivalent in this country. The term certainly cannnot be equated in all respects to the term "co-parcener" as it is understood in English law. (*A. I. R. 1921 P. C. 62 at 68*). Indeed, the problem before us cannot satisfactorily be solved by the mere selection of appropriate language.

Mayne's Hindu Law (*2nd Edn.*) *sec. 264* explains that, when one speaks of a Hindu joint family as constituting a "co-parcenary", one includes only those members of the family who, "by virtue of relationship,

[1] (*1933*) *A. C. 289.*

[2] (*1884*) *11 Cl. & F. 85 at 116.*

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have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burden it with their debts, and at their pleasure to enforce a partition. Outside this body there is a fringe of persons possessing inferior rights such as that of maintenance". *The whole body of such a family, consisting of males and females, "constitutes a sort of corporation"*, some of the members of which are "co-parceners", that is, persons who on partition would be entitled to demand a share, while others are entitled only to maintenance. So long as the family retains its undivided status, its joint property continues to "devolve" upon the "co-parceners" for the time being "by survivorship and not by succession"—*sec. 265.*

What, then, are the "interests" of a "co-parcener" in the joint property of the undivided family to which he belongs? Turner L.J. pronouncing the judgment of the Privy Council in *(1863) 9 Moore's I. A. 543 at 611*, refers to the property as "*the common property of a united family* . . . . There is community of interest and unity of possession between all the '("co-parcenary") members of the family; and upon the death of any one of them, the others may well take by survivorship that in which they had during the deceased's life-time a common interest and a common possession". Similarly, in the judgment pronounced in *(1866) 11 Moore's I. A. 75 at 89*, Lord Westbury said, "According to the true notion of an undivided family in Hindu law, no individual member of that family, while it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of the rent, and claim to take from the collector or receiver of the rents, a certain definite share. The proceeds must be brought, according to the theory of the undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment of the members of the undivided family".

I conclude from these observations that, under the strict Mitakshara law, no part of the joint property can be the subject of individual ownership by any members in definite shares unless and until there has been *either* a separation of the family which automatically results in a division of title (and is almost invariably accompanied by an actual partition) *or* at least a division of the title, by mutual agreement, in respect of a particular property which had previously been the subject of joint enjoyment (in which latter event the undivided status of the family, and its collective ownership of the rest of the joint property, is not affected). *As a third alternative*, a division of title may also take place if one "co-parcener", after due notice to the others, unequivocally separates himself from the family leaving the rest of the property (i.e., apart from his share) available to the family which retains its undivided status. It is only upon one or other of these events that there arises, in relation to the entirety of the common property or to a particular asset (as the case may be) what Lord Westbury described as "a separation in interest and in right". In other words, so long as the undivided status of the family subsists, the interest of a "co-parcenary" member in the joint property

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of the family of which he remains a member " is not individual property at all ".—*per* Sir Arthur Wilson pronouncing the judgment of the Board in (*1903*) *I. L. R. 25 All. 407 at 416.*

When property is held in " co-parceny " by a joint Hindu family, " there are ordinarily three rights vested in the " co-parceners " : (1) the right of joint enjoyment (2) the right to call for partition, and (3) the right to survivorship ". (*1881*) *4 I. L. R. Mad. 250.* The property is managed by the head of the family, i.e., the *karta* who has, within certain prescribed limits, a wide discretion in the exercise of his general powers of management, and, as " the individual enjoyment of the ' co-parceners ' is ousted by his management ", their right of joint enjoyment is virtually limited to the right to receive maintenance from the *karta. A. I. R. 1918 P. C. 81 at 82.* They may also, of course, restrain him from acting beyond the scope of his legitimate functions, and in certain matters—e.g., the alienation of joint property except for " family necessity "—the power of alienation must be exercised by all the " co-parceners " collectively

Before the strict Mitakshara law was modified so as to meet the demands of a developing society, any alienation by an individual " co-parcener ", whether gratuitously or for value, was wholly null and void, and one gathers that this is still the position in some parts of India. In due course, however, the rigid rule of earlier times was relaxed in Madras and in certain other States. The rights of the creditors of individual " co-parceners " first received recognition, so that an execution-purchaser of " the right, title and interest of " an individual " co-parcener " was held by the Privy Council to have " acquired *a right limited to that of compelling the partition which the debtor might have compelled, had he been so minded, before the alienation took place* ". (1877) I. L. R. 3 Cal. 198. It was considered, apparently, that this limited concession could be made in the name of equity and good conscience without unduly interfering with the peculiar status and rights of the undivided family. Two years later, the Privy Council also accepted it as settled law in the Presidency of Madras that one " co-parcener " may dispose of ancestral undivided estate for value, *even by private contract or conveyance*, " to the extent of his own share ". (*1879*) *I. L. R. 5 Cal. 148 at 166.* Such alienations were " inconsistent with the strict theory of a joint and undivided Hindu family ", but the judgment pronounced by Sir James Colville points out that the law, as established in Madras and Bombay, had been " one of gradual growth, *founded upon the equity, which a purchaser for value has, to be allowed to stand in his vendor's shoes and to work out his rights by means of a partition* ".

In Madras, the purchaser's equities are " worked out " by allotting to him at the ultimate partition a share (but not necessarily the particular property which he had purported to acquire) out of the *corpus* which his vendor would have received *at the date of the transfer* (*and not merely at the date of actual partition*).—(1902) I. L. R. 25 Mad. 690. Indeed, his claim is not defeated even by the death of his vendor before the partition has taken place. *A. I. R. 1952 Mad. 419.* It logically followed that the claims of the official Assignee of the estate of an insolvent

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" co-parcener " should receive similar recognition.—*A. I. R. 1925 P. C. 18.* In these respects, then, it must be conceded that some inroads have been made into the doctrine of survivorship which is an essential feature of the strict joint Hindu family system, because the improvident acts of one " co-parcener " might well operate to the detriment of the other members of the larger group.

Does it follow that, by some gradual process of erosion to which the strict law of earlier times has been subjected by the impact of equitable doctrines, a " co-parcener " must now be regarded as himself continuously enjoying a definite vested " share " in the joint property, and that this " share " may be freely alienated (albeit, the Crown concedes, only for value) without first effecting a separation of the united family or at least a division in the title to a particular asset of the joint property ? If this be the correct position, the only relevant distinction which now exists between the position of a Hindu " co-parcener " and his counterpart in England would be that the former's rights are transmitted upon his death to his surviving " co-parceners ", whereas the latter's rights are transmitted to his legal heirs. In either case, there would necessarily be a " passing " of property within the meaning of section 7 of the Ordinance.

With respect, I find myself unable to accept the proposition (which may appear to receive some support from the language of judicial pronouncements made in other contexts) that the gradual modification of the Mitakshara law in Madras during the past century has converted the " interests " of " co-parceners " in the joint Hindu family into *proprietary rights* such as we may properly concede to " co-owners " governed by the Roman-Dutch Law in this country. Still less do I subscribe to the view that a Mitakshara " co-parcener " *always* enjoyed in the joint estate a vested proprietary interest or a " share " equivalent to " real property ". The judgment of the Privy Council pronounced by Sir George Rankine in *A. I. R. 1941 P. C. 48 at 50* specially emphasises the fact that " what is loosely described as a ' share ' of a member of a Mitakshara family is really the share *which, if a partition were to take place today would be a (fractional) share* ", and this fundamental distinction was re-iterated in *A. I. R. 1943 P. C. 196 at 199.* Indeed, if the position were otherwise, I fail to see why execution-purchasers and purchasers for value must still submit to a mere " working out " of their " equities " in subsequent proceedings for partition ; or why claims to proprietary rights by transferees (before partition) from such purchasers have never been recognised in any part of India.

The conflict of opinion expressed by the experts called in the lower Court must now be examined. The assessees' expert, Mr. Bhashyam, takes the view that, upon the authorities which he has cited, a Hindu undivided family is, and always was, regarded as " a unit in contradistinction to its individual members, and treated as a sort of corporation owning property just as under other systems of law individuals own property ". Ownership, according to this witness, " vests in the family as such, and every member is entitled to its enjoyment. Under the Hindu law there is no such thing as succession of property. The joint

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members of the family take whatever they take by survivorship ; in fact, *there is no question of taking, they had the right, that is, they had what they had before the death* ". If this be so, no " passing " of property on the death of Arunachalam Chettiar (jnr.) within the meaning of section 7 could possibly have taken place.

As against this view, Mr. Rajah Aiyar, who was the expert called by the Crown, considered that, upon a correct understanding of substantially the same authorities as those relied on by Mr. Bhashyam, " a joint family is not a corporation in the sense that, as a unit, it possesses property apart from the co-parceners who constitute the co-parceny . . . . The property is *vested in the co-parceners as individuals*, each having with the others a unity of ownership and unity of possession. In a Mitakshara family during its continuance the interests of the co-parceners are necessarily fluctuating interests, but *despite the fluctuations a co-parcener has what might be called a real interest* which persons who are merely entitled to maintenance have not . . . . A co-parcener has proprietary interests in the property and *that proprietary interest is taken by the other members upon his death* ". Upon that view of the matter, there would clearly be an actual " passing " of property under section 7, and the alternative submissions with regard to a *notional* passing under either section 8 (1) (*a*) or section 8 (1) (*b*) would not arise.

I now approach, with considerable diffidence, the task of arriving at my own decision on this " question of fact " upon which such distinguished professional gentlemen have failed to agree. In favour of Mr. Rajah Aiyar's opinion, certain phrases contained in some judicial decisions doubtless do tend to support the theory of a transmissible individual proprietary interest which is vested at all material times in a "co-parcener". For instance, the judgment pronounced in *A. I. R. 1931 P. C. 118 at 120* mentions " the proprietary interest " which each member " acquires " by birth, and in *A. I. R. 1927 P. C. 159* reference is made to the " present ownership " of the " co-parceners " who are even described in one passage as " co-owners ". Similarly, the High Court of Patna has recently ruled that a Hindu undivided family cannot *as a unit* be adjudicated insolvent because, *inter alia*, " the ownership of the family property *belongs to the individual members who are existing at the time in undivided shares* ". *A. I. R. 1947 Pat. 665.*

On the other hand, Mr. Bhashyam's theory of " corporate " ownership in relation to the joint property (as contrasted with " individual " ownership) is by no means novel. Apart from the passage in *Mayne's Hindu Law* sec. 265 to which I have previously referred, Bhashyam Ayyengar J., in *(1901) 25 I. L. R. Mad. 144 at 154*, described the joint property of an undivided Hindu family as being " owned by the family *as a corporate body* ". In *A. I. R. 1941 P. C. 120* it was decided that, even in the *impartible* estate of a joint Hindu family, the head of the family (whose individual powers so greatly exceed those of the *karta* of a partible estate that they even include an unfettered power of disposition while the family is undivided in status) could not, for income tax purposes, be regarded as the " owner " of the property ; he was in truth the " owner " of the income arising from it, but the property was

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nevertheless "*the property of the joint family*". Similarly, in *A. I. R. 1937 P. C. 36 at 38*, the judgment of the Board, also pronounced by Sir George Rankine, reminds us that, in certain circumstances, property "belongs to the family as distinct from the individual" in the eye of the Hindu law. In *A. I. R. 1948 P. C. 9* reference is made to "the view of some eminent Hindu lawyers that a joint Hindu family is, in its true nature, *a corporation capable of a continuous existence in spite of fluctuating changes in its constitution*". It was considered sufficient, however, in that particular case to decide that, for the purpose of entering into a partnership transaction, the family may properly be regarded as "*an entity capable of being represented by its manager*" i.e., the *Karta*. [The Indian Courts have subsequently decided that such a transaction could only take place through the agency of the *karta*, because "a joint Hindu family, though at times spoken of by judges as a corporation, cannot be taken as a legal person *in the strict sense of the term* so as to constitute a partnership between an individual on the one hand and a real corporation on the other.—(*1952*) *21 Indian Tax Reports 474.*]

I venture to take the view that these apparently conflicting theories are not incapable of reconciliation. An undivided family obviously does not possess all the attributes of a *juristic person* capable as such of suing and being sued in the Courts, of being adjudicated insolvent, or of entering into commercial transactions except through the medium of an agent who is a legal *persona* in the strict sense of the term. To this extent therefore, the doctrine of "semi-personality" has not received full recognition in the Courts. Nevertheless, "many of the advantages of corporate life" may be enjoyed today by an unincorporated association of persons ("capable of a continuous existence in spite of fluctuating changes in its constitution") without the gift of legal personality by the State.—*Paton : Jurisprudence* (2nd Edn.) p. 341. This can be achieved by various means, for example, where a "semi-personality" operates through the agency of a legal *persona*, or where "a hedge of trustees" is established to afford "a convenient protection behind which the corporate life may flourish"—*Paton Jurisprudence* (2nd Edn.) p. 342. In the latter case, "the property (of the quasi-corporation) is deemed by the law to be vested, not in its true owners, but in one or more determinate persons of full capacity, who hold it in safe custody on behalf of those . . . . multitudinous persons *to whom it in truth belongs*. The law is thus enabled to assimilate collective ownership to the simpler form of individual ownership"—*Salmond : Jurisprudence* (10th Edn.) p. 337.

This method of approach suggests to my mind a logical solution which, without "laying an axe at the roots" of the joint family system of Mitakshara law, preserves that system in its substantial integrity without in any way ignoring the modifications introduced from time to time for the protection of *bona fide* purchasers for value and others in that category. The following passage, based on *Mitakshara 1 Pl. 28 to 30*, appears in one of the judgments pronounced in *A. I. R. 1952 Mad. 419 F. B. at p. 439*, and lends support to this idea :

> "*The family property is held in trust for the members then living and thereafter to be born.*"

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Applying this line of reasoning, I would say that, so long as the status of a Hindu undivided family remains intact, and *so long as there has been no division of title or separation of interests in respect of the whole or any part of the joint property*, the true relationship is as follows :

1. The " co-parceners " for the time being collectively hold the joint property for the benefit of all the members then living (including themselves) and of members thereafter to be born ; to this extent, the undivided family, in spite of fluctuating changes in its constitution, may properly be regarded as a corporate " entity " which is " the true owner " of the property *to the exclusion of its individual members ;*

2. That the male " co-parceners " for the time being constitute at any particular point of time a " hedge of trustees " who, while enjoying community of interest and unity of possession in the property, hold it collectively—indeed, as a sub-division of the larger group—*for the benefit of the entire family ;* the powers attaching to the management of the property, and the obligations towards the individual members who constitute the undivided family are centred in the *karta* who is the head of the family for the time being ; but in certain respects the power of alienation can only be exercised by all the " co-parceners " acting collectively ;

3. That upon the death of any male " co-parcener ", his " interest " is automatically extinguished, and the property *continues* to be held by the surviving " co-parceners " for the benefit of the undivided family ; in other words, the interest which they enjoy upon his death is in truth a " pre-existing interest ", no more and no less. (See *A. I. R. 1941 P. C. 72 at 78*).

The position as set out above represents, in my opinion, the true distinction between the property rights of the family unit on the one hand and of its individual " co-parcenary " members on the other, so long as the family remains undivided in status. This distinction is preserved until there has occurred either a complete or partial " division of title and separation of interests " between the " co-parcenary " members, in one or other of the modes recognised by the Mitakshara law. The " co-parceners " are no doubt invested with power to remove the " hedge " which protects the property rights of the so-called " corporation ". It is also possible, as an alternative, to pass some part of the property beyond the reach of the protecting " hedge ". But, generally speaking, the concept of individual ownership of joint property is ruled out while the corporate existence of the family is still intact.

In this view of the matter, it follows that, during the lifetime of Arunachalam Chettiar (jnr.), there had been neither a complete nor a partial division of title or separation of interests in the joint property of the undivided family of which he was at all material times a " co-parcenary " member. Upon his death, therefore, no effective change occurred in the title or possession of the joint property belonging to the undivided

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family. His father who survived him did not, in consequence of that event, receive any "*property*" *which he did not have before.* In the result, section 7 does not apply.

The circumstance that, upon the death of Arunachalam (jnr.) his father became the *sole surviving* "*co-parcener*" does not, in my opinion, introduce an alteration of property rights. For, although the *powers* which a sole surviving "co-parcener" over the joint property became, according to Mitakshara law, virtually unfettered except by moral considerations, nevertheless the death of Arunachalam (jnr.) did not operate either to disrupt the undivided family or to bring about an extinction of the beneficial ownership of that family in the property. The surviving "co-parcener" still continued, as he had previously done, to hold the property in fact and in law for the benefit of the family.

[After we reserved our judgment on this appeal, the consequences of a man becoming the "sole surviving co-parcener" of what was previously "the joint property of a Hindu undivided family" was more fully discussed during the argument in the connected appeal (*S. C. 236 of 1951/D. C. Colombo 38 Special* *). I see no reason to alter the views which I have ventured to express in my present judgment.]

A question was raised in this Court for the first time as to whether, in regard to the *immovable property* which forms part of the estate sought to be taxed, the *lex situs* brings into operation section 7 of the Wills Ordinance (Cap. 49) and/or section 18 of the Partition Ordinance (Cap. 56). These sections were introduced for the purpose of preventing the share of a *co-owner*, in the strict sense of the term, from devolving by survivorship instead of by succession on his death. The intention, apparently, was to exclude the incidence of "joint tenancy" under the English Law, but the sections have no relevancy to the "devolution" of a "co-parcener's" interests in any part of the joint property of a Hindu undivided family.

I have so far concluded that an actual "passing" of property did not take place within the meaning of section 7. I therefore proceed to consider whether there was at any rate a *notional* "passing" under section 8 (1) (*a*) or section 8 (1) (*b*). The latter section can more conveniently be disposed of first. Was there a "cesser" of the deceased's or anyone else's "interest" in the property upon his death, and if so, did a "benefit accrue or arise" to his father by reason of that cesser? The precise nature of an "interest", whose cesser attracts estate duty if the second condition laid down by section 8 (1) (*b*) is also fulfilled, can only be understood by an examination of the connected section 17 (6). The deceased or someone else must have enjoyed in respect of the property *a beneficial interest capable of valuation in relation to the income which the property yields.*

In the present case, the deceased did not enjoy during his lifetime an interest which "extended" either to the whole or to a fractional part of the income. *A. I. R. 1941 P. C. 120 at 126.* He merely had

*See page 496 (*infra*).—Ed.

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a right to be maintained by the *karta* out of the common fund to an extent which was at the *karta's* absolute discretion ; in addition he could, if excluded entirely from the benefits of joint enjoyment, have taken appropriate proceedings against the *karta* to ensure a recognition of his future maintenance rights and also to obtain compensation for his earlier exclusion. I find it impossible to conceive of a basis of valuation which, in relation to such an " interest ", would conform to the scheme prescribed by section 17 (6). Nor do I think that, upon a cesser of that so-called " interest ", a " benefit " of any value can be said to have accrued to the surviving " co-parcener " when the deceased's " interest " lapsed. Section 8 (1) (*b*) is therefore inapplicable to the present case.

There remains the alternative submission which was based on section 8 (1) (*a*). The arguments presented on behalf of the Crown, if I correctly understood them, were to the following effect :

(*a*) that (having regard to the recognition now given to the rights of purchasers for value) a " co-parcener " is at any point of time " competent to dispose " of a fractional share of the joint property *for value*, the appropriate fraction being ascertained by reference to the total number of " co-parceners " then alive ;

(*b*) that, in the alternative, a " co-parcener " may at any time form a unilateral intention to separate himself from the undivided family and to communicate that decision to the other " co-parceners " ; he would thereupon become vested with a " definite and certain share " of which he would be " competent to dispose " in any way he pleased.

I reject the first of these submissions. An alienee for value does not become vested immediately with a definite share *in specie* of any part of the joint property. No share is " carved out ", so to speak, of the joint property until the Court has subsequently " worked out the equities " between the purchaser and the non-alienating " co-parceners " in appropriate partition proceedings. Before that occurs, it cannot be said that there is actually *in existence* any " property " of which a " co-parcener " is " competent to dispose " within the meaning of section 8 (1) (*a*). I have assumed in this connection, although I do not hold, that the section applies if a man can " dispose of " specific property only for valuable consideration but not in any other way.

With regard to the alternative submission, I concede that, upon the communication of his unilateral decision to separate himself in status and title from the undivided family, a " co-parcener " immediately becomes " competent to dispose " of the definite share which he thus acquires for the first time. *A. I. R. 1916 P. C. 104.* But no such " competence " exists until the necessary disposing qualification (i.e., by the formation of an intention followed by its communication to the others) has been first attained. In the facts of the present case, Arunachalam Chettiar (jnr.) had, until he died, formed no intention to separate

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himself from the family ; still less had he communicated such an intention to his father ; in the circumstances, he enjoyed at best an *option* (which he could have exercised) of attaining competency to dispose of a fractional share of the property, and that option, being personal, died with him. A man is not " competent " to do something until he has placed himself in a position to do it effectively.

Mr. Jayawardena relied strongly on the decision of Luxmoore J. in *Re Penrose* [1], where a person was held to be " competent to dispose " of property within the meaning of section 5 (2) of the Finance Act, 1894, of England, if he can achieve that result by taking " *two steps instead of one* ", namely, by an appointment to himself, followed by a subsequent gift by way of disposition. The necessity of visualising a succession of acts done by a person in order to qualify himself for " competence to dispose " of property no longer seems to arise in England, because the Court of Appeal has since decided that " the ability to make a thing your own " is by itself sufficient to satisfy the requirements of section 5 (2) of the act—*In re Parsons* [2].

The ruling in *Penrose's case* (*supra*) cannot assist the Crown in the present case. For the purposes of section 8 (1) (*a*), " competence to dispose " must exist at *a single moment of time*, namely, the moment immediately preceding a man's death. Section 5 (2) of the Finance Act, 1894, of England, on the other hand, contemplates *a period of time within which there is scope for a number of separate and distinct acts to take place in a given order of succession.* On the other hand, section 8 (1) (*a*) does not apply unless the formation of an intention to separate and the communication of that intention to others, have both *preceded* the potential " disposition " of property by a " co-parcener ". I do not think that either the words of the section or the spirit of the Ordinance require a Court, for the purpose of sanctioning the imposition of estate duty, to contemplate *a notional synchronisation of a succession of distinct events.* The *Penrose case* must not be regarded as deciding that the deceased person concerned was competent to dispose of the fund " *at the time of his death* ". Moreover, I do not find myself compelled to place a construction on section 8 (1) (*a*) which would have the effect of attracting estate duty where a deceased person did not in fact dispose of any property before he died, and where, in consequence, his interest in that property lapsed upon his death without consequential benefit accruing to anyone who survived him. The Ordinance was not enacted to impose a penalty for the non-disposition of rights which become extinguished on death.

Finally, the present assessees could not be made accountable in the present case for any estate duty levied under section 8 (1) (*a*). The original machinery for the assessment and collection of duty payable under the Ordinance had, before any assessment was made, been superseded by the machinery laid down in the later Estate Duty Ordinance (Cap. 187—see sec. 79). Under section 24 of the new Ordinance, the " executor " of a deceased's estate is the person primarily accountable for duty levied on property which he was " competent to dispose " at his death. The assessees in this case are the administrators only of

[1] (*1933*) *Ch. 793.* [2] (*1943*) *Ch. 12.*

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the deceased father's estate, and were not " executors " of the deceased because, even if the definition of that term in section 77 were called in aid by the Crown, neither they nor Arunachalam Chettiar (snr.) had " taken possession or intermeddled with " the *deceased's property* after his death. Such " interests " as the deceased enjoyed in the joint property during his lifetime were automatically extinguished when he died. A man cannot intermeddle with something that does not exist.

In the result, I would hold that the Crown's claim to estate duty fails, because there was neither an actual " passing " of property under section 7 nor a notional " passing " of property under section 8 upon the death of Arunachalam Chettiar (jnr.). The appeal must accordingly be dismissed with costs.

It is no longer necessary to deal with the assessees' contention (which was submitted in appeal before us with very little enthusiasm) that section 73 of the new Ordinance operates retrospectively so as to exempt the joint property of a Hindu undivided family even in the case of " co-parceners " dying before 1st April, 1937. Section 73 of the new Ordinance does not appear to me to have any relevancy either way to the consideration of this appeal.

GUNASEKARA J.—I agree.

Appeal dismissed.

1953 *Present :* **Gratiaen J. and Gunasekara J.**

V. RAMASWAMI IYENGAR *et al.* (Administrators of the Estate in Ceylon of Rm. Ar. Ar. Rm. Arunachalam Chettiar, deceased), *and* ATTORNEY-GENERAL, Respondent.

S. C. 236—D. C. Colombo 38 (Special)

Estate Duty—Hindu undivided family—Death of sole surviving " co-parcenary member " —Liability of estate for estate duty—Estate Duty Ordinance (Cap. 187), ss. 6 and 73, as amended by Ordinance No. 76 of 1938, s. 5.

The sole surviving " co-parcenary member " of a Mitakshara Hindu undivided family died in February, 1938, leaving no male issue in existence. His son had predeceased him, and the actual survivors of the family were all females and included his widow.

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Adopting the *ratio decidendi* in *Attorney-General v. Ramaswami Iyengar* (55 N. L. R. 481) and following it to its logical conclusion—

Held, that all the property which was in the possession of the deceased at the time of his death was the joint property of the undivided family. Although the deceased had been "competent to dispose" of the joint property after his son's death, and although the joint property would, for that reason, normally be deemed to have "passed" on his death within the meaning of section 6 of the Estate Duty Ordinance so as to attract estate duty, the exempting provisions of section 73 protected the property from taxation.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *S. J. V. Chelvanayakam, Q.C.*, *Peri Sunderam* and *S. Sharvananda*, for the appellants.

Walter Jayawardena, Crown Counsel, with *V. Tennekoon* and *G. F. Sethukavaler*, Crown Counsel, for the respondent.

Cur. adv. vult.

October 12, 1953. GRATIAEN J.—

This is an appeal against a judgment of the District Judge of Colombo upholding an assessment made by the Commissioner of Estate Duty under the provisions of the Estate Duty Ordinance (Cap. 187) in respect of the estate of a person who has been conveniently described throughout the proceedings as "Arunachalam Chettiar (snr.)". He died on 23rd February 1938 shortly after the Ordinance came into operation, and was the father of Arunachalam Chettiar (jnr.) in connection with whose estate a separate assessment had been made under the provisions of the earlier Ordinance, No. 8 of 1919 (*vide* the proceedings in *S. C. 235 of 1951/D. C. Colombo 37 Special**). The assessees in each case were the administrators of the estate of Arunachalam Chettiar (snr.). They appealed against both assessments and, by agreement of parties, the relevant evidence, which overlapped to a considerable extent, was recorded in consolidated proceedings in the Court below.

During Arunachalam (jnr.)'s lifetime, i.e., until 9th July 1934, he and his father were the only "co-parcenary members" of an undivided family which, regarded as an entity, owned considerable "joint property" in various countries including Ceylon. We have already* held that no part of that property had actually or even notionally "passed" upon the son's death to his father so as to attract duty under the provisions of Ordinance, No. 8 of 1919. The basis of our decision, shortly stated, was that, under the Mitakshara law, the joint property belonged to the entire family group to the exclusion of its individual members.

The earlier Ordinance did not make express provision for the case of joint property belonging to a Hindu undivided family in relation to the

* See page 481 (*supra*).—Ed.

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question whether estate duty is payable upon the death of one of its members. In the Ordinance passed in 1938 (Cap. 187), however, which is concerned with the estates of persons dying on and after 1st April 1937, section 73, as originally enacted, declared as follows :

> " Where a member of a Hindu undivided family dies, no estate duty shall be payable on any property proved to the satisfaction of the Commissioner to be the joint property of that Hindu undivided family."

Shortly afterwards, a declaratory amendment to section 73 was passed by section 5 of Ordinance No. 76 of 1938, so as to remove doubts and difficulties which might exist in the case of immovables belonging to an undivided family—*vide A. G. v. Valliammai Atchie* (1949) 51 N. L. R. 169 at 174, which was upheld by the Privy Council in (1952) 53 N. L. R. 505. Section 73, as amended, now reads as follows :

> " Where a member of a Hindu undivided family dies, no estate duty shall be payable—
>
> (*a*) on any movable property which is proved . . . . to have been the joint property of that family ;
>
> (*b*) on any immovable property when it is proved . . . . that such property, if it had been movable property, would have been the movable property of that family. "

Upon the death of Arunachalam Chettiar (jnr.), what had previously been the entire " joint property " of the undivided family to which both he and his father had belonged as "co-parcenary members" came into the hands of the father by survivorship (and not by succession) as " the sole surviving co-parcener ". It so remained throughout the period 9th July 1934 to 23rd February 1938, when the father died leaving no male issue in existence to continue the line. The actual survivors of the family were all females—namely, his step-mother, his widow, his unmarried daughter, and his daughter-in-law.

The assessees claim exemption under section 73 from duty in respect of the deceased's estate on the ground that they have established the following facts :

(*a*) that he continued, until he died, to be a member of a Hindu undivided family ;

(*b*) that all the property in his possession at that time was the *joint property* of the undivided family.

If both these propositions be established, section 73 admittedly operates *even if, but for the statutory exemption, the property would be deemed to have " passed on his death " within the meaning of section 6 of the Ordinance.*

It is beyond argument that, under the Mitakshara law which governs the case, Arunachalam Chettiar (snr.) did continue until the time of his death to be a " member of a Hindu undivided family ". That family had been undivided in status during the lifetime of his son, and the son's death did not operate to disrupt the family. Indeed, the undivided

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status of the family continued even after the death of Arunachalam Chettiar (snr.) himself. " Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without male issue *until the death of his widow renders the continuation of the line by adoption impossible* ".—*A. I. R. 1918 P. C. 192.* In other words, " A Hindu undivided family cannot be brought finally to an end while it is possible in nature and in law to add a male member to it "—*A. I. R. 1943 P. C. 196.* The High Court of Nagpur has held that a right of a widow to adopt a son to her deceased (co-parcenary) husband is preserved even if no single co-parcener exists, that is to say, even if at the time of adoption the Hindu undivided family " has been *reduced to a female*, i.e., the adopting mother "—*A. I. R. 1942 Nag. 19 at 23*, the *ratio decidendi* of which was approved by the Privy Council in *A. I. R. 1943 P. C. 196.*

The learned District Judge accepted the contention that this first qualification for exemption under section 73 was fulfilled. He took the view, however, that the death of Arunachalam Chettiar (jnr.) operated to divest the family of the *joint property* which it had previously owned, and that the property thereafter became vested (albeit provisionally) in Arunachalam Chettiar (snr.) as absolute owner. He accepted the opinion of Mr. Rajah Aiyar, the expert witness called by the Crown, that the term " joint property " is synonymous with " co-parcenary property ", and that " until the contingency of an addition of a male member, whether in nature or in law, arises " a sole surviving co-parcener becomes the " full owner " of what had previously been joint property belonging to the undivided family.

Mr. Bhashyam, who was called as an expert by the assessees, disagreed with Mr. Rajah Aiyar's opinion on this vital issue. He took the view that the fortuitous circumstance that the " co-parcenary unit ", so to speak, of an undivided family has at any point of time been reduced to a single individual does not divest the family of its " joint property "; the undivided status of the family continues, and so does its joint estate.

We are once again confronted with the duty of deciding for ourselves upon the conflicting evidence of two distinguished lawyers in regard to a question of foreign law with which we are unfamiliar.

I have arrived at the conclusion that Mr. Rajah Aiyar's opinion, and the learned Judge's acceptance of his view upon this question, cannot be accepted. I must assume, for the purposes of this appeal, that our decision in the connected case* correctly explains the concept of " joint property " belonging to a Hindu undivided family. An undivided family, being an entity consisting not merely of its co-parcenary members but also of others, must be regarded as " the true owner " of the joint property; the co-parceners for the time being collectively constitute, so to speak, " the holding members " of the larger entity; and the *karta* for the time being is the " managing member ". To what extent, if any, can the temporary reduction of the " co-parcenary unit " to a single individual affect the ownership of what had previously been the joint property belonging to the entire undivided family whose corporate

* See page 481 (*supra*).—Ed.

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existence has admittedly not been brought to an end ? It seems to me that we can only answer this question by adopting the *ratio decidendi* of our earlier decision and following it to its logical conclusion.

If it be correct to say that, when two or more co-parceners exist, they do not *own* the joint property in undivided shares, I do not see how it can logically be concluded that, when only one of them remains, he automatically becomes the owner of the entire property which he and his co-parceners had previously held for the benefit of the true owner, namely, the undivided family. On the contrary, it seems to me that, so long as the co-parcenary unit (irrespective of the number of persons who comprise it at any point of time) continues to hold that property, there can be no change of ownership *until the family, as a corporate entity, has itself finally ceased to exist.*

It is important to bear in mind that a person's *rights* of ownership may well be subject to very wide *powers* vested in someone else. For example, all the co-parceners, acting collectively, possess unfettered powers of alienation over the joint property which is owned by the undivided family (i.e., an entity including but not confined to the co-parceners themselves.) They may alienate the entire joint property by collective action, or they may gift it away. If they so prefer, they may dispose only of some part of the joint property, in which event what remains in their hands continues to belong to the family whose undivided status is still preserved.

In the same way, if there is only a single co-parcener for the time being (as there was in the present case after 9th September 1934) all the unfettered powers of alienation previously vested in the co-parcenary group become centred in the individual. He too is free to defeat the existing property rights of the undivided family, wholly or partially, by exercising those powers in any way he pleases : (*1905*) *I. L. R. 39 Mad. 437 ;* so much so that even a male who subsequently enters the family (by birth or by adoption) may well find his " birthright " to have been diminished or even extinguished *in toto*. In other words, there is nothing except the dictates of his own conscience to prevent a single co-parcener from frittering away the joint estate, to the detriment of the other members of the family (be they alive or yet unborn).

Some of the authorities referred to by the experts, in discussing a single co-parcener's extensive *powers of alienation*, certainly use words suggesting that he is, in a certain sense and for all practical purposes, regarded as " the owner of the joint property " or as " in the position of full owner "—*A. I. R. 1929 Mad. 296.* But this does not mean that he is in truth the absolute owner of the joint property to the exclusion of the quasi-corporation to which an undivided family is often equated. His responsibilities and obligations as manager or *karta* of the property in his possession are not extinguished, and female members still enjoy the right, *based on their continued membership of the undivided family*, to be maintained by him out of the common fund. *A. I. R. 1940 Mad. 664 ; A. I. R. 1953 Mad. 159.* So again, a widow of a deceased co-parcener—e.g., in this case, the widow of Arunachalam Chettiar (jnr.)—could

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enforce against him her claim to maintenance *quoad* what would have been her husband's share upon a partition if he were still alive. *A. I. R. 1947 P. C. 143.* I have not been referred to any authority which suggests that the position of an " inferior " member of an undivided family is (so long as the joint property is in the hands of a single co-parcener) any different to what it had previously been when the property was in the hands of a larger co-parcenary unit.

From all these circumstances, I cannot but conclude that, so long as a single surviving co-parcener refrains from exercising his power to place the property beyond the reach of the undivided family by alienation, the property continues to belong to the entire family. Although, therefore, Arunachalam Chettiar (snr.) at the time of his death was " competent to dispose " of the joint property throughout the relevant period following his son's death, and although the joint property would, for that reason, normally be deemed to have " passed " on his death within the meaning of section 6 of the Ordinance so as to attract estate duty, the exempting provisions of section 73 protect the property from taxation.

I concede that if at any time (before a Hindu undivided family capable as such of owning joint property to the exclusion of its individual members has been established) a man governed by the Mitakshara law enjoys full *dominium* over even ancestral property which has come into his hands, he continues to hold it " as his very own " *until a son is born to him* so as to diminish his individual interest in the property—because it is only then that such ancestral property would be brought by operation of law into the joint ownership of the newly-established Hindu undivided family —*A. I. R. 1937 P. C. 36.* I also agree that " the mere existence of a wife or daughter " is not sufficient to create an undivided family and thereby convert a man's individual property into " joint " property. But the converse proposition does not automatically follow, and, to my mind, it would make a mockery of the undivided family system if the temporary reduction of the co-parcenary unit to a single individual were to convert *what was previously joint property belonging to an undivided family* into the separate property of the surviving co-parcener.

By enacting section 73, the legislature has now given formal recognition to the concept of an undivided family (in spite of constant fluctuations in its composition) as an *entity* capable of owning property. The term " *of* an undivided family " in section 73 means " *belonging to* an undivided family ". Nevertheless, it has been argued for the Crown, the phrase " *joint property* " implies that there should always be *at least two co-parceners* actually alive to hold the property in " community of interest and unity of possession ". I disagree. The word " joint " in this context merely emphasises *the concept of unity attaching to the entire undivided family* which is the true owner of the property concerned.

For these reasons, I have come to the conclusion that the learned District Judge was wrong in deciding that section 73 does not apply to this case. I would therefore set aside the order under appeal, and substitute a decree (*a*) declaring that no estate duty was payable under the Estate Duty Ordinance (Cap. 187) in respect of the estate of Arunachalam Chettiar (snr.), and (*b*) ordering the Crown to refund to the

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appellants the sum of Rs. 700,402·65 with legal interest thereon from the date on which these proceedings were instituted in the District Court. The appellants are also entitled to their costs in this Court and in the Court below.

It is unnecessary to express an opinion on certain subsidiary issues which would only have arisen for consideration if the principle of the Commissioner's assessment had been affirmed.

GUNASEKARA J.—I agree.

Appeal allowed.

1954 [COURT OF CRIMINAL APPEAL]

Present : **Nagalingam A.C.J. (President), Pulle J. and Swan J.**

S. CHARLES SILVA, Appellant, *and* THE QUEEN, Respondent

APPLICATION 131 OF 1953

S. C. 12—M. C. Gampaha, 11,680

Charge of murder—Defence of alibi—Intoxication alleged in dying deposition of deceased —Summing-up—Misdirection.

In a prosecution for murder, the defence was an alibi. In his dying deposition, however, the deceased had stated that the accused was drunk and staggering at the time he inflicted the fatal injury and that there was no altercation or previous ill feeling between the accused and the deceased.

Held, that in the circumstances it was the duty of the trial Judge to have considered in his summing-up whether the accused by reason of intoxication was incapable of realising the natural and probable consequences of the violence he used on the deceased.

APPLICATION for leave to appeal from a conviction in a trial before the Supreme Court.

R. R. Crossette-Thambiah, Q.C., with *S. B. Lekamge* and *S. Sharvananda*, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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February 1, 1954. PULLE J.—

By a verdict of six to one the appellant was convicted on the charge that on the 13th April, 1953, he committed murder by causing the death of one Senasige Isadoru Silva *alias* Isan Silva. The case for the prosecution was that on the night of 13th April the appellant inflicted on the deceased one stab wound on the abdominal wall one inch long and penetrating to a depth of two inches as a result of which he died on the 15th April. The scene of the offence was a public highway close to the house of the witness S. Sebastian Fernando. This witness did not see the stabbing. He heard the voice of a person crying out, " Mudalali, Chaipolis stabbed me with a knife ". He came out of the house with an electric torch and as he flashed it he saw the appellant running away. Another witness Senasige Marthinu Silva who happened to be on the road stated that he also heard the same cry and as he proceeded towards Sebastian Fernando's house he saw the appellant running past him towards the house of one D. M. de Soysa, a Police constable, who was married to a niece of the appellant. The defence was an alibi. The appellant in his evidence stated that at about 7.30 p.m. he was sleeping in the verandah of the boutique of his brother one Kulasekera. This boutique is on the same road, a short distance away from the house of de Soysa. When he was sleeping he heard a commotion from the direction of de Soysa's house and he then went to that house where, later in the night, he was arrested.

In appeal the finding of the jury that the appellant stabbed the deceased was not canvassed. It was submitted on his behalf that the learned Commissioner had inadvertently omitted to ask the jury to consider whether the appellant by reason of intoxication was incapable of forming the intention necessary to constitute the offence of murder. The submission was based on the dying deposition which was read at the trial as part of the evidence for the prosecution. It was taken at the hospital on the 14th April and is as follows :

" Yesterday at about 8 p.m. one Charles Silva stabbed me on my abdomen. This happened on the high road near Charles' house. I raised cries and 10 or 12 people came up.

" Sebastian Mudalali saw Charles running away with the knife in hand. Charles is no relative of mine. *Charles was drunk, I saw him come staggering.* There is no previous ill feeling between me and Charles. There was no talk or altercation before the stabbing. "

The whole of this deposition was read out by the Commissioner to the jury but only as relevant to the issue whether it was the appellant who stabbed the deceased. He dealt with the question of knowledge but in that context he made no reference to intoxication.

The question we have to decide is whether there was no evidence on which the jury, properly directed, could find that by reason of intoxication the appellant could not form a murderous intention at the time he inflicted the injury. A point was made by learned Crown Counsel that the appellant stated in his evidence that he did not take any liquor on

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the 13th April but it is conceded that his claim to have been sober on that night did not conclude the question whether in fact he was intoxicated or not.

It is a circumstance of some weight in this case that there was no proof of any motive for the offence and that the attack on the deceased was not preceded or accompanied by an exchange of blows or words. The deceased said that the appellant was not merely drunk but staggering. When one regards the totality of the evidence it cannot be said that the jury could not possibly infer that the appellant by reason of intoxication was in such a condition that he was incapable of realising the natural and probable consequences of the violence he used on the deceased.

We are of the opinion that there has been a non-direction on a material issue arising on the dying deposition and we accordingly set aside the conviction and sentence. We do not think that there should be a re-trial. Accordingly we substitute a verdict under section 297 of the Penal Code and sentence the appellant to eight years' rigorous imprisonment.

Conviction altered.

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1954 *Present :* **Gratiaen J. and Sansoni J.**

NAWADUN KORALE CO-OPERATIVE STORES UNION, LTD., Appellant, *and* W. M. PREMARATNE, Respondent

S. C. 496—D. C. Ratnapura, 391 S

Co-operative Societies Ordinance (Cap. 107)—Section 45—Dispute between co-operative society and past officer—Act No. 21 of 1949—Act No. 17 of 1952—Retroactive effect—Appeal—Power of Appellate Court to re-hear case—Interpretation Ordinance (Cap. 2), s. 6 (3) (c)—Courts Ordinance (Cap. 6), s. 37.

The provisions of neither the Co-operative Societies (Amendment) Act, No. 21 of 1949, nor the Co-operative Societies (Special Provisions) Act, No. 17 of 1952, are applicable to a dispute which had originated between a co-operative society and one of its " past officers " prior to 24th May, 1949, and which was pending in appeal to the Supreme Court at the time when Act No. 17 of 1952 came into force.

Section 2 of the Co-operative Societies (Special Provisions) Act, read with section 6 (3) (c) of the Interpretation Ordinance, does not interfere with the rights of the parties in an action which had already commenced before the Act was passed, or in a pending appeal filed before that date.

Quaere : Does the Supreme Court, when hearing appeals, sit as a Court of rehearing, with unqualified power to make such order as the Judge of first instance could have made if the case had been heard by him at the date on which the appeal was heard ? Does its power extend to the re-examination of *substantive rights* in the light of fresh legislation passed in the interval between the judgment of the Court of first instance and the hearing of an appeal against it ? *Silva v. Swaris* (1904) 1 Bal. Rep. 61, considered.

APPEAL from a judgment of the District Court, Ratnapura.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy* and *E. B. Vannithamby*, for the plaintiff appellant.

C. Thiagalingam, Q.C., with *H. W. Jayewardene* and *E. A. D. Atukorale*, for the defendant respondent.

Cur. adv. vult.

June 24, 1954. GRATIAEN J.—

This is an appeal against a judgment pronounced by the learned District Judge of Ratnapura on 25th July, 1951, refusing to enforce a purported award dated 14th February, 1951, in favour of a co-operative society under the provisions of the Co-operative Societies Ordinance (Cap. 107).

The respondent had been the manager of the society from March 1946 until his services were discontinued on 1st November, 1947. In June 1948 the society purported to refer an existing dispute between itself and the respondent under section 45 concerning the respondent's alleged

2—J. N. B 37328–1,590 (8/54)

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accountability for certain sums which he had received during his period of office. The Registrar, however, upheld the respondent's objection that section 45 (in its original form) had no application to a dispute between the society and one of its "past officers". So matters stood until the Co-operative Societies (Amendment) Act, No. 21 of 1949, passed into law on 24th May, 1949. In consequence of this new legislation, section 45 in its new form for the first time authorised a dispute which "*arises*" between a society and a "past officer" to be referred to the decision of a statutory tribunal under the special machinery set up by the Ordinance.

In spite of objection by the respondent, the society purported on 8th February, 1950, to refer to the Registrar under section 45 (as amended) the present dispute *which had admittedly originated before the amending Act passed into law.* An award upon this reference was made against the respondent (as a "past officer") in favour of the society on 18th August, 1950, and was filed in Court on 14th February, 1951, with an application for its enforcement. It directed the respondent to pay to the society a sum of Rs. 8,844/35 and accrued interest.

The learned District Judge refused to enforce the award because, although the amending Act of 1949 had enlarged the category of disputes which fall within the scope of section 45, this particular dispute had in his opinion "arisen" before the relevant amendment became applicable.

In my opinion the learned Judge's judgment was perfectly correct. A dispute "arises" between two persons when one of them has for the first time unequivocally repudiated a claim made upon him by the other; so long as the claim continues to be repudiated, the dispute which has arisen still exists; but it certainly cannot continue to "arise". The amending Act has accordingly no application to a dispute which had originated between a society and one of its past officers before 24th May, 1949; it merely legalised the reference of a new class of dispute (which had not previously been capable of a valid reference under section 45 in its original form) provided however that it first "arose" *after the date of the amending Act.*

Mr. H. V. Perera suggested for our consideration an interesting alternative argument based on the provisions of a further amendment to section 45 which passed into law on 21st March, 1952—that is, several months after the judgment under appeal was pronounced. He submitted that, even if the learned Judge's rejection of the award was justified by the state of the law then in force, this Court (as an appellate Court of "rehearing") ought now to declare the award to be capable of enforcement in view of the provisions of the Co-operative Societies (Special Provisions) Act, No. 17 of 1952.

The argument may be summarised as follows :

(1) that in view of section 2 (1) of the amending Act, section 45 applies to every dispute of any description contemplated by the 1949 amendment *notwithstanding that the dispute may have arisen prior to 24th May, 1949;*

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(2) that section 2 (2) gives retrospective validity to a previous purported reference of such a " past dispute " ;

(3) that the jurisdiction of the Supreme Court, not being " strictly appellate " in its nature, requires us to take into account for the purposes of our decision all new legislation enacted pending the final decision of an appeal from the court of first instance.

(I shall later examine in this context the scope of the proviso to section 2 (2) of the 1952 amendment.)

It will be convenient first to discuss the true nature of the civil appellate jurisdiction of the Supreme Court. In *Silva v. Swaris* [1] a Bench of two Judges decided that the function of the Court was to decide appeals " by way of re-hearing " and not merely to correct errors of law or fact made by the Court below ; accordingly, there was always power to re-examine the issues in the light of fresh legislation passed in the interval between the judgment of the Court of first instance and the hearing of an appeal against it. The Privy Council found it unnecessary to decide whether this proposition was correct—*Ponnamah v. Arumugam* [2]. A Collective Bench of this Court considered the question afresh, however, in *Guneratne v. Appuhamy* [3]. Middleton J. thought that the Court was bound to determine an appeal " according to the law existing at the time when the action was begun ", and that *Silva v. Swaris* (*supra*) had been wrongly decided. Lascelles A.C.J. decided the case on somewhat different grounds, and Wood Renton J. expressed no independent opinion on the subject.

I am content to say that, whether or not the appellate jurisdiction of this Court is one of " re-hearing ", the propositions laid down in *Silva v. Swaris* (*supra*) cannot be accepted without qualification. Even in England, where the Court of Appeal (as a court of " re-hearing ") is *prima facie* able and bound to give effect to " new procedure " and " new remedies " introduced by statute after an order appealed from was made by the court of first instance, it must generally, *in regard to substantive rights*, apply the same law as that which was in force during the earlier proceedings. The only exception is where the new legislation clearly and in unambiguous terms has retrospectively altered the earlier law—*vide In re a Debtor* [4], explaining the earlier judgments of Jessell M.R. in *Quilter v. Mapleson* [5] and *in re Suche & Co.* [6]. These are the principles which are embodied in every subsection of section 6 (3) of our own Interpretation Ordinance (Cap. 2).

Let us apply the correct rules to the problem now before us. At the time when the judgment under appeal was pronounced, the respondent enjoyed *a substantive right* to have the merits of the particular dispute which had previously arisen between him and the society adjudicated upon only by the regular courts of justice. Can it now be contended that subsequent legislation has retrospectively ousted the jurisdiction of the courts in favour of the jurisdiction of a statutory tribunal ? It

[1] (*1904*) *1 Bal. Rep. 61.*
[2] (*1905*) *8 N. L. R. 223.*
[3] (*1906*) *9 N. L. R. 90.*
[4] (*1936*) *1 Ch. 237.*
[5] (*1882*) *9 Q. B. D. 672.*
[6] (*1875*) *1 Ch. D 48.*

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would indeed have been startling if any legislature had thought fit to bring about such a result in regard to the rights of parties in pending actions. It is therefore our clear duty to refuse to infer such an intention in the absence of express words to that effect in the new enactment.

There is no language in the Act of 1952 which convinces me that Parliament intended to interfere with the substantive rights of the parties in an action which had commenced long before the Act was passed, or in a pending appeal filed before that date. We must therefore decide this appeal as if the earlier law had not been repealed—see *section 6 (3) (c) of the Interpretation Ordinance*. Indeed, the indications are that this was precisely what Parliament required to be done in the present case. The relevant words of the proviso to section 2 of the 1952 Act are as follows :

> " Provided, however, that in any case where any court of competent jurisdiction has prior to the date of the commencement of this Act made order or entered judgment holding that any dispute was not duly referred . . . . *nothing in the preceding provisions of this sub-section shall be construed to affect the validity of the order or decree made or entered in that case.*"

I do not consider these words as applying only to cases where a court has made an order on the basis of the earlier law which has reached finality (in the sense that no appeal was pending against it when the amending Act was passed) ; the proviso also precludes the Court, sitting in appeal, from applying the new law so as to disturb the validity of the order of the Court of first instance, provided of course that the original decision was correct at the time when it was pronounced. The judgment under appeal has properly interpreted the law in force on 25th July, 1951 ; our duty is therefore to pronounce that *it remains " valid " in spite of the subsequent changes in legislation.*

For these reasons, I would dismiss the appeal with costs.

SANSONI J.—

I agree. I should like to add my own reasons in view of the interesting argument addressed to us by learned Counsel for the appellant. In order to succeed in this appeal, the Society must establish : (1) that this Court when hearing appeals sits as a Court of rehearing, with the power to make such order as the Judge of first instance could have made if the case had been heard by him at the date on which the appeal was heard ; (2) that the amending Act No. 17 of 1952 (which I shall refer to as the amending Act), is retrospective, and (3) that there is no saving clause which restricts the retrospective action of the amending Act in any way.

On the first question I am of opinion that this Court is a Court of rehearing and not merely a Court of error. I rely for this view on the decision in *Attorney General v. Birmingham, Tame, & Rea District Drainage Board* [1]. Lord Gorell there points out, at page 801, that the Court of Appeal in England is a Court of rehearing and has power to make any

[1] *(1912) A. C. 788.*

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order which ought to have been made, and to make such further or other order as the Court may think fit (Order LVIII, Re 1 and 4). The Court also has the power to take evidence of matters which have occurred after the date of the decision from which the appeal is brought (Order LVIII R 24). Section 37 of the Courts Ordinance, Cap. 6, makes it competent for this Court on the hearing of an appeal to pass such judgment, sentence, decree or order therein as it shall think fit. This Court also has the power under that section to receive and admit new evidence touching the matter at issue in any original cause, suit, prosecution or action as justice may require. The absence of a statutory declaration that the hearing of an appeal is by way of rehearing does not, to my mind, conclude the matter. In India it has always been held that an appeal to the High Court is, under the processual law of that country, in the nature of a rehearing of the cause. The provisions of O 41 R 33 of the Civil Procedure Code of 1908, and the conferment of the power to allow further evidence to be adduced have invariably been relied on in support of that position, and it was so held by the Federal Court in *Shukul v. Chaudhuri* [1]. Varadachariar J. in his judgment said that it makes no difference that it is not explicitly stated in the Indian Statute that an appeal is by way of rehearing. As the learned Judge has pointed out in that judgment : " The practice of the Judicial Committee in this respect does not appear to have been uniform. In *Ponnamma v. Arumugam* [2], Lord Davey, delivering the judgment of the Board, observed that : ' Their Lordships have only to say whether that judgment (of the Supreme Court) was right when it was given ' . . . . In the recent case of *Mukherjee v. Ram Ratan* [3], it would appear from the report of the arguments in *63 I. A. 47* that *Quilter v. Mapleson* [4] was referred to, and it was observed by Lord Thankerton in the course of the argument that the duty of a Court is to administer the law of the land at the date when the Court is administering it. This adds significance to the fact that their Lordships in that case did not deal with the judgment of the Patna High Court on its merits, but dismissed the appeal on the strength of a provision contained in an enactment which was passed only during the pendency of the appeal before His Majesty in Council. In the circumstances I am of opinion that we should follow the law as laid down in the latter case ". With respect, therefore, I would agree with the decision in *Silva v. Swaris* [5].

On the question whether the amending Act is retrospective, section 2 (1) of the Act expressly makes section 45 of the Co-operative Societies Ordinance, Cap. 107, applicable to every dispute " notwithstanding that the dispute may have arisen prior to the date on which (Act No. 21 of 1949) came into operation " and section 2 (2) makes section 45 applicable to every reference " which may heretofore have been made in purported pursuance of the provisions of (section 45) ". If the amending Act had stopped there nothing could have been clearer than that it was intended to have retroactive effect.

[1] *(1940) 20 Patna 429.*
[2] *(1905) 8 N. L. R. 223.*
[3] *A. I. R. (1936) P. C. 49.*
[4] *(1882) 9 Q. B. D. 672.*
[5] *(1904) 1 Balasingham 61.*

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But here one has to consider the effect of section 6 (3) (*c*) of the Interpretation Ordinance, Cap. 2. Since this appeal was pending when the amending Act came into operation, the appeal would have to be decided regardless of the amending Act since there is no express provision making the amending Act applicable to this particular appeal.

Apart from this objection, it seems clear to me that the provisos to section 2 (1) and (2) prevent the amending Act having retroactive effect in two respects. Firstly, if the dispute was a matter in issue in an action which was pending at the date of the commencement of the Act in any Court of competent jurisdiction, the Court was empowered to hear and determine that matter, and section 2 (1) is specifically made inapplicable either to affect the jurisdiction of the Court or " the validity or operation of the order or decree made or entered in the action ". I would only observe at this point that whatever the word " action " may mean in this context, this provision cannot apply to the case under consideration because the proceeding in the lower Court was not pending at the date of the commencement of the amending Act. I have no doubt that the phrase " in any Court of competent jurisdiction " can only apply to a Court of first instance. Secondly, if any Court of competent jurisdiction has prior to the date of commencement of the amending Act made order or entered judgment holding that any dispute was not duly referred for decision under section 45, again section 2 (1) is specifically made inapplicable to affect " the validity of the order or decree made or entered in that case ".

Mr. H. V. Perera submitted that in seeking to make the amending Act apply to this case he was not attacking the validity of the order of the District Court. While conceding that it was valid, his submission, as I understood it, was that it was open to him to show that it was rendered incorrect by the operation of the amending Act, and since it was under appeal when the amending Act was passed it was not a final order ; in other words, the order ceased to be *res judicata* and was rendered *sub judice* and became at large, and its correctness has to be determined in the light of the amending Act. I agree that there may well be cases where an order which was correct when it was made can be reversed by this Court—a course taken by the Court of Appeal in England in the case of *Quilter v. Mapleson* (supra) where that Court gave effect to an Act which came into operation with retrospective effect after an appeal had been filed against the order of the lower Court. But this is not one of those cases. There is, as I have pointed out, the obstacle created by section 6 (3) (*c*) of the Interpretation Ordinance. The second obstacle is the proviso to section 2 (2) of the amending Act. Reading the amending Act as a whole, as I think one should, and bearing in mind the purpose underlying the proviso to section 2 (1), I think it is clear that the proviso to section 2 (2) was also enacted in order to preserve unaffected the operation of all orders or decrees entered before the amending Act came into operation so long as they had been entered by a competent Court of first instance. It would not be surprising if the framers of the amending Act felt that it would be a grave thing to deprive a suitor of his vested rights either in a pending action or in a decided case.

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The Concise Oxford Dictionary defines the word " Valid " as meaning " sound and sufficient ". The appellant is seeking to get the order of the District Judge entirely out of the way and to render it of no effect. The clear purpose of the proviso to section 2 (2) was to protect a party who had obtained an order such as the respondent had obtained, and to prevent the soundness and sufficiency of this order being questioned by reason of the provisions of the amending Act.

Appeal dismisssed.

1954 *Present :* **Gratiaen J., Gunasekara J. and Pulle J.**

IN RE S. A. WICKREMASINGHE

IN THE MATTER OF A RULE ISSUED ON DR. SUGISWARA ABEYWARDENA WICKREMASINGHE TO SHOW CAUSE WHY HE SHOULD NOT BE PUNISHED FOR AN OFFENCE OF CONTEMPT OF COURT

Contempt of Court—Extent of right to criticise Judges.

In the course of a speech at a public meeting the respondent criticised Judges in such a manner that no person who may have been persuaded by the speech to accept the views expressed in it about the judiciary could continue to have confidence in the impartiality of the courts of justice, and in particular of the courts in the city of Galle.

Held, that it is no less an offence of contempt of court to scandalise the judiciary generally than to scandalise the Judge or Judges of a particular court.

IN the matter of a rule issued for Contempt of Court.

T. S. Fernando, Q.C., Solicitor-General, with *Douglas Jansze* and *Walter Jayawardena*, Crown Counsel, as *amicus curiae*.

Respondent in person.

Cur. adv. vult.

January 25, 1954. GUNASEKARA J.—

A Rule issued by this Court on December 9, 1953, called upon the respondent to " show cause why he should not be punished for an offence of contempt against and in disrespect of the authority of the Courts of this Island and in particular of the District Court and the Magistrate's Court of Galle " committed by the uttering of certain words in the course of a speech made by him at a public meeting held at the Galle Esplanade on October 4, 1953. The speech was made in Sinhalese, and the passage

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that was alleged to constitute a contempt was set out in the Rule togethe with a translation of it in these terms :—

> " I think there is no other Police Station anywhere in Ceylon which so indecently, and for no reason, scorns the rights of the people in so base a manner as the Galle Police (applause and laughter). Look ! I now come from Akuressa. Even in those village areas a permit is allowed to speak through the loud speaker till half-past six. In the City of Galle, a city where lights are on—it must be stopped at six, it is said. Yes ; cannot they (those fellows) see after six ? (laughter). That has happened because of Police chiefs of that same kind—chiefs who lead extremely uncultured and uncivilised lives ; Courts also exist which suit them well—the great pestilence of this city today. If there are judges (in Courts) who have self-respect and a back-bone it will become possible to make these a little more disciplined than this. What has happened now is that there now exists a herd who (act) as the Police say—a herd of judges—who expect to safeguard their jobs by obeying the behests of the Police. It is not a case of giving independent judgments ; it is a very great pestilence that has come about in Ceylon. "

The respondent, who appeared before us in person, admitted that he had no cause to shew why he should not be punished. He said, however, that the purpose of his speech had been to expose the wrongdoing of the police, and in particular of the police at Galle, and to suggest means by which they might be prevented from abusing their powers, and that he had not intended " to bring the judiciary into contempt ". He had not known at the time that " general criticisms " could amount to a contempt of court, but he had since been advised by his lawyers that the uttering of the words in question did constitute a contempt. " I do express my regret ", he said, " because unintentionally I broke the law by criticising the courts and brought the judiciary into disrepute. My intention was to criticise the police but not the courts ".

The respondent did not contradict or challenge the accuracy of the statements contained in the affidavits upon which the Rule was issued. The words imputed to him in the Rule are quoted from a report which, according to some of these affidavits, is based on an electrical recording of his speech made on a " Grundig " tape recorder. Further, it appears from the affidavits of four of the deponents, who say that they heard the speech, that they heard the respondent say about the judiciary what is imputed to him in this report. There can be no doubt that he did utter the words in question in a speech made at a public meeting held on the Galle Esplanade as alleged in the Rule.

It is true that the main topic of the speech was the conduct of the police. But it is also true that in his speech the respondent used language that stated or implied that the judges were devoid of self-respect ; that they had not the courage to do justice in cases where the police had done wrong ; and that they were so shameless and weak and dishonest as to give judgment in such cases in accordance with orders received from the police, for fear that otherwise they might be removed from office. It is idle for the respondent to pretend that he did not intend to bring the

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judiciary into contempt; though it may be true that he did not know at the time that this "general criticism" of the judges amounted to a contempt of court, and in that sense it was "unintentionally" that he "broke the law".

What the respondent has chosen to describe as a "general criticism" is a scandalising of the general body of judges and, in the light of the context, a scandalising in particular of the judges of the courts sitting in Galle. It is far removed from an exercise of the right of criticism, about which it has been said:

> "The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune." *Ambard v. Attorney-General for Trinidad and Tobago* [1].

While there is no question that judges and courts are open to criticism, there is no longer any room for doubt that scandalising a judge is punishable as a contempt. An argument that no such branch of the law of contempt existed in this country was rejected by a Bench of three Judges in the case of *Armand de Souza* [2]. "Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court". *Reg. v. Gray* [3]. The object of this branch of the law, of course, is not the protection of the personal reputation of judges but the protection of the authority of the courts, which must be preserved in the interests of the community. It is therefore no less an offence to scandalise the judiciary generally than to scandalise the judge or judges of a particular court. No person who may have been persuaded by the respondent's speech to accept the views he expressed about the judiciary could continue to have confidence in the impartiality of the courts of justice, and in particular of the courts in the city of Galle.

For these reasons we convicted the respondent of the offence with which he was charged, and we sentenced him to six weeks simple imprisonment and a fine of Rs 1,000 or a further term of six weeks simple imprisonment in default of payment.

The learned Solicitor-General brought to our notice a previous conviction of the respondent on a charge of disaffection laid against him under the Defence (Miscellaneous) Regulations, 1939. That was a conviction in 1940, and we did not take it into account in sentencing the respondent for the present offence. On the other hand, we did not find it possible to regard his expression of regret as a sufficient apology for his offence.

GRATIAEN J.—I agree.

PULLE J.—I agree.

Rule made absolute.

[1] [*1936*] *A. C. 322 at 335.* [2] (*1914*) *18 N. L. R. 33.* [3] [*1900*] *2 Q. B. 36.*

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[COURT OF CRIMINAL APPEAL]

1953 *Present :* **Nagalingam A.C.J., Gratiaen J. and K. D. de Silva J.**

W. JAYASENA *et al.*, Appellants, *and* THE QUEEN, Respondent

Appeals 35–39, with Applications 52–56/S. C. 25—M. C. Chilaw, 52,857

Trial before Supreme Court—Failure of accused to give evidence—Adverse comment by Court—Scope of inference against accused—Misdirection.

In a trial before the Supreme Court, the case for the prosecution rested principally upon the evidence of one witness, K. B. In the course of the Judge's summing-up the Jury were told that they could legitimately draw the inference that K. B.'s evidence, which, taken by itself, might not be regarded as trustworthy, could, in view of the failure of the accused persons to give evidence on their own behalf and contradict that evidence, be deemed to be true.

Held, that the Judge's comment on the failure of the accused to give evidence was in the circumstances a misdirection.

APPEALS, with applications for leave to appeal, against certain convictions in a trial before the Supreme Court.

M. M. Kumarakulasingham, with *S. Saravanamuttu* and *S. B Lekamge*, for the accused appellants.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 19, 1953. NAGALINGAM A.C.J.—

The prisoners in this case were convicted of offences of being members of an unlawful assembly, rioting and attempt to commit murder, and were sentenced to three years' rigorous imprisonment each. The nature of the evidence against the prisoners was summarised by the learned trial Judge as follows :—

" Of course, in a case which rests on the testimony principally of one witness, as in this case, you would have to be very circumspect before you decide to act on that evidence, and you would have to be specially so, having regard to the previous record of the witness Kiri Bandiya,"

and the learned trial Judge proceeded to assess the value to be placed on the evidence of this witness :

" Although there is no evidence to hold that he is an interested witness, still if you come to the conclusion that he had spoken a falsehood on a material point, then there is sufficient ground for you to hold that he is an interested witness, and taking into consideration his previous record I think it is unsafe to act on his evidence."

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Thereafter the learned Judge, after directing the Jury quite properly that it was for the prosecution to establish its case beyond reasonable doubt, commented on the absence of the accused from the witness-box as follows :—

" The other matter relied upon by the prosecution is that no evidence has been adduced to show where the accused were. The accused are not obliged to lead that evidence, *but they are in a position to adduce evidence to show that they were not at the scene of this incident, and thereby contradict the evidence of Kiri Bandiya.* As I said, the accused are not obliged to lead evidence or call witnesses. None of the accused needs get into the witness-box to give evidence. One witness has been called by the defence to show that Somida and Kiri Bandiya did not go to Tileke's house that night. When you are considering the evidence such as this, what are the reasonable inferences to be drawn on matters again within your province as judges of fact ? *But in drawing these inferences you must bear in mind that the accused are at liberty to adduce evidence to disprove that they have been absconding. When it is open for them to give evidence, although they cannot be compelled to give evidence, and if they refrain from giving evidence, then they must suffer the consequences. On a careful consideration of the matter, on the question that they were absconding, if you hold that from the failure of the accused to give evidence that what Kiri Bandiya says is the truth,* then you can act on his evidence, of course, bearing in mind what I already told you that the accused cannot be compelled to give evidence. However, you must not regard these matters as reasons which may enable you to overlook the deficiencies in the prosecution case."

This passage taken as a whole cannot be said to be above the reasonable criticism made by counsel for the appellants that the effect of it was that the Jury were told that they could legitimately draw the inference that Kiri Bandiya's evidence, which taken by itself may not be regarded as trustworthy could, in view of the failure of the prisoners to give evidence on their own behalf and contradict that evidence, be deemed to be true.

This direction, there can be little doubt, proceeds on a wrong basis. The weakness in the prosecution case is never made good by a deficiency in the defence set up by the accused. It is axiomatic to say that the absence of the accused from the witness-box does not make a case more onerous against him, or that a prosecution case otherwise not established is proved thereby. Lord Oaksey in delivering the judgment of the Judicial Board of the Privy Council in the case of *Cyril Waugh v. The King* [1] said :

" It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence ; but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comment

[1] *(1950) L. R. A. C. 203 at 211.*

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Here the appellant had told the same story almost immediately after the shooting, and his statements to the prosecution witnesses and his statement to the police made the same day were put in evidence by the prosecution. Moreover, his story was corroborated by the finding of the bag of coconuts and the iron tool and by the independent evidence as to the place where the shooting took place. *In such a state of the evidence the judge's repeated comments on the appellant's failure to give evidence may well have led the Jury to think that no innocent man could have taken such a course.*"

And the conviction for murder in that case was for that reason quashed. In this case, however, the charge to the Jury went further than mere comment on the prisoner's failure to give evidence, as in the case cited. Here, to put it at the lowest, the suggestion is made to the Jury that " from the failure of the accused to give evidence " they may hold that " what Kiri Bandiya says is the truth " for " they must suffer the consequences " " if they refrain from giving evidence ".

In *Doraisamy's case* [1], in regard to a statement in the charge :

" So, where there is evidence adduced by the Crown which implicates the prisoner, and the prisoner does not give evidence, you are entitled to draw an inference against him from that fact ",

Hearne J., who delivered the judgment of the Court, remarked :

" The standard of proof required in criminal cases remains constant irrespective of the fact that the accused has not given evidence."

In the *case of Chelliah* [2], I had occasion to observe :—

" If an inference that the accused person is guilty be permitted to be drawn from the fact that he has not chosen to get into the witness-box and deny the case set up against him by the prosecution, whatever the infirmities of that case may be, it would be easy to see that far from the burden of proof remaining from start to finish on the prosecution it gets shifted to the accused on the close of the case for the prosecution, whatever the case established against the accused may be, a proposition which under our law at any rate carries with it its own condemnation."

And this observation is of equal applicability to the circumstances of the present case.

Having regard to these considerations, we allowed the appeal and acquitted the accused.

Appeal allowed.

[1] *(1942) 43 N. L. R. 241.*

[2] *(1952) 54 N. L. R. 465.*

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1954

Present : **Gratiaen J.**

D. T. ROBERT, Appellant, *and* MRS. P. RASHAD, Respondent

S. C. 150—C. R. Colombo, 37,045

Rent Restriction Act, No. 29 of 1948—Sub-letting by tenant—Condonation by landlord— Landlord's right to claim cancellation of tenancy—Sections 9 and 13.

A tenant wrongfully sub-let a portion of the premises without the landlord's prior written consent, but the landlord, although he was aware of that fact, made no protest of any kind and continued to demand, and to accept from the tenant, rent for each subsequent month.

In an action brought subsequently by the landlord claiming cancellation of the tenancy on the ground that the tenant had sub-let the premises in contravention of the provisions of Section 9 of the Rent Restriction Act—

Held, that the landlord's conduct after he became aware of the sub-tenancy disentitled him to have recourse to his statutory remedy under Section 9. When a landlord becomes aware of the contravention of Section 9, he must forthwith elect whether or not to treat the contract of tenancy as terminated ; if he does not so elect, the contravention is condoned, and the contractual tenancy continues.

Wimalasuriya v. Ponniah (1951) 52 N. L. R. 191, distinguished.

APPEAL from a judgment of the Court of Requests, Colombo.

H. V. Perera, Q.C., with *S. Sharvananda* and *Joseph St. George*, for the defendant appellant.

M. I. M. Haniffa, with *M. H. M. Naina Marikar*, for the plaintiff respondent.

Cur. adv. vult.

July 26, 1954. GRATIAEN J.—

This is an appeal by a monthly tenant from an order for his ejectment from premises to which the Rent Restriction Act, No. 29 of 1948, applies. The basis of the learned Commissioner's decision was that the tenant had, in contravention of Section 9 of the Act, sub-let a portion of the premises, without his landlord's prior written consent, on 12th September, 1951. The alleged sub-lessee has since vacated the premises, and the tenant is now in sole occupation.

I shall assume for the purposes of my judgment that the tenant had in fact contravened the provisions of Section 9.

The action for ejectment was instituted by the landlord on 8th February, 1952. It is common ground that he had not given the tenant prior notice of his election to treat the contravention of Section 9 as a breach of the contract of tenancy. The learned Commissioner considered, however, that no such notice was necessary in view of the ruling of Basnayake J., sitting alone, in *Wimalasuriya v. Ponniah* [1].

[1] *(1951) 52 N. L. R. 191.*

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Before I examine the judgment of this Court in *Wimalasuriya v. Ponniah* (*supra*) it is necessary to refer to one distinguishing feature of the present case. According to the landlord's version, the fact that the tenant had wrongfully sub-let a portion of the premises was brought to his notice very shortly after the sub-tenancy commenced. Nevertheless, he made no protest of any kind, and he continued to demand, and to accept from the tenant, rent for each subsequent month including the month of January, 1952. His letters D1, D2, D3 and D4 to the tenant gave no indication that he objected to the presence of the sub-tenant on a portion of the premises although he was well aware of it. Nevertheless, he peremptorily filed this action in *February, 1952,* basing his claim for ejectment solely on the contravention of Section 9 (1) *in September, 1951.* In my opinion his subsequent conduct since he became aware of the sub-tenancy disentitles him to have recourse to his statutory remedy under Section 9 (1).

The Rent Restriction Act passed into law on 20th December, 1948. After that date, the effect of Section 9 (1) and 9 (2) was to read into every contract of tenancy in respect of protected premises (*a*) a prohibition against sub-letting without the landlord's prior written consent (*b*) a statutory provision (equivalent to an express contractual stipulation) entitling the landlord, in the event of a contravention of Section 9 (1), to claim a cancellation of the tenancy and a consequential decree for ejectment notwithstanding the provisions of Section 13 which would have otherwise now been applicable.

I agree with the judgment in *Wimalasuriya's case* in so far as it rejects the argument that a tenant who has contravened Section 9 is nevertheless entitled to resist a decree for ejectment on that ground unlesss he has also received " reasonable notice (terminating the tenancy) according to the contract ". But I do not accept the further proposition (if that was intended to be suggested by Basnayake J.—I do not say that it was) that a contravention of Section 9 *ipso jure* brings the contract of tenancy to an end. The correct view is that, *when the landlord becomes aware of the contravention,* he must forthwith elect whether or not to treat the contract as terminated. If he elects to enforce this statutory remedy, the tenant's statutory protection under Section 13 is automatically forfeited. But if he does not so elect, the contravention is condoned, and the contractual tenancy continues. " The conduct of the landlord in accepting rent (for subsequent periods) with clear knowledge of the sub-letting amounts to a waiver of his statutory right (under Section 9) and must inevitably amount also to a ' consent ' to the sub-letting in the sense of being a negation thereto "—*per* Evershed M. R. in *Hyde v. Pimley* [1]. In other words, he " has by implication so acted as to bar himself from alleging that he has not consented "—*per* Lord Watson in *Elphinstone v. Monkland Iron & Coal Co.*[2]. This is precisely what has occurred to the present case. I therefore allow the appeal and dismiss the plaintiff's action with costs in both courts.

Appeal allowed.

[1] (*1952*) *2 Q. B. 506 at 512.* [2] (*1886*) *11 A. C. 332 at 337.*

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1954 *Present:* **Gratiaen J. and Fernando A.J.**

PARAKRAMA SAMUDRA COLONY C. A. P. S. SOCIETY, LTD., Appellant, *and* E. S. WIMALASEKERA, Respondent

S. C. 479—D. C. Anuradhapura, 3,122

Co-operative Societies Ordinance (Cap. 107)—Section 18—Contractual liability of society—Effect of by-laws.

A co-operative society, upon registration under the Co-operative Societies Ordinance, becomes incorporated by statute (section 18), and its liability in contract is regulated by the limits of its constitution and of its by-laws. The President of a co-operative society has, therefore, no power or authority to commit the society to contractual obligations into which, according to the by-laws, the Committee alone can enter.

APPEAL from a judgment of the District Court, Anuradhapura.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy*, for the defendant appellant.

S. J. V. Chelvanayakam, Q.C., with *N. Kumarasingham*, for the plaintiff respondent.

Cur. adv. vult.

June 16, 1954. GRATIAEN J.—

The appellant is a co-operative society registered under the Co-operative Societies Ordinance (Cap. 107), and the respondent is a trader doing business at Hingurakgoda. This appeal is from a judgment of the learned District Judge of Anuradhapura awarding the respondent Rs. 41,892·50 as damages against the society for an alleged breach of contract to supply to him a certain quantity of paddy.

According to the plaint, a contract was entered into between the society and the respondent on 15th November, 1949, for the sale of 20,000 bushels of paddy at Rs. 8·25 a bushel; the respondent had paid sums aggregating Rs. 62,150 by instalments as part of the consideration between 15th November, 1949, and 6th December, 1949, but only 6,215 bushels had been delivered in terms of the contract, so that the society was in default in respect of the balance 13,785 bushels (for some of which, admittedly, no payment had been made).

The amount claimed includes a sum of Rs. 10,876·25 representing that part of the total amount advanced against which no deliveries had been made, but Mr. Chelvanayakam concedes that this item also falls to be included under the general head of "damages" for breach of contract. It was certainly not claimed upon any alternative cause of action such as "money had and received" or on the footing of "unjust enrichment".

For the purposes of considering the grounds upon which Mr. Perera has challenged the correctness of the judgment under appeal, I shall

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assume that the respondent's version of the transaction is substantially correct. The society itself was not in a position to offer any reliable evidence as to what had originally taken place—the reason being (as the learned judge points out) that two of the society's office-bearers (with whom the respondent had carried on all his negotiations in regard to the alleged contract) had embezzled a large portion of the money paid to them by the respondent, and fabricated the society's books in order to cover their fraud. The relevant facts may be summarised as follows: The society purchased paddy from its members, who were cultivators, at a guaranteed price of Rs. 8 per bushel, and sold the produce to outsiders at prices determined from time to time by the Committee. (*By-law 44* of the society prohibited credit sales except on terms as to security previously approved by the Registrar of Co-operative Societies.)

On 1st November, 1949, the President of the society (with the Committee's authority) advertised in the "Ceylon Daily News" that 26,000 bushels were available "for immediate sale". On the same day the respondent negotiated with the President for the purchase of 20,000 bushels, and the President orally accepted his offer of Rs. 8·25 per bushel subject to this rate being confirmed by the Committee. So matters stood until 15th November, 1949, when the previous arrangement was orally confirmed. The respondent paid a sum of Rs. 500 to the President out of the proposed purchase-price, and obtained from him a receipt P3 describing the payment as "an advance agreeing to sell 20,000 bushels at Rs. 8·25 per bushel *if the Committee agrees to sell at this rate*".

The receipt P3 did not, however, incorporate all the terms of the bargain. According to the respondent, he did not possess either the funds or the storage facilities to permit of a "spot sale" whereby he could take immediate delivery of 20,000 bushels on payment of the full contract price. Accordingly, the arrangement was that, subject only to general confirmation of the price by the Committee (but without reference to any particular contract with any specified buyer) the respondent would be entitled "to pay whatever money (he) had and buy the paddy from time to time".

Later in the day, i.e. on the 15th November, 1949, the Committee passed a resolution "to sell the paddy at the store without gunnies at Rs. 8·25 to be delivered at the store and further to receive payment before delivery". The President immediately informed the respondent that the price had now been fixed, and the respondent's contention is that his previous oral agreement with the President thereupon came into operation as an enforceable contract binding on the society.

According to the plaint, this "contract" was performed in part both by the respondent and by the President "on behalf of the society". The respondent made various payments and received instalment deliveries from time to time—although it is not suggested that, against each payment, a precisely corresponding quantity of paddy was handed to him.

This is the contract which the respondent seeks to enforce against the society. Analysed in the context of the Sale of Goods Ordinance, it is capable of two alternative interpretations. *Either* a specific quantity

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of 20,000 bushels was appropriated to the contract on 15th November itself, the seller undertaking to retain the goods at the buyer's disposal until such time as the latter chose to remove them by convenient instalments (against payment of an equivalent instalment of the contract price); *or*, in the alternative, the seller bound himself by agreement to sell an aggregate quantity of 20,000 bushels at future dates selected by the buyer, so that the property in part of the goods would pass to the buyer whenever he took an instalment delivery against an instalment payment.

The Committee itself had no knowledge of the fact that the President had purported to bind the society in this way. The market price of paddy soon began to show an upward trend, and certain quantities in stock on or after 15th November (including that which, according to the respondent, should have been ear-marked for him) were sold and delivered to other purchasers at higher rates in the ordinary way. In the result, the President was not in a position fully to implement his earlier undertaking with the respondent even if he so desired. What he and another office-bearer actually did was to embezzle certain instalments of the purchase-price received from the respondent, and to put him off with false promises on various pretexts. Inevitably, the fraud came to light, and the President was interdicted from duty. The present action then commenced.

The society's books of account (fraudulently maintained by the dishonest office-bearers) sufficiently establish at any rate that the society had not received the benefit of any sum exceeding the value of paddy actually received by the respondent under the "contract" sought to be enforced. No question of "unjust enrichment" would therefore have arisen as a ground of liability even if it had been put in issue between the parties.

The defence which was pressed before us in appeal was that, even upon the respondent's version of the transaction, his agreement with the President did not constitute a contract enforceable against the society. In other words, the President had no power or authority to commit the society to contractual obligations of that kind. In my opinion, this objection must be upheld.

The society, upon registration under the Co-operative Societies Ordinance, became incorporated by statute (section 18), and its liability in contract is regulated by the limits of its constitution and of its by-laws. Under *by-law 32*, the Committee "shall exercise all the powers of the society subject to any . . . . restrictions in the by-laws", and is specially empowered "to decide the terms of purchase and sale of any goods"—*by-law 32 (14)*. *By-law 32 (21)* further empowers the Committee (and no one else):

> "to enter into contracts on behalf of the society. Such contracts shall bear on behalf of the society the signature of the President and of either the Secretary or the Treasurer of the society".

I have already referred to the special restrictions imposed with regard to sales on credit. *By-law 44* clearly applies to "spot sales" across

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the counter. It also invalidates, in my opinion, any "agreement to sell", even if directly entered into by the Committee, on terms as to credit not previously approved by the Registrar. In order to minimise the risks involved in improvident transactions without adequate safeguards, only the Registrar is empowered to bind the society by decisions as to whether, and on what terms, credit facilities could safely be given to a customer.

The President is merely the chief executive officer of the society, and his powers and duties are specified in *by-law 35*. In the present case, the officer concerned was also the society's Treasurer, and as such he was required to take charge of all monies received "by the society" from its members and its customers—*by-law 41*.

Having regard to these by-laws, it is perfectly clear to my mind that the society is not liable under the contract purported to have been entered into by its President in November 1949. Had the President, acting upon the Committee's resolution of 15th November, merely sold 20,000 bushels to the respondent against immediate payment at the approved rate, the transaction would without doubt have been binding on the society. But we are here concerned with a contract imposing many onerous obligations on the society, some of them to be fulfilled at a future undetermined date : for instance, it involves an irrevocable undertaking to accept payment at Rs. 8·25 even if the market for paddy should subsequently rise, and to keep in stock a very large quantity ear-marked for the buyer for an unspecified period of time. The formation of such a contract fell entirely outside the scope of an individual office-bearer's functions, and only the Committee was vested with power to bind the society in that way. This power was not exercised by the Committee, nor was it delegated to the President. Indeed, it was not capable of delegation. Moreover, it is implicit in the language of *by-law 32 (21)* that a contract involving future obligations should, if entered into by the Committee, be reduced to writing so that the ascertainment of its terms should not depend on oral testimony. The present contract was therefore also defective in matter of form. Finally, it might well have been argued that the contract purported to grant the respondent credit facilities in violation of *by-law 44*. For all these reasons, I conclude that no cause of action had accrued to the respondent to sue the society for the recovery of Rs. 41,892·50 or any part of that sum.

It was the duty of the respondent, before entering into this transaction, to satisfy himself as to the powers of the office-bearers with whom he chose to negotiate. Mr. Chelvanayakam conceded that it was the Committee alone which could validly enter into a contract of the kind sought to be enforced, but he argued that these powers had, in the ordinary course of business, been delegated to the President subject only to the limitation as to the price at which the paddy might be sold. I do not agree that the present case falls within the well-known "principle of convenience" which entitles a third party to assume against a corporation that all matters of internal administration have been duly complied with—*Royal British Bank v. Turquand* [1] and *Dey v. Pullinger Engineering Co.* [2]. That principle only applies where the third party can point to an

[1] *(1856) E. & B. 327.* [2] *(1921) 1 K. B. 77.*

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article (or by-law) *authorising the delegation of authority by the Directors* (or persons vested with the actual power) to someone who had purported to enter into the contract on behalf of the corporation. In such a case, the *ostensible* authority of the servant or agent binds the corporation even though there had been no delegation *in fact*. But the present action concerns a contract with a President who had no delegated authority to bind the society, and to whom the Committee had no power to delegate its own powers. In such a situation, the contract is wholly void as against the corporation—*Kreditbank Cassell v. Schenkers, Ltd.*[1].

Mr. Chelvanayakam finally suggested that the respondent was at least entitled to recover the sum of Rs. 10,876·25 which he had overpaid to the President and in exchange for which no paddy had been delivered. Suffice it to say that no such claim was made on the basis of any alternative cause of action. Indeed, I do not see how it could have succeeded. The society was not " enriched " in any way by payments made to (and retained by) two office-bearers who had no authority under the by-laws to accept money on behalf of the society under a contract by which the society was not bound.

I would set aside the judgment under appeal and enter a decree dismissing the respondent's action with costs both here and in the Court below.

FERNANDO A.J.—I agree.

Appeal allowed.

1954 *Present :* **Pulle J. and Swan J.**

M. U. M. SAMEEM *et al.*, Appellants, *and* W. W. DEP, Respondent

S. C. 316—D. C. Colombo, 5,896/L

Possessory action—Right of a tenant to bring it—Test of possessio civilis*—Limits of its applicability—Prescription Ordinance* (*Cap. 55*), *s. 4—Rent Restriction Act.*

A contractual or statutory tenant who has been forcibly ousted from his premises is entitled to maintain a possessory suit against the person dispossessing him.

As against a spoliator the person dispossessed need not prove *possessio civilis* to be restored to possession.

APPEAL from a judgment of the District Court, Colombo.

Sir Lalita Rajapakse, Q.C., with *E. R. S. R. Coomaraswamy* and *E. B. Vannitamby*, for the defendants appellants.

Sir Ukwatte Jayasundera, Q.C., with *Ivor Misso* and *S. Rodrigo*, for the plaintiff respondent.

Cur. adv. vult.

[1] *(1927) 1 K. B. 826.*

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May 10, 1954. PULLE J.—

This is an appeal in which the principal parties concerned are the plaintiff and the second defendant. There are three other defendants who are brothers of whom the first defendant is the son-in-law of the second. Judgment has been entered for the plaintiff declaring him entitled to the possession of premises No. 323, Main Street, Colombo, for ejectment and damages.

The whole case, so far as the evidence goes, turns on a simple issue of fact, namely, whether on November 29, 1949, the plaintiff as the tenant of the Public Trustee was in occupation of the premises in question and whether he was forcibly dispossessed by the defendants or whether the 2nd defendant was in occupation as a sub-tenant under the plaintiff. The evidence both oral and documentary has covered a large area. It has been carefully considered by the learned trial Judge and it would unduly lengthen this judgment if all the submissions made to us on the finding of fact are subjected to a further analysis. On the whole we agree with the verdict of the trial Judge that the evidence in support of the plaintiff's case is overwhelming. It suffices to deal with two points stressed at the argument.

The defendants produced the promissory notes D1 and D2 dated respectively 15th March, 1947 and 1st May, 1947, granted by the 1st and 2nd defendants to two chettiyars. In these notes the address of the makers is given as No. 323, Main Street. Reliance was placed on this address in support of the defendant's case that they were carrying on business at the premises in their own right as early as 1947. The payee on the second note was one A. P. R. P. L. Palaniappa Chettiyar. A kanakapulle of the payee calling himself A. P. R. P. L. Palaniappa Chettiyar gave evidence to the effect that he used to recover monies due on D2 at No. 323. Complaint is made that his evidence has been viewed with suspicion because he did not disclose himself specifically as the clerk to the firm of the payee. I cannot say that the Judge was wrong in putting himself on his guard against a witness who appeared to identify himself as the payee on the note, whereas he was only a clerk. But apart from this the learned Judge has carefully analysed the evidence of this witness and satisfied himself that the address in D2 and the fact that the witness may occasionally have seen the 2nd defendant at No. 323 could be explained in a manner consistent with the evidence called for the plaintiff.

It has been strongly urged that a letter D7 of 19th December, 1947, addressed in connection with a criminal matter to the Inspector-General of Police by the 2nd defendant in which he stated that he was carrying on business at No. 323 should have been accepted by the Judge as confirmation of the 2nd defendant's evidence and that, further, the theory on which the letter is accounted for by the Judge is unsatisfactory.

I think that the way in which the Judge has dealt with D2 and D7 must be looked at in the general context of his judgment. He had formed a very favourable view of a number of independent witnesses called

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to support the plaintiff on the crucial issue whether prior to 29th November, 1949, the plaintiff carried on business at No. 323. Unless it could be said that D2 and D7 completely undermined the evidence of all these witnesses the Judge was justified in formulating a theory to explain D2 and D7, although in the case of D7 the theory may not commend itself as the true reason as to why the 2nd defendant said he was carrying on business at No. 323, if in fact, according to Mariampillai, the representatives of Millers Limited and the Public Trustee, Inspector Weerasooriya of the Pettah Police, Police Sergeant Piyadasa and the watcher Ramasamy and also according to a number of documents, the sole owner of the business was the plaintiff.

In my opinion it would be entirely unjustifiable to disturb the finding of fact in favour of the plaintiff that he being the occupier of premises No. 323 was forcibly ousted by the defendants.

There remains to be decided whether the submission is good that the plaintiff cannot maintain the action because he was only a monthly tenant. The argument was on these lines. The plaintiff in his plaint asked for a possessory decree. Such a decree could only be passed in favour of a person having a *possessio civilis* but as the plaintiff was a monthly tenant and not a notarial lessee he was not entitled to maintain the action. No plea was taken in the answer that the action in the form in which it was instituted did not lie. As far as the issues go it was raised whether the plaintiff could maintain the action, if the court found that the 2nd defendant was a sub-tenant of the plaintiff. The point of law raised at the argument in appeal was consequently not dealt with in the judgment.

A large number of authorities have been cited on behalf of both parties and I do not propose to deal with everyone of them. Cases like *Ukku Amma et al. v. Jema et al.*[1] can be distinguished on the ground that they were not possessory actions contemplated by section 4 of the Prescription Ordinance (Cap. 55). If *possessio civilis* is the rigid test I do not find it easy to follow how a usufructuary mortgagee whose possession terminates on the payment of the principal debt has been given the right to institute a possessory suit. Vide *Banda v. Hendrick et al.*[2]. In this case Wood-Renton J. cites with approval a dictum of Bonser C.J. in *Changarapillai v. Chelliah*[3] that the possessory action is a most beneficial one whose operation the Court should seek to enlarge rather than to narrow. On a parity of reasoning I should say that a tenant who like the plaintiff is protected by the Rent Restriction Act has a large beneficial interest in the property in the sense that, if he performs what may be called the statutory covenants, he has rights of occupation and enjoyment which in his life time could only be brought to an end by the surrender of occupation to his landlord or eviction by legal process and the remedy of a possessory suit should be extended to vindicate these rights.

It seems to me that as against a spoliator the person dispossessed need not prove *possessio civilis* to be restored to possession. Wille on Landlord

[1] *(1949) 51 N. L. R. 254.*

[2] *(1907) 1 A. C. R. 81.*

[3] *(1903) 5 N. L. R. 270.*

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and Tenant states in Chapter XV, " If the landlord ejects the tenant either forcibly or illicitly he commits an act of spoliation against the tenant and the tenant is entitled to a *mandament van spolie* or order replacing him in occupation or possession of the premises *immediately and before the landlord can take any further legal steps and as a preliminary to any inquiry or investigation into the merits of the case.*" *A fortiori* the remedy should be available against a stranger.

Dealing with the character of possession to justify a *mandament van spolie* Professor R. W. Lee states in the Introduction to Roman-Dutch Law, 1946 ed. p. 165,

" It is given not merely to the possessor in the strictest sense, but to a trustee or lessee and to any other person who holds by lawful title ' with the intention of securing some benefit for himself as against the owner, such as a borrower, and, perhaps, to any other person in actual control." In my opinion occupation of a property by a contractual or statutory tenant is to hold it by lawful title. The case of *Meyer v. Glendinning* [1] cited by Professor Lee is interesting. There a racehorse trainer succeeded in obtaining a spoliation order against the owner who having entrusted some horses to the trainer removed them from the stables without notice to and consent of the trainer. While on the subject of *mandament van spolie* I should add that in *Goonewardene v. Pereira* [2] approved in *Silva v. Appuhamy* [3] Bonser C.J. said that he was not prepared to assent to the proposition that where there is an ouster by violence of the person who is possessor of the property, anything more was required to be proved by him than that he was in possession and that he was violently ousted. In those circumstances the plaintiff did not have to prove possession for a year and a day.

To the facts of this case I would apply the words of Buchanan A.C.J. in *Wilsnach v. Van der Westhuizen and Haak* [4] in which a licensee under a local authority of a house was evicted by the respondents who purported to have obtained a title deed in their favour.

" The whole foundation of the rule for the restoration of property taken possession of in this way is, that a spoliator is not entitled to take the law into his own hands, and a person who takes the law into his own hands must restore the property and establish his right thereto in a peaceable manner or in a court of law. "

On the findings of fact there was not the vestige of a right in the defendants to have taken possession of the premises.

The appeal fails and should be dismissed with costs.

SWAN J.—I agree.

Appeal dismissed.

[1] *(1939) C. P. D. 84.*
[2] *(1902) 5 N. L. R. 320.*
[3] *(1912) 15 N. L. R. 297.*
[4] *(1907) S. C. 600.*

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1953 *Present :* **Swan J.**

A. H. M. SAHEED, Appellant, *and* L. BAPTISTE (Sanitary Inspector), Respondent

S. C. 1,171—M. C. Negombo, 64,175

Housing and Town Improvement Ordinance—Section 13 (1) (b)—Deviation from approved plan—Meaning of " plan ".

Where a person is charged under section 13 (1) (*b*) of the Housing and Town Improvement Ordinance with deviating from an approved plan in respect of a building, it is not necessary for the complainant to establish that the plan was drawn to scale ; it will be sufficient if the diagrams and measurements together indicate clearly what the accused proposed to erect and what was duly approved.

APPEAL from a judgment of the Magistrate's Court, Negombo.

H. V. Perera, Q.C., with *M. H. Aziz*, for the accused appellant.

E. B. Wikramanayake, Q.C., with *M. L. S. Jayasekera*, for the complainant respondent.

Cur. adv. vult.

March 2, 1953. SWAN J.—

The accused was charged under section 13 (1) (*b*) of the Housing and Town Improvement Ordinance with having deviated from the plan he had submitted, and which had been approved by the Chairman of the Town Council, in respect of a building he had erected in the town of Minuwangoda. The approved plan is marked P1. It was later amended by P2. P1 is certainly not drawn to scale. That is self-evident ; but there are certain measurements given therein which must undoubtedly be taken as part and parcel of the plan. It is not denied that the building now erected deviates from the measurements contained in P1 and P2, and the accused also admits that instead of providing expanded metal for the rear walls of the kitchens he installed windows.

The defence taken in the lower Court was that the deviations were made either on the suggestion or with the approval of the prosecuting Inspector, and with the consent or acquiescence of the previous Chairman and the Medical Officer of Health. As the learned Magistrate says in his judgment this is no defence because any deviation from an approved plan must be with the written consent of the Chairman.

A good deal of evidence was led to show that the present Chairman is not well-disposed towards the accused. But that is wholly irrelevant to the question at issue.

The point urged by Mr. Perera was that the accused could not be guilty of any offence because P1 and P2 are not plans but rough sketches. He contends that a plan must be something drawn to scale. I am unable to agree. The Ordinance does not define the word plan. The new

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International Dictionary defines *plan* as " draft or form, properly a representation drawn on a plane as a map . . . . a graphic representation, a diagram ". In Stroud's Dictionary I find the following :—

> *PLAN.* " The plan to be submitted to a Local Authority of Works to be done does not mean something merely showing the ' method ' or ' manner ' but means a map or something equivalent, which will enable the Authority to judge whether what is proposed shall be allowed to proceed. "

In my opinion P1 and P2 answer that description. They may be sketches not drawn to scale but they are amply sufficient to show what is proposed to be done. There is a " ground plan " which shows the floor space the rooms will cover. There is a " cross-section " which gives an idea of the height of the walls and the roof. There is a " front elevation " which is a graphic representation of what the entire building will look like from the road. There are also certain measurements given ; and if you take the diagrams and measurements together there can be no doubt as to what the accused proposed to erect and what was duly approved. In my opinion the learned Magistrate was right in holding that the accused was guilty of the offence with which he was charged. Perhaps the deviations are innocuous, but that is a matter that will have to be considered when application is made by the accused for a certificate of conformity, or if the alleged animosity of the present Chairman is manifested by an application to Court for a mandatory order under section 13 (2).

The appeal is dismissed.

Appeal dismissed.

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[In the Privy Council]

1954 *Present :* **Earl Jowitt, Lord Keith of Avonham and Mr. L. M. D. de Silva**

S. SAVERIMUTTU, Appellant, *and* P. THANGAVELAUTHAM *et al.*, Respondents

Privy Council Appeal No. 14 of 1953

S. C. 174—D. C. Point Pedro, 2,761

Trust—Sale of land by debtor to creditor—Adequate consideration—Parol evidence of agreement by transferee to reconvey the land—Admissibility—Prevention of Frauds Ordinance (Cap. 57), s. 2—Trusts Ordinance (Cap. 72), s. 5 (1) and (3).

Although in some cases the provisions of section 2 of the Prevention of Frauds Ordinance have been relaxed on proof of fraud on the ground that the " Statute of Frauds may not be made an instrument of fraud ", this proposition has only a limited application, and it is necessary that Courts should approach with caution the facts and the law on which any case is claimed to be an exception to the general rule that a transaction relating to immovable property is invalid unless the terms of the transaction have been embodied in a notarially attested document.

A. transferred for adequate consideration certain immovable property to B. by Deed No. 3. The property in question had previously been the subject matter of a mortgage decree on which, at the date of the transfer, a balance amount of Rs. 2,000 was payable by A. to B. It was stated in Deed No. 3 that the consideration for the transfer was the balance amount due on the mortgage decree. Satisfaction of the decree was duly certified of record, and, on the face of it, Deed No. 3 was an unqualified transfer for consideration. Immediately after the execution of Deed No. 3, on the same day, B. by Deed No. 4 leased the property to A. for a period of six years.

In a *rei vindicatio* action instituted (after the expiry of the lease) against A. by B.'s successor in title, A. sought to assert by evidence of an informal agreement that the transfer to B. was subject to a condition that B. was to hold the land in trust for A. and reconvey it to A. on payment to B. of a sum of Rs. 2,000 with interest.

Held, that the informal agreement relied on by A. amounted not to a trust but to a contract for the transfer of immovable property and was therefore invalid as it contravened the provisions of section 2 of the Prevention of Frauds Ordinance.

Valliamma Atchi v. Abdul Majeed (1947) 48 N. L. R. 289, distinguished.

APPEAL from a judgment of the Supreme Court reported in *54 N. L. R. 28.*

Stephen Chapman, for the 1st defendant appellant.

2——J. N. B 37761—1,592 (8/54)

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H. J. Phillimore, Q.C., with *Robert N. Hales*, for the plaintiff respondent.

Cur. adv. vult.

July 13, 1954. [*Delivered by* MR. L. M. D. DE SILVA]—

This is an appeal from a judgment of the Supreme Court of Ceylon dated 26th July, 1951, which, setting aside a judgment of the District Court of Jaffna, entered a decree in favour of the first respondent (hereinafter called " the respondent ") to this appeal.

The respondent instituted the action in the District Court of Jaffna to obtain a declaration that he was entitled to a land called Pannaikaddaiyady situated at Valvettiturai, an order for possession and damages. The appellant was the first defendant in the action. The 2nd to the 10th respondents were the 2nd to the 10th defendants.

The respondent in his plaint averred that the appellant and his late wife Annammah had at one time owned the land called Pannaikaddaiyady, that they had by Deed No. 3 of the 12th November, 1937, transferred the said land to one Karthigesar Aiyadurai who by Deed No. 308 of the 24th June, 1946, had transferred it to the respondent. He thus claimed to be the owner of the land and entitled to possession. He averred that the appellant and the 2nd to the 10th respondents were in wrongful possession of the land.

The 2nd to 10th respondents did not appear at the hearing of this appeal but it is common ground, and their Lordships are satisfied, that their position with regard to the land can be no higher than that of the appellant. As their Lordships have decided that the appeal must fail their case does not call for separate consideration and no further reference will be made to them.

It was pleaded in defence by the appellant that the transfer to Karthigesar Aiyadurai was subject to a condition that Aiyadurai was to hold the land in trust for the transferors and reconvey it to them on their paying to Aiyadurai a sum of Rs. 2,000 with interest. At the trial before the learned District Judge it was sought to support this plea, not by a notarially attested instrument, but by secondary oral evidence of an informal writing which it was alleged had been given by Aiyadurai to the respondent and his wife at the time of the execution of Deed No. 3. Secondary oral evidence was permitted on the ground that the original writing was not available to the respondent at the date of the trial. On the view, referred to later, of the facts taken by the learned trial judge secondary evidence was admissible.

It was pleaded further in defence that the respondent at the time the land was conveyed to him had knowledge that Aiyadurai held the land

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in trust and that therefore the respondent's position was no better than that of Aiyadurai. It will be necessary to consider this plea if the first plea that Aiyadurai held the land in trust succeeds but not otherwise.

Aiyadurai was dead at the time of the trial.

The learned District Judge held that a trust had been established. On appeal the Supreme Court took the view that no trust had been established and the question before their Lordships is whether upon the material placed before the learned trial judge and with due regard to his views on the credibility of the witnesses who gave evidence before him it can be said that a trust came into existence.

Section 2 of the Prevention of Frauds Ordinance (Chapter 57, Volume 2, Legislative Enactments of Ceylon) is to the following effect :—

> "No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property, shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorised by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnessed."

The amendment to the section made by Ordinance 60 of 1947 leaves unaffected the questions arising for consideration in this case and the views expressed hereafter. No reference was made to it at the argument and no further reference to it will be made by their Lordships.

The section has been observed by Lord Atkinson in the case of *Adicappa Chetty v. Caruppan Chetty*[1] to be "more drastic" than the corresponding section of the English Statute of Frauds in that the latter does not render an agreement not complying with the formalities required by it "invalid", whereas the Ceylon Ordinance does.

Subsection 1 of section 5 of the Trusts Ordinance (Chapter 72), Volume II, Legislative Enactments of Ceylon is to the following effect :—

> "Subject to the provisions of section 107, no trust in relation to immovable property is valid unless declared by the last will of the

[1] *(1921) 22 N. L. R. 417.*

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author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed."

Subsection (2) relates to movable property.

Subsection (3) says :—

"These rules do not apply where they would operate so as to effectuate a fraud."

It thus appears that the law of Ceylon in the generality of cases refuses to recognise a transaction relating to immovable property unless the terms of the transaction have been embodied in a notarially attested document. Oral evidence and even evidence in writing which does not possess the authenticity of a notarially attested document are thus rendered of no avail in the generality of cases. It is evident that the aim of the Prevention of Frauds Ordinance is to prevent frauds by making evidence other than the evidence of a notarially attested document ineffective. Their Lordships think that the departures permitted by law from this general rule should not be extended as any undue extension would interfere seriously with the object sought to be achieved by the statute law of Ceylon.

Proof of fraud entitles the Court in certain circumstances to depart from the general rule. This principle has found statutory recognition in section 5 (3) of the Trusts Ordinance referred to above, and in some cases the provisions of the Prevention of Frauds Ordinance have been relaxed on proof of fraud on the ground that the "Statute of Frauds may not be made an instrument of fraud". It must however be remembered that this proposition has only a limited application. For instance it may be proved by evidence of the utmost reliability not supported by a notarially attested document that a person has entered into a plain and simple agreement to sell land to another for a consideration. A breach of such an agreement is undoubtedly dishonest, but the dishonest conduct resulting from the breach does not amount to fraud within the meaning of the proposition that the Statute of Frauds may not be used as an instrument of fraud. If the contrary view were taken the Ordinance would be totally ineffective. Their Lordships are of the view that in order that the Ordinance may not be deprived of all efficacy it is necessary that Courts should approach with caution the facts and the law on which any case, claimed to be an exception to the general rule referred to above, is founded.

By deed No. 3 of the 12th November, 1937, already referred to, the appellant and his wife transferred to Aiyadurai not only the land Pannaikaddaiyadi but also two other lands Elumullupattai, Muthiraikaddaiadi. The three lands were the subject matter of a mortgage decree in District Court Jaffna No. 265 on which at the relevant date a balance amount of Rs. 2,000 was payable by the appellant and his wife to

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Aiyadurai. Five lands had originally been covered by the decree but two of them had been released. It is stated in Deed No. 3 that the consideration for the transfer effected by it was the balance amount due on the mortgage decree. Satisfaction of the decree was duly certified of record. On the face of D. 3 it is an unqualified transfer for consideration.

Immediately after the execution of Deed No. 3, on the same day, the respondent by Deed No. 4 leased the property to the appellant and his wife for an agreed rental for a period of six years. As stated by the Supreme Court on the face of these documents " the relationship between Aiyadurai and the appellant had been converted from that of creditor and debtor to that of lessor and lessee ".

The appellant (by secondary oral evidence of an informal agreement) sought to assert that the true position of the respondent was not that of a full owner and lessor but that of a trustee. He said, and the learned trial judge held, that he had handed the informal writing to one Pomiah, an attorney of Aiyadurai who had wrongfully failed to return it and it is not contested that in such circumstances secondary oral evidence was admissible.

In support of his case it was suggested that the consideration for Deed No. 3 of 12th November, 1937, was inadequate and this suggestion was accepted by the trial judge. The Supreme Court rejected the suggestion. On an examination of the evidence led for the appellant on the question of the value of the land their Lordships find that the oral evidence was not sufficiently disinterested, and the documentary evidence not sufficiently related, to the land transferred by the appellant as to form a safe basis for the view that the consideration paid on the transfer was below the value of the land. They think therefore that the view of the Supreme Court that the suggestion should be rejected should prevail. The Supreme Court drew the inference that the consideration was adequate from a valuation made by the appellant of the land in question and certain others for the purposes of a case instituted in 1946 and an admission by the appellant as to the extent of the general increase in the price of land in the years preceding 1946.

The oral evidence led to establish the execution of an informal writing and to prove its contents was that of three persons; Sivagnanam a proctor and notary and nephew of the respondent, the appellant and Virisithamma (4th defendant and 4th respondent to this appeal) a daughter of the appellant. Sivagnanam said that " an informal writing was also executed simultaneously " with the execution of the deed of transfer to Aiyadurai. He did not give evidence as to what the writing contained. The appellant said that he agreed to transfer the land to Aiyadurai because Aiyadurai had said if the debt owed by him to Aiyaduari was paid off within eight years he would retransfer the land to the appellant. He said an informal writing had been given by Aiyadurai to him. Virisithamma was the only witness who purported, speaking from recollection, to state what the contents of the informal writing were. She said: " I saw the document

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personally. The agreement referred to was contained in a piece of paper about 5 in. by 8 in. I can give a summary of the contents. The agreement was Rs. 1,200 for Elumullupattai and Rs. 800 for Pannaikaddayadi and Muthiraikaddai, and these amounts to be repaid by instalments, and Aiyadurai undertook to re-transfer the lands on repaying the amount due". In answer to a question as to whether any period was laid down in the agreement she said that " the period mentioned was eight years ". In the course of cross examination in answer to a question by the trial judge she said for the first time " The rate of interest at ten per cent. was mentioned in the agreement ".

In the answer filed by the appellant the facts relied upon to sustain the plea of a trust were contained in the second paragraph which is to the following effect :—

> " These defendants state that the said land and two other lands were conveyed on the said Deed No. 3 by the 1st defendant and his late wife Annammah to Karthigesu Aiyadurai referred to therein to be held in trust for them and to be re-conveyed to them on their paying to the said Aiyadurai the sum of Rs. 2,000 with interest thereon from 12th November, 1937."

And in the prayer the appellant asked that the respondent be ordered to execute a conveyance in favour of the appellant (and the defendants who were the representatives of Annammah) on payment of the sum of Rs. 2,000 and such reasonable interest from 12th November, 1937, as the Court may order. No mention is made in the answer of the period of eight years or of the rate of interest. A period and a rate were necessary to render the agreement free from the infirmity of indefiniteness but these elements, if present in the agreement, had not impressed themselves sufficiently on the memory of Virisithamma as to make them part of the instructions given to the appellant's proctor for the purpose of filing answer. She said she " instructed the proctor at the time of filing answer ". If the witness Virisithamma showed at the time answer was filed a disregard for the material elements of the agreement to which reference has been made from lack of recollection or even from an incapacity to appreciate their importance her evidence would appear to have lacked that high degree of reliability and the certainty of accuracy upon which alone a court can arrive on oral evidence at a finding of fact affecting adversely a title founded upon a notarially attested document.

In these circumstances it would not have been unreasonable for the learned trial judge, without any reflection on the credibility and honesty of the appellant and his witnesses, to have dismissed the appellant's action on the simple ground that, considering the purpose for which it had been led, he could not regard the evidence as sufficiently reliable as to entitle the appellant to found a case upon it. But the trial judge has not so held and their Lordships hearing this case as an appellate tribunal do not feel disposed to act upon the view that the trial judge should have done so.

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Accepting the secondary oral evidence of Virisithamma as to the contents of the informal writing it will be seen that it contained no reference to a trust and was in terms plainly an undertaking by Aiyadurai to retransfer the land to the appellant on the payment of a specified amount. It was sought to amplify the nature of the undertaking by resort to the evidence as to what was orally stated before the agreement was signed. Objection was taken by the respondent to a consideration of this evidence on the ground that once the agreement was reduced to writing oral evidence to amplify it was not admissible. Their Lordships do not find it necessary to consider this objection because they find the further evidence, if admissible, to be too slender to be regarded as capable of adding to the terms of the agreement.

It was conceded by counsel for the appellant that a refusal however dishonest by a person (say A) to carry out a non-notarial agreement to transfer land for a consideration (to say B) cannot normally be enforced on the ground that the agreement gives rise to a trust in favour of B. But it was argued that if B transfers land to A for a consideration by an effective notarial document and A as part of the same transaction agrees orally or by a non-notarial agreement to retransfer the land to B for the same or another consideration a trust in favour of B arises. Their Lordships do not agree. They think that further facts clearly indicative of a trust must be proved before a trust can be said to arise. In the case of *Perera v. Fernando* [1] 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 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 the case of *Adicappa Chetty v. Caruppan Chetty* [2] the facts were different but it was sought to establish by oral evidence that a person who held a land under a notarially attested document held it in trust for another. Lord Atkinson delivering the judgment of the Board held that parol evidence was inadmissible. He held that the agreement to establish which parol evidence was given sought to " create something much more resembling a mortgage or a pledge than a trust " and was consequently of no force or avail in law if it contravened the provisions of the Prevention of Frauds Ordinance.

[1] *(1914) 17 N. L. R. 486.* [2] *(1921) 22 N. L. R. 417.*

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It was urged by the appellant that the decision of the Board in *Valliamma Atchi v. Abdul Majeed* [1] supported his case. In that case it was held on facts established by oral evidence that a creditor held on trust a land conveyed to him by a debtor by a notarial document which on the face of it purported to be an outright deed of sale and made no reference to a trust. Chief among the purposes of the trust were that the transferee should enter into possession, collect the income and therewith pay off the debt due to himself and debts due to certain other persons. The transferee was thereafter to reconvey the property to the transferor. One of the points argued in that case was " that there was no evidence to support the finding that the trust alleged in the plaint was proved ; that at the most, the evidence showed only that the conveyance P21 was in the nature of a mortgage involving an obligation to reconvey the property to the transferor on payment of the debt due to the transferee ". This argument was rejected and it is this rejection that the appellant seeks to rely upon. In rejecting the argument their Lordships said that they " have been referred to the relevant evidence and they are satisfied that there was ample evidence, if admissible, to justify the finding that the trust was established. They accept the concurrent findings of the Courts in Ceylon upon this point ". What the evidence referred to was is not stated in the judgment although the purposes of the trust were, but it is clear that the judgment proceeded upon the basis that it was ample. No doubt the purposes of the trust would have formed a part of that evidence. The decision does not in terms or otherwise detract from the force of the view expressed by the Board in the case of *Adicappa Chetty v. Caruppan Chetty*. If the agreement between the parties had been one creating " something much more resembling a mortgage or a pledge than a trust " it would have been held to have been of no force unless it had been contained in a notarially attested document. It is true that in the case of *Valliamma Atchi v. Abdul Majeed* and in the case now before their Lordships there are common elements. There is in each case an alleged agreement by a transferee of land to reconvey it to the transferor. The transferor is in each case indebted to the transferee at the time of the transfer. But these elements by themselves do not establish a trust. They establish an agreement to reconvey. The judgment in *Valliamma Atchi v. Abdul Majeed* does not indicate that the common elements mentioned are in all cases sufficient to give rise to a trust. It proceeded as already stated upon the view emerging from an examination of the particular facts of the case that there was ample evidence to establish a trust. In the case before their Lordships although the elements referred to as common elements exist, there is nothing of sufficient weight which, taken together with them, can support the proposition that a trust has been established.

For the reasons which they have given, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the first respondent.

Appeal dismissed.

[1] *(1947) 48 N. L. R. 289.*

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1954 *Present:* **Rose C.J., Gratiaen J., Gunasekara J., Sansoni J., Fernando A.J.**

A. G. DE MEL, Appellant, *and* R. C. DE NEISE (Inspector of Police), Respondent

S. C. 1,286—M. C. Colombo, 28,870

Post Office Ordinance (Cap. 146)—Sections 71 (1) and 88 (1)—Applicability of Sections 11 and 152 (3) of Criminal Procedure Code.

A Magistrate who is also a District Judge has power under Section 152 (3) of the Criminal Procedure Code to assume jurisdiction to try an offence punishable under Section 71 (1) of the Post Office Ordinance and which, by reason of Section 88 (1) of that Ordinance, is triable in a District Court. The reference to the District Court in Section 88 is permissive and not exclusive.

Section 152 (3) of the Criminal Procedure Code is a provision contemplated by proviso (*b*) of Section 11 of that Code.

THIS appeal from a judgment of the Magistrate's Court, Colombo, was referred under Section 48 of the Courts Ordinance to a Bench of five Judges.

M. M. Kumarakulasingham, with *J. C. Thurairatnam*, for the accused appellant.

T. S. Fernando, Q.C., Solicitor-General, with *Douglas Jansze* and *V. S. A. Pullenayagam*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

July 14, 1954. ROSE C.J.—

This appeal comes before us on a reference under Section 48 of the Courts Ordinance. The question that has been reserved for our decision is whether a Magistrate who is also a District Judge has power under Section 152 (3) of the Criminal Procedure Code to assume jurisdiction to try an offence punishable under Section 71 (1) of the Post Office Ordinance and which, by reason of Section 88 (1) of that Ordinance, is triable in a District Court.

In this matter there has been no certification by the Attorney-General under the proviso to Section 88, and the relevant part of that Section, as far as the present matter is concerned, reads as follows :—

> "Offences under this Ordinance which, by reason of the amount of the penalties with which they are punishable are not within the summary jurisdiction of a Magistrate's Court, may be tried in a District Court, and such Courts, in cases where the punishment assigned to such offences exceeds the ordinary jurisdiction of a District Court, may award in respect of such offences so much of the punishment assigned thereto as District Courts are by law empowered to award."

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Learned Counsel for the appellant contends that the above section "mentions" the District Court as being the appropriate court for the trial of offences contra Section 71 of the Ordinance within the meaning of Section 11 of the Criminal Procedure Code, the relevant provision of which reads as follows :

> "Any offence under any law other than the Penal Code shall when any court is mentioned in that behalf in such law be tried by such court."

He relies on *Attorney-General v. Sinnethamby et al.*[1]. It is to be noted that the matter under consideration in that case was whether a Magistrate who is also a District Judge could exercise his powers under Section 152 (3) of the Criminal Procedure Code in regard to an offence contra Section 58 (1) of the Ceylon (Parliamentary Elections) Order in Council, 1946. Section 58 reads as follows :

> "Every person who—
>
> (*a*) commits the offence of . . . . shall be guilty of a corrupt practice and shall on conviction by a District Court be liable . . . ."

The learned Solicitor-General contends that "mentioned in that behalf" in the first sentence of Section 11 of the Criminal Procedure Code means mentioned to the exclusion of any other court. Upon this view of the matter there would seem to be no conflict between the case cited above and *Gunawardene v. Vythialingam*[2], which held that on a proper construction of Section 43 of the Telecommunication Ordinance the jurisdiction of a Magistrate under Section 152 (3) of the Criminal Procedure Code remains unaffected in every case where the Attorney-General has not sought to exercise the special power conferred on him by the proviso to Section 43.

It is apparent that the provision with regard to the court of trial in Section 58 of the Elections Order in Council is mandatory and that it therefore follows that the first sentence of Section 11 of the Criminal Procedure Code is applicable, whereas the learned Judge in the case under the Telecommunication Ordinance considered that the reference to the District Court in that Ordinance was permissive and not exclusive. While the Telecommunication Ordinance is not under our direct consideration in the present matter, we would observe that we see no reason to dissent from his reasoning.

To come to Section 88 of the Post Office Ordinance with which we are here concerned, we consider that the reference to the District Court in this Section too is permissive and not exclusive. It follows from this

[1] (*1948*) *49 N. L. R. 385.* [2] (*1950*) *43 C. L. W. 75.*

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that the first sentence of Section 11 of the Criminal Procedure Code is inapplicable and the matter is governed by the remainder of the Section which reads as follows :—

"When no court is mentioned it may be tried by the Supreme Court or by any other court mentioned in that particular schedule provided that :

(*a*) . . . .

(*b*) Except as hereinafter provided no Magistrate's Court shall try any of such offences . . . ."

That being so, there can be no doubt—and it is not suggested to the contrary by learned Counsel for the appellant—that Section 152 (3) is a provision contemplated by sub-section (*b*) above.

For these reasons the question under reference must be answered in the affirmative and the appeal is dismissed.

GRATIAEN J.—I agree.

GUNASEKARA J.—I agree.

SANSONI J.—I agree.

FERNANDO A.J.—I agree.

Appeal dismissed.

1953 *Present :* **Gratiaen J. and Gunasekara J.**

D. N. W. A. KUMARASINGHA, Appellant, *and* H. ANDIRISHAMY, Respondent

S. C. 145 (Inty.)—D. C. Tangalle, P 182

Partition action—Interlocutory decree—Improvements made by co-owner—Special direction to Commissioner relating to them—Scope—Partition Ordinance, s. 5.

When a Court enters interlocutory decree in an action for the partition of a land it would be acting prematurely if, without examining all the relevant considerations, it gives an *unconditional* special direction to the Commissioner to the effect that a co-owner who has made certain improvements should be allotted, in lieu of his undivided share, a specified portion which includes those improvements.

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APPEAL from an order of the District Court, Tangalle.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the plaintiff appellant.

Vernon Wijetunge, for the 7th defendant respondent.

Cur. adv. vult.

March 25, 1953. GRATIAEN J.—

In this case the learned District Judge entered an interlocutory decree for the partition of the land depicted in Plan No. 350 filed of record, allotting shares to the parties as indicated in paragraph 7 of the plaint. There was no dispute as to the soil shares, but there was a contest as to the claim of the 7th defendant in respect of an improvement represented by Building No. 3 standing on Lot B. The learned District Judge held as a fact that this building had been constructed by the 7th defendant before the action commenced, and in his interlocutory decree he gave a "special direction" that the Commissioner should in his scheme of partition give the 7th defendant his rights in the soil so as to include this building. The present appeal is directed against this "special direction".

A Court, when entering an interlocutory decree, undoubtedly possesses jurisdiction under section 5 of the Partition Ordinance to give a special direction to the effect that a co-owner who has made certain improvements should be allotted, in lieu of his undivided share, a specified portion which includes those improvements. *Jayawardena on Partition* p. 91. But a Court should, I think, be slow to make such a direction *unconditionally*, unless the Court has perfectly satisfied itself, upon an examination of all the relevant considerations, that such a scheme of partition is practicable and just. In *Sinchi Appu v. Wijegoonesekera*[1], Wendt J. directed that, in the circumstances of that particular case, "in the partition the Commissioner making it will, *if possible*, so divide the land that the buildings may fall in the defendants' moiety, but if that be not possible, some other division will be adopted which will give the defendants the entire value of the buildings". Similarly, in *Sanchi Appu v. Marthelis*[2] Pereira J. ordered an interlocutory decree "declaring that the second defendant is entitled to compensation in respect of the house from his co-owners . . . . " and directing that, "*if practicable*, the second defendant, on the partition, be given a portion with the house on it".

The circumstance that a particular co-owner had, in the exercise of his rights as co-owner, built a house on the common land is certainly, even in the absence of special directions by the Court, a weighty consideration to be taken into account by the Commissioner who prepares a scheme of partition for confirmation by the Court. But it is not necessarily the only consideration. In the present case, for instance, the plaintiff draws attention to his claim to be the owner of the land on the east immediately adjoining the portion on which the building stands, whereas the 7th defendant owns the adjoining land on the west which is far removed

[1] *(1902) 6 N. L. R. 1 at page 11.* [2] *(1914) 17 N. L. R. 296 at page 297.*

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from the site of the building. The learned Judge has given no expression in his judgment to his opinion on these or any other factors, but he seems instead to have been influenced almost entirely by his suspicion that the plaintiff, who is wealthier than the 7th defendant, desired a sale instead of a partition of the land so as to "swallow up all the rights in it". This theory is disproved by the plaintiff's evidence where he expressly asked for partition and not for sale.

I am not convinced that the unconditional special direction given to the Commissioner was not premature. It would have sufficed, I think, to have given only a general direction that due consideration should be given by the Commissioner to the circumstance that the 7th defendant was the co-owner who had constructed the building No. 3, and I would prefer not to fetter the Commissioner's discretion to any further extent for the present. It seems to me that, after the scheme of partition which the Commissioner ultimately recommends has been duly submitted, the Court would be in a better position to adjudicate upon any objections which a party might raise against it.

I would amend the decree by substituting for the special direction given by the learned District Judge a direction that the Commissioner should pay due regard to the circumstance that the 7th defendant is the co-owner who constructed the building No. 3 standing on Lot B. Subject to this variation, I would affirm the judgment of the learned District Judge dated 25th May, 1951. In all the circumstances, I would make no order as to costs of this appeal.

GUNASEKARA J.—I agree.

Decree amended.

[COURT OF CRIMINAL APPEAL]

1954 *Present*: **Nagalingam A.C.J. (President), Pulle J. and Weerasooriya J.**

D. D. THEMIS, Appellant, *and* THE QUEEN, Respondent

APPLICATION NO. 27 OF 1954

S. C. 9—M. C. Kalutara, 18,826

Trial before Supreme Court—Jury are sole judges of fact—Requirement of such direction in summing-up—Charge of murder—Duty of Judge to place before Jury every possible defence.

In a trial before the Supreme Court it is the duty of the Judge to caution the Jury that any views he may express on questions of fact are not to be regarded as binding upon them and that they are the sole judges of fact.

In a trial for murder, the fact that the accused or his Counsel does not advert to a possible plea of private defence that may reasonably be said to arise upon the facts does not relieve the Judge from the duty imposed upon him of placing it before the Jury in his summing-up.

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APPLICATION for leave to appeal from a conviction in a trial before the Supreme Court.

Wesley D. Thamotheram, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 5, 1954. NAGALINGAM A.C.J.—

This is an appeal from a conviction for murder, based upon grounds of non-direction amounting to misdirection. The prisoner and two others were indicted upon a charge of murder. The latter were acquitted, while the former was convicted and sentence of death was passed on him. In a very lucid and careful charge the learned Commissioner presented the case to the jury, and the charge, so far as it goes, is beyond criticism.

Two points have been raised by counsel for the appellant in that the charge does not go far enough in that the learned Commissioner failed to caution the Jury that any views he may express on questions of fact are not to be regarded as binding upon them and that they were the sole judges of fact, and secondly that the plea of private defence which arose on the evidence in the case was not placed before them.

To deal with the second point first, the defence of the prisoner as disclosed in his evidence showed that the deceased woman had abused and attacked him by delivering a blow with her fist on his face which loosened one of his teeth and not content with that act she proceeded to get hold of him by his testicles and squeezed them so hard that he felt excruciating pain and that she dragged him in that way causing unbearable pain ; that he in order to release himself from her mortal hold waved a knife which was handy on his person as a result of which the deceased came by her death.

It was conceded at the argument that Counsel for the defence did not himself attempt to rely upon any plea of self defence, nor does it appear that Crown Counsel himself adverted to the possibility of such a defence arising upon the facts established. Counsel for the defence confined himself to putting forward the mitigatory plea of grave and sudden provocation. The learned Commissioner dealt with this plea himself but failed to direct the attention of the Jury that the plea of self-defence was one that arose on the facts as presented by the prisoner. The fact that the prisoner or his Counsel does not advert to a possible defence that arises upon the facts does not absolve or relieve a Judge from the duty imposed upon him by law of placing before the Jury every aspect of the case, including every possible defence that may reasonably be said to arise upon the facts disclosed at the trial. Quite recently this Court had occasion to make a pronouncement on this topic in the case of

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Murugesu [1] where on analogous facts the trial Judge dealt in his summing up with the plea of self defence but failed to direct the Jury adequately on the plea of grave and sudden provocation which arose on a possible view of the facts. In that case the learned trial Judge dismissed the whole plea of grave and sudden provocation with one sentence. This Court held that that direction was inadequate and altered the verdict from one of murder to one of culpable homicide not amounting to murder. We think that the non-direction in regard to the plea of self defence that evidently arises in this case amounts to a misdirection.

There remains for consideration the first point submitted by learned Counsel for the appellant. The learned Commissioner at no stage of his summing up brought home to the minds of the Jurors that they were the sole judges of the facts and that though he himself may express any opinion on questions of fact they were not bound by his views on such questions of fact and that it was entirely a matter within the special province of the Jury to determine whether they would take a particular view or not of the facts. That the learned Commissioner did, as undoubtedly he is entitled to, express his views and give indications of the views he had formed on questions of fact is plain from a reading of the summing up. In fact in this case the learned Commissioner had expressly directed the Jury to bring in a verdict of not guilty against the 2nd and 3rd accused, and when in dealing with the case against the prisoner he expressed his own opinions on questions of fact and disclosed how his mind was working, though on more than one occasion he told them that they must be satisfied in regard to the facts necessary to be established, the criticism that the Jurors may have felt themselves bound by the opinion expressed by the Judge in the absence of a specific caution to the contrary is a criticism that cannot be lightly repelled.

The Court of Criminal Appeal in England in the case of *Frederick Mason* [2] allowed the appeal of a prisoner on the ground that when the trial Judge, while in the course of his summing up said, "I invite you to take such and such a course", that was sufficient to amount to a misdirection in the absence of an accompanying direction that the right of deciding on the facts was solely theirs. Lord Hewart C.J. in delivering judgment expressed himself thus :

> "In the present case there is reason to apprehend that with regard to both the acceptance of certain evidence and the finding in that evidence of corroboration of other evidence the Jury may not have been left sufficiently clearly in the belief that the responsibility was theirs."

In this case, as observed earlier, there was no indication whatsoever given to the Jury that the determination of questions of fact was solely for them and that they were not under any duty of feeling obliged to accept the view of the Commissioner on questions of fact. We are therefore of opinion that the non-direction with regard to the functions of the Jury is also a misdirection.

[1] *(1951) 53 N. L. R. 469.* [2] *(1924) 18 C. A. R. 131.*

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We have given anxious consideration as to what the order is that we should make in this case, and we think that upon a true view the proper order to make is to set aside the conviction and to order a new trial, which we do.

New trial ordered.

1954 *Present :* **Rose C.J. and Fernando A.J.**

R. T. SIRIMALA VEDA, Appellant, *and* P. T. SIRIPALA *et al.*, Respondents

S. C. 393—D. C. Kegalle, 6,186

Civil Procedure Code—Procedure when assignee of a decree seeks to obtain execution—Validity of an order for execution preceded by substitution—Assignee in insolvency—" Representative " of insolvent—Sections 339, 347.

(i) Where the assignees of a decree first applied for substitution as plaintiffs and, after that application was granted, made a separate application for execution, without a formal petition—

Held, that the applications, taken together, constituted substantial and sufficient compliance with the requirements of section 339 of the Civil Procedure Code.

(ii) The assignee in insolvency of a judgment-debtor is a " representative " of the judgment-debtor within the meaning of section 339 of the Civil Procedure Code. Therefore, where a mortgagor against whom a hypothecary decree has been entered is subsequently adjudged insolvent and the hypothecary decree is thereafter transferred by assignment from the mortgagee to any other person, such assignee, when he applies for execution of the decree under section 339 of the Civil Procedure Code, must name as respondent the assignee in insolvency of the judgment-debtor and/or a person who has purchased the mortgaged property from the assignee in insolvency. Failure to do so will render null and void the sale in execution of the hypothecary decree.

APPEAL from a judgment of the District Court, Kegalle.

H. V. Perera, Q.C., with *H. W. Jayewardene* and *D. R. P. Goonetilleke*, for the plaintiff appellant.

N. E. Weerasooria, Q.C., with *Sir Lalita Rajapakse, Q.C.*; and *G. D. C. Weerasinghe*, for the 1st defendant respondent.

C. R. Gunaratne, for the 2nd defendant respondent.

Cur. adv. vult.

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June 7, 1954. FERNANDO A.J.—

The plaintiff appellant in this case instituted an action against three defendants for declaration of title to a ⅓rd share of a land called Divelgam Walauwa-watte ; the claim against the 3rd defendant was adjusted at the trial and the contest was between the plaintiff on the one hand and the 1st and 2nd defendants on the other.

The share in dispute was originally owned by one Richard Nugawela, who mortgaged the land in 1924 as security for a sum of Rs. 15,550. The mortgagees put their bond in suit in 1924 and hypothecary decree was entered in that action on December 12th, 1929. Although notice was served on the mortgagor in 1931 to show cause why commission for sale of the mortgaged property should not issue, no steps were taken at that stage to have the property sold in execution.

Richard Nugawela, the original owner and mortgagor, was adjudged insolvent in 1936, and on October 7th 1936 the Secretary of the District Court of Kegalle was appointed assignee of the insolvent estate ; the share in dispute in the present case was sold by the assignee on April 11th 1938 with leave of the Court, the sale was confirmed by Court, and on October 10th 1938 a conveyance was executed in favour of the purchaser who is the plaintiff in the present action. The plaintiff's claim to the share in dispute is based on this conveyance.

In March 1939 the mortgagees who had obtained the hypothecary decree in the mortgage action assigned the decree to the 1st and 2nd defendants who on May 5th 1939 filed a petition in the mortgage action for the substitution of themselves in place of the original plaintiffs *for the purpose of proceeding with the action to recover the amount due under the decree in this case.* The mortgagor Richard Nugawela was the only respondent named in the petition and notice was issued on him, but although he was represented at the hearing of the petition of July 5th 1939, no objections were filed on his behalf to the application of May 5th 1939. The Court at first made order that writ (presumably for execution) may be issued but, upon a statement by the proctor for the petitioner that his application was only for substitution, the Court vacated the order for issue of writ and only allowed substitution. Subsequently on July 20th 1939 the substituted plaintiffs applied for notice on the defendants (Richard Nugawela) to show cause against the issue of a commission for the sale of the mortgaged property, and cause not having been shown the commission for sale issued. That commission was returned unexecuted on September 1st 1940 on the ground that the substituted plaintiffs were not desirous that the sale be held for some reason of their own. On application made on October 14th 1940 and after notice to the defendant Nugawela, the commission was reissued on December 19th 1940. The property was sold under that commission and purchased by the substituted plaintiffs in whose favour a conveyance was executed on April 15th 1943. The title of the 1st and 2nd defendants to the present action, who were the substituted plaintiffs and the purchasers in the mortgage action, is based on that conveyance.

The learned District Judge has dismissed the plaintiff's action holding that the title of the 1st and 2nd defendants on the conveyance of 1943

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in the mortgage action confers a better title than that obtained by the plaintiff by virtue of the conveyance in his favour in the Insolvency proceedings. This appeal against the judgment of the District Judge is based purely on questions of law concerning regularity of the proceedings in the mortgage action which preceded the sale in execution under the hypothecary decree. Counsel for the plaintiff appellant questioned the regularity of those proceedings on three grounds.

Firstly it was argued that under section 339 of the Civil Procedure Code the only application which may be made by the assignee of a decree is one for *execution* of the decree, that it must be made by *petition* and that on such a petition the order for substitution of the assignee as plaintiff could only be ancillary to the substantial order which the Court may make namely an order for execution of the decree. It was urged that the order of Court made on July 5th 1939 for the substitution of assignees as plaintiffs was a nullity because the Court had no jurisdiction to allow the substitution except upon an application for execution of the decree. Counsel referred to the case of *Rajapakse v. Bastian*[1] where this Court upheld the refusal of the District Court to allow the application by the assignee of a decree to have himself substituted as plaintiff in the action. There too the applicant's counsel had as in the present case stated that *the application was one for substitution and that he was not asking for execution.* Howard C.J. held that an application made merely for an assignee to be brought on the record without any other prayer will not lie. Such application must ask for execution of the decree. The first contention of the appellant in this case was therefore that the petition for substitution was a nullity, that the only application properly before the Court was that made on October 14th, 1940 for execution, and that the latter not having been made in compliance with section 339, i.e., by petition in which the mortgagor-defendant (*inter alia*) should have been made respondent, the Court had no jurisdiction under section 339 to allow execution.

There are seemingly conflicting decisions or dicta of this Court as to what the correct procedure should be when the assignee of a decree seeks to obtain execution, particularly with regard to the question whether it is permissible for the Court to allow an application for execution *which has been preceded by an application for substitution.* In *Abeywardene v. Marikar*[2], Withers J. held (Burnside J. *dubitante*) that an application for the substitution of the legal representative of a deceased plaintiff was an incidental step, and that it should be made by motion and not by petition by way of summary procedure. In *Adawiappen v. Aboobucker Lebbe*[3], Schneider J. held that in a case where the plaintiff had died after decree, " before any step in execution can be taken it was necessary that some person should have been substituted in his place. The procedure for doing so is pointed out in *Abeywardene v. Marikar*[4]. This substitution having taken place, then a motion should have been submitted for execution of the decree ". In *Silva v. Kavanihamy*[5], although the question of the validity of an order for execution preceded

[1] *(1940) 42 N. L. R. 214.*
[2] *(1892) 1 S. C. R. 192.*
[3] *(1924) 6 C. L. Rec. 17.*
[4] *(1892) 1 S. C. R. 192.*
[5] *(1948) 50 N. L. R. 52.*

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by substitution did not directly arise, yet the practice of allowing execution in such circumstances was referred to without criticism. Canekeratne J. said at p. 53 "the judgment-creditor having died an application for substitution was made thereafter, and after notice to the debtor, certain persons, one of whom was P. H. W. Edwin Singho, were substituted on January 13th 1937. On November 8th 1937, an application for execution was made to the Court by the substituted plaintiffs. It is in the form specified in the Code, Form 42 in the schedule and is marked 5 D5, the names of the plaintiff and of the defendant are given in the application and the amounts paid are shown. The prayer is that the writ lying in the above case may be executed and be issued for execution to recover Rs. 691·83½ with further interest. It was allowed by the Judge." In *Latif v. Seneviratne*[1] Hearne J. said that s. 339 does not contemplate that there should be an application for substitution as distinct from an application for execution. All that is necessary is that the transferee should file his application for execution setting out the grounds on which he claims to be the transferee and the Court orders the application for execution to proceed or rejects it. If the Court allows the application it also orders that the transferee's name be substituted for that of the original decree holder. He pointed out that in that case the fact that the application for execution was not made by petition did not vitiate the sale. The application set out all the relevant details, a formal declaration was made that the details were true and the appellants given due notice, and he held that even if the application cannot be described as a petition he would follow the principle that the Court would not be disposed to set aside an execution on merely technical grounds when the execution has been found to be substantially right.

In view of these cases it appears that our Courts have not laid it down as a *sine qua non* for the validity of an order for execution under section 339 that there must be strict compliance with the exact procedure specified in the section. The argument for the appellant in this case is that the provisions of the section are mandatory and that the Court would only have jurisdiction to allow an order for execution where there has been strict compliance : in the absence therefore of the contemplated application *by petition* the Court if it allows execution would not be committing an error of jurisdiction, but would be acting without jurisdiction, a circumstance which would totally vitiate the order for execution. Counsel for the respondent urged that there had been substantial compliance with the provisions of s. 339 and relied on decisions relating to s. 347 where substantial compliance was held to have been sufficient. A Full Bench of the Bombay High Court in the case of *Lakhamshi v. Dahyabhai*[2] dealing with Order 21 Rule 16 of the Indian Civil Procedure Code which provides for execution upon application of the assignee of a decree, held that the assignee cannot get a decree executed unless he had established his title to be assignee after giving notice to the judgment-debtor and after his objections if any had been heard by the Court. It was pointed out that while the Privy Council regarded the notice to the judgment-debtor as mandatory and the very foundation of the jurisdiction to allow execution, the view of the Privy Council was that

[1] *(1938) 40 N. L. R. 141.* [2] *A. I. R. (1949) Bombay 63.*

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what is prohibited is the execution of the decree *without hearing the objections of the judgment-debtor*. The facts of the case were that though no notice was given to the judgment-debtor in terms of the section, nevertheless the debtor did appear and raised objections challenging the title of the assignee to maintain the execution proceedings. The Court held that the irregularity of not issuing the necessary notice had been cured by the judgment-debtor putting in a written statement and filing his objections which were considered before execution was allowed.

Applying the *ratio decidendi* of that case to the one before us it will be seen that the object which the Legislature had in view in providing for a procedure by way of petition for an application for execution has been substantially satisfied. Although in fact the application of October 14th 1940 for execution was not made by petition and did not specify the title of the assignee to ask for execution, yet there had been previously made to the Court a petition for substitution upon which the judgment-debtor could if he so wished have challenged the title of the petitioner. He was aware, and the Court was aware, when the subsequent application for execution was made, that substitution had previously been allowed by the Court on the application by the assignee. The principal object of the section being not so much to permit objections to the issue of execution but to permit challenge of the validity of the assignment, that object was in my opinion substantially satisfied by what took place in the proceedings in the mortgage action. Howard C.J., in *Rajapakse v. Bastian*[1], said that the question for decision in that case is whether the petition in that case could be regarded as an application for execution. Undoubtedly it could not. But if in fact it had been followed by an application for execution I do not think the Court would have had much hesitation in deciding that the applications taken together constituted substantial and sufficient compliance with the requirements of s. 339.

For the reasons set out above, I am of opinion that the conveyance in favour of the respondents cannot be impeached on the first ground contended for by the appellant.

Secondly, Counsel for the appellant argued that the order for execution of the decree in favour of the substituted plaintiffs in the mortgage action was invalid on the ground that the original plaintiffs (who had assigned their rights under the decree to the defendants in the present case) had not been named respondents to the application for execution. Here too the principle sought to be relied on is that the provisions of s. 339 are mandatory and that the naming of the assignors as respondents was essential in order to confer jurisdiction on the Court. The object of the section in requiring that they be so named was to give them an opportunity of denying the validity of the assignment or of alleging that the assignment was subject to some reservation or qualification.

On the facts of the present case there appear to have been no circumstances whatever which would permit one to take the view that this object had been even substantially secured. The effect of the order for execution and the substitution allowed by the Court would have been

[1] (*1940*) *42 N. L. R. 214.*

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to sweep away the right of the alleged assignors, and undoubtedly the latter would be entitled successfully to challenge the validity of such an order on the ground that it was made without notice to themselves. It is not equally clear that a third party like the present appellant would have a similar right. There is much to be said for the view that the failure to comply with a procedural provision framed to secure so important an object would vitiate the order for execution, but in view of my decision on the third point raised by the appellant it is unnecessary for the purposes of this case to decide the question involved on this second ground of appeal.

The third ground taken at the argument in appeal is that the order for execution and the sale and conveyance in pursuance of it are void by reason of the failure to name, as respondents to the petition for execution, the assignee in insolvency of the original mortgagor and/or the present plaintiff who had purchased the property in the insolvency proceedings. Counsel for the appellant conceded that the title of the plaintiff to the property which he purchased was subject to the hypothecary decree previously entered in the mortgage action, but argued that never-the-less the rights under the hypothecary decree could not be enforced in such manner as to affect the title of the appellant unless the assignee in insolvency or the appellant or both had been named respondents in the execution proceedings.

There is no express provision in the Code laying down the procedure to be followed by the holder of a decree in a case where the judgment-debtor is subsequently declared insolvent and an assignee in insolvency appointed. In *Carson v. William Cameron* [1] a mortgagee had obtained a hypothecary decree, but before the mortgaged property was seized in execution the mortgagor was adjudicated insolvent and an assignee of his estate appointed. Subsequently, the plaintiff applied *ex parte* to have the assignee made a party defendant and for execution to be levied on the mortgaged property. The District Judge refused the application on two grounds :—*Firstly*, that the assignee could not be made a defendant at a stage after judgment, and *secondly*, that the plaintiff was not entitled to interfere with the assignee's duties and rights of administration which included the right to sell the insolvent's interests in the mortgaged property. Immediately thereafter a proxy was filed on behalf of the assignee authorising the proctor to consent to the issue of execution against the mortgaged property. Clarence J. held in appeal that the mortgagee is entitled to proceed to execution under his decree and the insolvency threw no obstacle in his way. The learned Judge was " not at present prepared to say that the mortgagee was bound even to give the assignee notice before proceeding to execution ", but he did not consider the point because in fact the assignee had intimated to Court that he did not oppose the plaintiff's application for execution. Counsel for the respondent in the present appeal relied on that judgment as authority for the argument that there was no necessity to name the assignee or his successor in title as respondent in the proceedings under s. 339. It must be noted however that the remark of Clarence J. regarding the need for notice to the assignee was clearly an *obiter dictum*. In *Suppiah*

[1] (1883) 5 *S. C. C.* 149.

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Pillai v. Ramanathan[1] it was held that where the property of a judgment-debtor had been seized in execution of a decree, the insolvency of the judgment-debtor after seizure does not abate the seizure and that therefore, the seized property being already in the hands of the law it was not necessary to substitute the assignee in insolvency in place of the insolvent debtor. That decision is inapplicable to the case of a hypothecary decree where the title to the mortgaged property still remains in the judgment-debtor, being only liable to be sold under a subsequent order if the principal debt is not paid. The property would not come "into the hands of the law" until the order to sell is actually issued. In *Santiago v. Segu Mohamado*[2] the judgment in which was only a brief one, the District Judge had apparently refused to permit the judgment-creditor to enforce his hypothecary decree, presumably because the Judge thought that the subsequent insolvency of the debtor barred the right of execution. Apparently also in that case no assignee in insolvency had even been appointed, and that being so the title to the mortgaged property undoubtedly remained with the judgment-debtor. Obviously therefore the plaintiff was fully entitled to have the land sold in execution of his decree, the right which this Court recognised in appeal. Macdonell C.J. however said that after the sale or auction "the money or the proceeds thereof would have to be lodged in Court and there will then be ample opportunity for the assignee of the insolvent, if such be then appointed, to show cause against the money being paid out to the plaintiff and to impeach the plaintiff's mortgage". It might be that this was said *obiter*, but the learned C.J. must have intended it either as guidance or as a directive to the lower Court in regard to the matter of the disposal of the proceeds of sale. If it is open to an assignee to impeach a mortgage, a sale in execution of which had taken place even prior to his appointment as such, it would seem to follow *a fortiori* that after he is appointed an order for sale cannot issue except after notice to him.

We were not referred to any decision expressly declaring that a decree which has been entered against a defendant who subsequently becomes insolvent cannot be executed without notice to the assignee. But recognition of the status of the assignee is implied in the judgment of Drieberg J. in *Hong Kong and Shanghai Bank v. Krishnapillai*[3] where in his judgment at p. 255 (citing from *Mathiah v. Markar Tamby*[4]) he refers to three courses open to a mortgage creditor when the mortgagor is adjudicated insolvent—"he should make a formal demand of the assignee in order to allow him the opportunity of redeeming the mortgage under s. 76 of the Ordinance and disposing of the property for the benefit of the creditors; if the assignee does not elect to redeem the property the mortgage creditor can prove his claim under the mortgage bond and when the property is sold he can draw the whole proceeds or so much as is sufficient to satisfy his claim, or he might bring an action on the bond against the mortgagor as debtor and against the assignee as the party in whom the property has vested under s. 71 of the Ordinance, obtain a hypothecary decree and have the property sold".

[1] *(1920) 22 N. L. R. 225.*
[2] *(1931) 32 N. L. R. 222.*
[3] *(1932) 33 N. L. R. 249.*
[4] *(1884) 6 S. C. C. 83.*

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The dictum of Drieberg J. referred only to the position of a creditor upon a mortgage and not to one of a creditor who had obtained a mortgage decree prior to the insolvency of the debtor; but I find it of assistance in construing the provisions of s. 339 of the Civil Procedure Code which requires the assignee of the decree to name as respondent to his petition for execution " the parties to the action or their representatives ". The person who must first and obviously be named respondent is the judgment-debtor, but where an assignee of the judgment-debtor has been appointed already, his title to the mortgaged property as well as his interest in the proceedings in the mortgage action would have ceased and undoubtedly the object of the section is not secured by serving a notice on him of the petition for execution.

Counsel for the 1st respondent relied on decisions that in considering the validity of execution proceedings, the Court would not insist on compliance with technical requirements as to procedure. That principle is well recognised, but when there is non-compliance with any particular procedural requirement, it is the duty of the Court to consider the object which the Legislature had in mind when imposing the requirement and the importance of that object: if in fact the consequence of the procedural defect is that some important object has not been secured or that a means of protection intended to be afforded to some party or other interested person has not in fact been afforded to him, then the execution cannot be said to be substantially right and a Court which declares it invalid will not be doing so on "merely technical grounds". Counsel also cited the case of *Malkarjun v. Narhari and another*[1] where upon the death of the judgment-debtor notice was served on a person stated by the plaintiff and found by the Court to be his legal representative. The Privy Council held that once notice was served the Court had jurisdiction to order the sale despite its erroneous finding that the party served was the legal representative. This case was distinguished by the Privy Council in *Ragunath Das v. Sundar Das Khetri*[2] on the ground that in the latter case where the debtor had been adjudicated insolvent no notice of the application for execution had been served on the assignee of the insolvent estate. The two cases illustrate the difference between an error of the Court in the exercise of jurisdiction, which would make the execution only voidable, and a failure to take a step necessary to found jurisdiction, which renders anything done in purported exercise of the jurisdiction a nullity. The defect in the case now before us is clearly one of the latter description. The case of *Ragunath Das v. Sundar Das Khetri* is of importance because in fact the assignee had notice of an application for substitution but no notice of the application for execution.

Another argument which we were invited to consider in favour of the respondents to this appeal was that s. 339 of the Civil Procedure Code does not apply to a mortgage action. For the 1st respondent it was urged that S. 12 of the Mortgage Ordinance (Cap. 74) includes the power to give directions for the substitution of parties at the stage of execution: Counsel for the 2nd respondent made the more extreme suggestion that

[1] (1900) 27 *Ind. App.* 216, 25 *Bombay* 337. [2] *I. L. R.* (1914) 42 *Cal.* 72.

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the whole set of provisions in the Civil Procedure Code dealing with execution is excluded from application to a mortgage action. Even assuming for a moment the correctness of either or both of these contentions, the most favourable conclusion one could draw would be that the matter of the execution of a hypothecary decree in circumstances such as those obtaining in this case is left to the discretion of the Judge. But that discretion, if such there be, must be exercised judicially and reasonably ; and requirements such as those set out in s. 339 are no more than what a Court should insist upon as conditions precedent to the exercise of its discretion. I would therefore hold that the assignee in insolvency of the judgment-debtor and/or a person who has purchased the mortgaged property from the assignee in the insolvency proceedings is a "*representative*" of the judgment-debtor within the meaning of s. 339, that accordingly each or one of those persons should have been named as respondents to the proceedings under s. 339 and that the sale in execution of the hypothecary decree obtained against Richard Nugawela, the original defendant in the mortgage action, was void on the ground that neither the assignee nor the present appellant was named a respondent to, or in any manner participated in, the proceedings under s. 339.

The appeal is therefore allowed and decree will be entered in favour of the plaintiff-appellant as against the 1st and 2nd defendants declaring him entitled to the property claimed. The 1st and 2nd defendants must pay the costs of this appeal and of the contest in the lower Court to the plaintiff. That part of the decree of the District Court which requires the plaintiff to give up possession to the 3rd defendant of a share of certain contiguous lands (a matter which was settled by agreement on 30th October 1950) and the payment of the costs of the 3rd defendant will not be affected by the judgment in this appeal.

ROSE C.J.—I agree.

Appeal allowed.

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1954 *Present :* **Gratiaen J. and Gunasekara J.**

COMMISSIONER OF INCOME TAX, Appellant, *and* CHETTINAD CORPORATION, LTD., Respondent

S. C. 458—Case Stated for the Opinion of the Supreme Court under the provisions of the Income Tax Ordinance (Cap. 188)

Excess profits duty—Partnership—Liability of each partner—Procedure for assessment—Excess Profits Duty Ordinance, No. 38 of 1941, ss. 12 (1) (2), 14 (1), 19—Income Tax Ordinance, ss. 29, 64–67, 68 (2) (b), 76 (1).

Under section 12 (2), read with section 19, of the Excess Profits Duty Ordinance excess profits duty may be assessed on any partnership. And under section 12 (1) the procedure for assessment and notice of assessment is analogous to that which is prescribed by sections 64 to 67 of the Income Tax Ordinance.

Section 76 (1) of the Income Tax Ordinance, which, by virtue of section 14 (1) of the Excess Profits Duty Ordinance, is applicable " as far as may be " to the payment and recovery of excess profits duty, imposes a liability on each partner to pay, in terms of the notice served upon him, the total amount of the duty due from the partnership.

CASE stated under section 74 (1) of the Income Tax Ordinance.

Walter Jayawardene, Crown Counsel, with *J. W. Subasinghe*, Crown Counsel, for the Commissioner of Income Tax, appellant.

S. Nadesan, with *S. Ambalavanar*, for the assessee respondent.

Cur. adv. vult.

March 22, 1954. GRATIAEN J.—

This is a case stated by the Board of Review for the opinion of the Supreme Court on the application of the Commissioner of Income Tax. Broadly stated, the dispute is as to whether the Chettinad Corporation, Ltd. (hereafter referred to as " the respondent ") is entitled to escape liability to pay the full amount of duty assessed under the Excess Profits Duty Ordinance, No. 38 of 1941 (as amended by Ordinances Nos. 6 of 1942, 39 of 1942 and 39 of 1944), on the " excess profits " of a rubber business carried on during four accounting periods between 15th April, 1943, and 31st December, 1946.

It is common ground that, under two agreements dated 15th April, 1943, and 14th November, 1945, the Lomond Rubber Mills Ltd. of Kelaniya carried on " the business of buying raw rubber, manufacturing rubber and selling the manufactured product " during the relevant

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accounting periods; and this business was "managed and financed" by the respondent upon certain terms which provided that the respondent should receive *inter alia* from the Lomond Rubber Mills Ltd. a share of the profits.

The Assessor took the view that these agreements constituted a partnership or joint venture between the respondent and the Lomond Rubber Mills Ltd., and four notices (A8 to A11) were served on the respondent requiring it, in respect of each accounting period, to pay the full amount of excess profits duty computed under the Ordinance. The respondent appealed to the Commissioner, and the only ground on which the assessments were challenged in those proceedings was that the respondent denied that it held a partnership interest in the business; the argument was that the contractual arrangement for a division of the profits should be construed as stipulating only for payments to the respondent of something equivalent to "interest" under a money-lending transaction. The Commissioner rejected this argument and upheld the assessments. He also recorded an admission made on behalf of the respondent that "*If it is held that there is a partnership, then the assessments on the figures as now agreed must stand*".

An appeal was preferred to the Board of Review against the Commissioner's determination, and once again the principal argument was that the agreements dated 15th April, 1943, and 14th November, 1945, did not constitute a partnership. On this issue the Board reversed the Commissioner's decision and held that no partnership had been established, so that the assessments would have had to be annulled on this ground alone. But the Board also proceeded to consider the respondent's further objection (which was inconsistent with its position taken up during the earlier appeal before the Commissioner) in the following terms:

> "Even if the agreements constituted a joint venture, the assessments could not have been made on us only as we were not the person solely owning or carrying on the business, and *the assessments are therefore invalid and of no force or avail in law.*"

The respondent admittedly placed no material before the Board (apart from the actual notices of assessment A8 to A11) to enable them to determine this issue. The decision of the Chairman, with whom the other members of the Board agreed, was as follows:

> "The second issue is whether, if a partnership has been proved, the claim is still bad *because the assessment notice is invalid.* I will not discuss this at length, but hold that *it is invalid* because it is not an assessment of a partnership of Lomond Company and the Chettinad Corporation. It is an assessment of the Chettinad Corporation.
>
> It seems to me far from reasonable that the appellant (corporation) should be made liable to pay on the whole of the profits when he

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receives only half the profits and when he has already deposited E. P. D. on that behalf. My colleagues agree to allow this appeal."

The assessments were accordingly annulled by the Board on both grounds. The Commissioner thereupon applied for a case stated under section 74 (1) of the Income Tax Ordinance (which also applies to the Excess Profits Duty Ordinance) on the following questions of law :

" (*a*) whether the determination of the Board that there was no partnership between the Chettinad Corporation, Ltd. and the Lomond Rubber Mills Ltd. is correct ;

(*b*) whether the determination of the Board that there has not been an assessment of the said partnership is correct ".

These two questions were duly submitted for the opinion of this Court, except that the second question has been amended by the Board by the insertion of the words " nor due notice of such assessment " between the words " partnership " and " is correct ".

With regard to the issue whether the agreements between the respondent and the Lomond Rubber Mills Ltd. constituted a partnership between them, Mr. Nadesan informed us at the outset that he was unable to support the decision of the Board. He agreed that the validity of the respondent's claim to exemption from duty on the excess profits of the business should be determined by us solely by reference to the second question of law submitted for our opinion, and on the assumption that the profits of the business during the relevant periods were in fact and in law the profits of a partnership. It is therefore necessary only to consider whether the Board correctly decided that " there has not been an assessment of the partnership ". In my opinion this question should be answered in favour of the Commissioner.

It is important to avoid confusion between the requirements contained in the relevant revenue enactments as to " an assessment " on the one hand and " a notice of assessment " on the other.

Section 12 (1) of the Excess Profits Duty Ordinance makes the provisions of Chapter 10 of the Income Tax Ordinance applicable " as far as may be " to the assessment of excess profits duty, and section 12 (2) declares that " the duty may be assessed on any person for the time being owning or carrying on a business ". Section 19 provides that in this context " any person " must be interpreted so as to include " any partnership ". For purposes of income tax, by way of contrast, partnerships are expressly excluded from the statutory definition of the terms " person " and " body of persons " in the Income Tax Ordinance : the principle of the scheme of taxation under that Ordinance in respect of income derived from a partnership business is that each individual partner is liable to be assessed only in respect of his own share of the profits (section 29).

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Section 64 of the Income Tax Ordinance empowers an Assessor to assess every "person" (as defined in that Ordinance) who is in his opinion chargeable with income tax. The *assessment* so prepared by the Assessor is then scrutinised and either approved or amended by an Assistant Commissioner, who in due course signs *the assessment* if he is satisfied that, in its final form, it charges the person to whom it relates with the full tax with which he ought to be charged (section 66). Eventually, section 67 empowers the Assistant Commissioner to issue *a notice of assessment* "to each person who has been assessed stating the amount of income assessed and the amount of tax charged". The distinction between an "assessment" and a "notice of assessment" is thus made clear: the former is the departmental computation of the amount of tax with which a particular assessee is considered to be chargeable, and the latter is the formal intimation to him of the fact that such an assessment has been made. Section 68 (2) (*b*), for instance, declares that "an assessment shall not be impeached or affected *by reason of any variation between the assessment and the notice thereof*".

The analogous procedure which ought to be followed by the taxing authorities in a case where excess profits duty is chargeable on the profits of a business carried on by two or more persons in partnership must now be examined. The Assessor should prepare an assessment of duty *on the partnership* under section 12 (2) of the Excess Profits Duty Ordinance; this assessment must then be scrutinised and signed (after amendment, if necessary) by an Assistant Commissioner under section 66 of the Income Tax Ordinance; and thereafter, the Assistant Commissioner must issue *to each partner* a notice of assessment under section 67. Once this has been done, section 14 (1) of the Excess Profits Duty Ordinance makes the provisions of section 76 (1) of the Income Tax Ordinance applicable "as far as may be" to the payment and recovery of excess profits duty. In consequence, each partner is liable to pay the total amount of duty claimed in terms of the notice served upon him, and, in the event of non-payment, he becomes a defaulter to the full extent (and not merely of a proportionate share). It will be observed that, whereas section 76 (1) operates only in exceptional cases in the context of liability to income tax, it enjoys a very much wider scope when excess profits duty is levied on partnership profits. (In the latter case, an individual partner may lawfully be called upon to discharge the whole of the partnership liability, and, if he has done so, he would generally have an independent claim for contribution from the other partners.)

In this case, the respondent had not raised any objection to the form of the notices of assessment served on it in respect of the relevant accounting periods. The Board of Review had therefore no jurisdiction to quash the assessments merely because, in their opinion, the notices thereof were lacking in validity. That matter was not in issue before the Board at all. Indeed, Mr. Nadesan concedes that the objection which was intended to be taken was confined to an attack on the assessments themselves; the notices, he explained, were relied on only as evidence to establish that the assessments were bad in law. In my opinion, therefore, the decision of the Board is vitiated by misdirection, and must be

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set aside unless we are satisfied that, if the respondent's real objection had been properly appreciated, the same conclusion should necessarily have been reached by a different process of reasoning.

Mr. Nadesan's argument is that the language of the notices of assessment A8 to A11 which were served on the respondent contains *prima facie* evidence that the assessments themselves had been made on the respondent alone, and not (as they should have been) on the partnership, i.e., on the respondent as well as Lomond Rubber Mills Ltd., who jointly owned the business. I cannot agree. Each notice specifically states that the business on whose excess profits the department was claiming duty was the respondent's joint venture with Lomond Rubber Mills Ltd.", and the form of each notice sufficiently complies (as far as the respondent was concerned) with the requirements of section 67 (1) of the Income Tax Ordinance. Similarly, the fact that in each case payment was demanded from the appellant to the total amount of duty chargeable on the excess profits of the " joint venture " is justified and explained by the circumstance that section 76 (1) imposed an obligation on each partner to pay the full amount.

A claim that an individual partner should (as required by law) discharge the entirety of a partnership liability in respect of excess profits duty does not carry the implication that the departmental assessments had been made on him alone. Indeed, the admission made on behalf of the respondent at the proceedings before the Commissioner " that the assessments must stand " if a partnership was established militates against the inference which Mr. Nadesan now invites us to draw from the language of the notices of assessment.

In my opinion, the respondent has not discharged the onus of proving that the assessments were invalid or of no force or avail in law, and there was no evidence on which the Board could reasonably have decided that the assessments made under section 12 (2) of the Excess Profits Duty Ordinance were made only on the respondent and not on the partnership. I would therefore decide, as a matter of law, that the second question submitted for the opinion of this Court should be answered in favour of the Commissioner. The determination of the Commissioner dated 28th February, 1951, confirming the assessments (on the basis of the figures agreed to) must accordingly be restored. The respondent must pay the Commissioner's costs of appeal, and also a sum of Rs. 50 representing the fee delivered to the Clerk of the Board of Review under section 74 (1) of the Ordinance.

GUNASEKARA J.—I agree.

Appeal allowed.

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1954 *Present:* **Gratiaen J. and Fernando A.J.**

HARRIET SAMARASEKERA, Appellant, *and* LAKSHAMI MUNASINGHE *et al.*, Respondents

S. C. 28 (Inty.)—D. C. Colombo, 5,513/P

Servitude—Jus superficiarium—*Acquisition by prescription—Compensation—Basis of assessment—Partition sale.*

Where A. puts up a building at his own expense on the land of B. with B.'s consent and approval, and exclusively enjoys the use of it as a superficiary for a period of ten years without interference by the soil owner B., he acquires, by prescription, the servitude known as the *jus superficiarium*. This right which a person has to a building standing on another's ground is acquired and lost like immovable property. It can be alienated by notarial conveyance or transmitted to the heirs of the superficiary on his death.

The soil owner who takes over the building from the superficiary must, in the absence of an agreement to the contrary, pay him its " present value " (and not merely its original cost if that be less). The same basis of assessment should be adopted where the servitude is extinguished, by consent of parties, at a partition sale.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *D. L. Edusuriya* and *D. A. Jayasuriya*, for the 2nd defendant appellant.

N. E. Weerasooria, Q.C., with *Sir Ukwatte Jayasundera, Q.C.*, and *G. T. Samarawickreme*, for the plaintiff respondent.

Cur. adv. vult.

June 7, 1954. GRATIAEN J.—

This appeal calls for a decision as to the precise nature of the legal rights enjoyed by certain parties in respect of a building (described for convenience as the " Victoria Petrol Service Station ") standing on a land in Peliyagoda.

The plaintiff instituted this action under the Partition Ordinance for a sale of the land together with all the buildings standing on it. Admittedly, the land had at one stage belonged to Don Thomas who by P3 dated 21st September, 1940, gifted it to his two daughters (the plaintiff and the 1st defendant) in equal shares. Certain buildings (other than the Victoria Petrol Service Station) went with the soil shares, and there is no dispute as to them.

The circumstances in which the Victoria Petrol Service Station came into existence in or before the year 1928 are not in dispute either. It had been built by Don Thomas' son Don Chandradasa at his own expense at a time when the father was the exclusive owner of the land. An almost contemporaneous notarial lease 2D1 (which both Don Thomas and Don Chandradasa signed) was executed in favour of the Asiatic Petroleum Co., Ltd., and it recites that Don Chandradasa had " with Don Thomas,

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consent and approval " incurred this expenditure " for the purpose of carrying on the said premises the business of storing and selling Shell Motor spirit, motor oil and other accessories ". A later notarial lease (P4 of 1934) in favour of the Shell Co. of Ceylon Ltd. (the successors of the former lessee) establishes that Don Chandradasa in fact carried on the business as previously arranged in his own right. It was he (and not Don Thomas) who received the stipulated lease-rent under P4.

Don Chandradasa died on 29th June, 1939, leaving as his intestate heirs his widow (the appellant), his father Don Thomas, and three sisters (the plaintiff, the 1st defendant and the 3rd defendant). A subsequent deed of gift P3 of 1940 executed by Don Thomas is instructive as to how the members of the family at that time understood the legal rights which had passed to them in respect of the Petrol Service Station upon Don Chandradasa's death : Don Thomas, while donating the soil rights and the other buildings to two of his daughters (the plaintiff and the 1st defendant) on the footing that he enjoyed absolute *dominium* over them, only conveyed to them his " undivided ¼ share of Victoria Petrol Service Station building ". In other words, Don Thomas recognised that the rights which he now enjoyed in respect of this superstructure were rights (short of absolute *dominium*) which had been transmitted to him in 1939 as one of his son's intestate heirs. Similarly, in 1946, the appellant, the plaintiff and the 1st and 3rd defendants jointly executed a further notarial lease of the Petrol Service Station in favour of the Shell Company—thereby indicating that the rights in respect of this building had come to them by intestacy (and, as far as Thomas' inherited rights were concerned, by virtue of his subsequent deed of gift P3).

The same position is also recognised in the plaint in the present action. The plaintiff claimed in paragraph 10 that she and her sister the 1st defendant were each entitled (under P3) to an undivided ½ share of the land and the buildings other than the Petrol Service Station, whereas the latter superstructure, instead of passing with the soil rights in the ordinary way, " belonged " to the parties in the following shares :

1. to the plaintiff and the 1st defendant in respect of a 5/24 share each (i.e., partly as Don Chandradasa's intestate heirs and partly under P3) ;
2. to the 3rd defendant in respect of an undivided 1/12 share (by intestacy) ;
3. to the appellant, as Don Chandradasa's widow, in respect of an undivided 1/2 share (by intestacy).

The plaintiff asked for a sale of the land and buildings (including the Petrol Service Station) under the Partition Ordinance, but subject to a direction that the Commissioner should first make a " just appraisement of *the value* of the superstructure Victoria Petrol Service Station built by the said Don Chandradasa ". The clear intention was that if either of the co-owners of the land (i.e., the plaintiff or the 1st defendant) should exercise her right of pre-emption under the Ordinance, she should be given credit for her share of *the value* of this particular building ; and that, out of

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the balance proceeds of sale, each of the other parties should in turn be entitled to draw her appropriate share of its "*appraised value*".

The appellant filed answer agreeing to judgment in the form suggested, and, after some formal evidence had been led, this proposal was adopted in the decree for sale. The decree itself declares that "the parties are entitled to compensation for the improvements made by Don Chandradasa", but gives no special directions as to the basis on which such compensation should be assessed. Up to this stage, it seems to have been conceded that the true basis of appraisement was the value (and not the original cost) of the buildings.

At the judicial sale which followed, the 1st defendant purchased the entire property for Rs. 81,000. A dispute then arose for the first time as to the basis of assessment that should be adopted for the purpose of setting apart a portion of the purchase price for distribution between the parties as "compensation" in respect of the Victoria Petrol Service Station.

According to the appellant's contention, this superstructure should be assessed at Rs. 32,400 (i.e., its agreed *value at the date of the sale*); the plaintiff submitted on the other hand that it should be assessed only at Rs. 8,400 (i.e., the *original cost* of making the improvement in 1928). The learned judge who dealt with this outstanding dispute adopted the latter basis of assessment. (To some extent he was, I think, handicapped by the fact that he was not the judge who had tried the action up to the stage when a decree for sale was ordered.)

It was argued on behalf of the appellant that the right which Don Chandradasa enjoyed in respect of the building, and which had been transmitted on his death to his intestate heirs, was a right of servitude known as *jus superficiarium*. The learned judge, however, took the view that "his position had been simply that of a *bona fide* improver who can only claim the actual cost of his improvements or their present value, whichever is less".

The later basis of assessment certainly conforms to the correct principle for awarding compensation to a man who improves land belonging to someone else under the *bona fide* belief that he is its true owner; and also in certain analogous cases: for example, where the true owner stands by and acquiesces in the improvement of his land by a trespasser, or where a co-owner who has improved the common land must be compensated by another co-owner who, in an ultimate partition, is allotted the portion which includes the improvement. But the circumstances in which Don Chandradasa erected the Petrol Service Station cannot be equated to any of these situations, nor is it suggested that he was a mere "lessee" who had improved the property with his lessor's consent. The basis on which he (or after him, his heirs) should be compensated upon the extinguishment of the right to enjoy the building must therefore be ascertained by reference to some other principle of our common law.

The servitude of *jus superficiarium* is of ancient origin, and is well-recognised by the Roman Dutch law—*vide* generally on this topic, *Lee's*

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Elements of Roman Law (2nd Ed.) p. 170, para 243. In *Ahamado Natchia v. Muhamedo Natchia*[1] Layard C.J., with whom Wendt J. agreed, said, "The *jus superficiarium* is the right which a person has to a building standing on another's ground. It cannot be termed full ownership, for no one can be legally full owner of a building who has not the ownership of the soil. It is the right to build on the soil and to hold and use the building so erected, *until such time as the owner of the soil tenders the value of the building, if the amount to be paid has previously not been agreed upon.* The right is acquired and lost like immovable property, and is even presumed to be granted when the owner of the ground permits another to build thereon. *The right can be alienated and consequently there can be no doubt of its passing to the heirs of the original owner of the right*".

Ahamado Natchia's case (*supra*) was considered (after a re-trial) in a second appeal by Lascelles C.J. and Middleton J. in (*1906*) *9 N.L.R. 331.* They observed that "an agreement between the landowner and the person who acquires the right" is the foundation of the *jus superficiarium*, but the Court did not finally decide whether, in Ceylon, the provisions of section 2 of the Prevention of Frauds Ordinance precludes us from recognising an implied or non-notarial grant which is "inferred from the fact that the owner permits another to build on the land". Similar doubts were later expressed, but not resolved, by Lascelles C.J., sitting alone, in *de Silva v. Siyadoris* [2].

I conclude from these authorities that the *jus superficiarium* is a servitude which can without doubt be created in Ceylon by notarial grant; similarly, once acquired, it can be alienated by notarial conveyance or transmitted to the heirs of the superficiary on his death; clearly, it can also be acquired by prescription where a person who, in appropriate circumstances, has erected a building on another's land and has without interference by the soil-owner exclusively enjoyed the use and enjoyment of it as a superficiary for the requisite period of ten years. (In such a case he prescribes to the servitude, not to the soil-rights.) The only outstanding problem is whether the servitude can also be created under a non-notarial agreement between the builder and the soil-owner. Mr. H. V. Perera has submitted for our consideration the argument that the Prevention of Frauds Ordinance has no application to an informal agreement whereby a soil-owner merely permits someone else to build on his land, in which case it is in truth the implementation of the agreement (but not the agreement itself) which confers the *jus superficiarium* on the builder *by operation of law.* For the purposes of the present appeal, it is not necessary to decide whether there is some flaw in this attractive argument.

Upon the facts admitted in the pleadings and established by the evidence led at the trial, I am satisfied that Don Chandradasa was from the very outset recognised by his father as enjoying, in respect of the Victoria Petrol Service Station, certain exclusive rights which were equivalent to those of a superficiary. Their foundation was no doubt an informal agreement between father and son, but they had become perfected by prescriptive user before Don Chandradasa died in 1939—

[1] (*1905*) *8 N. L. R. 330.* [2] (*1911*) *14 N. L. R. 268.*

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so that, although the building acceded to the soil, Don Thomas' rights of full ownership were subject to the servitude enjoyed by his son. That servitude has since passed to the parties in the proportions specified in the decree. It has now been extinguished by virtue of the sale under the Partition Ordinance—and the purchaser has virtually acquired (1) the soil-rights and the bare ownership (if I may use that term) of the building which belonged to the plaintiff and the 1st defendant in succession to Don Thomas, and (2) the exclusive right " to hold and use the building " which belonged to these parties who enjoyed the *jus superficiarium* in succession to Don Chandradasa. The decree might well have directed a sale of the property subject to the servitude. But, as the direction was that, in accordance with the intention of the parties, the servitude should be extinguished by the sale, it seems to me that the superficiaries were clearly entitled to receive as compensation the " present value " of the building which constitutes an integral part of the purchase price. In *Ahamado Natchia's case* (*supra*) Layard C.J. explained that a soil-owner who takes over the building from the superficiary must, in the absence of an agreement to the contrary, pay him its *value* (and not merely its original cost if that be less). I see no reason therefore why a reduced figure should be awarded as compensation in a case where the servitude is extinguished, by consent of parties, at a partition sale. Indeed, Mr. Weerasooria's argument seemed to concede that if Don Chandradasa's rights were in truth those of a superficiary, the appellant's arguments must prevail.

I would set aside the order under appeal and direct that, out of the purchase price, the appellant, the plaintiff and the 3rd defendant should each receive her appropriate share of Rs. 32,400 and not of Rs. 8,400 only. The appellant is entitled to the costs of this appeal and of the inquiry in the Court below.

FERNANDO A.J.—I agree.

Order set aside.

1954 *Present :* **Gratiaen J. and Gunasekara J.**

E. SIMEON SILVA *et al.*, Appellants, *and*
A. K. N. SIVASUPRAMANIAM AMBALAM, Respondent

S. C. 19—D. C. (Inty.) Negombo, 5,275

Abatement of action—Death of sole plaintiff—Circumstances when an order of abatement may be made—Civil Procedure Code, ss. 395, 396, 402, 403.

Where, after the death of a sole plaintiff, his legal representatives delayed for nearly eighteen months to have themselves substituted under section 395 of the Civil Procedure Code—

Held, that an order of abatement of the action could be entered under section 396 of the Civil Procedure Code.

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APPEAL from an order of the District Court, Negombo.

H. W. Jayewardene with *P. Ranasinghe*, for the respondents-appellant.

N. K. Choksy, Q.C., with *C. Renganathan*, for the petitioner-respondent.

Cur. adv. vult.

May 28, 1954. GUNASEKARA J.—

This is an appeal from an order of the District Court of Negombo, made upon an application by the respondent Sivasupramaniam Ambalam, setting aside an order made by it nineteen years earlier for the abatement of an hypothecary action.

The action, which was for the recovery of a sum of Rs. 5,000 and interest secured by a bond dated the 17th November, 1927, was instituted on the 6th March, 1931, by the plaintiff's attorney Kowenna Sinniah Pulle, through his proctor Mr. Wijayaratnam, against two defendants, of whom the first was sued as the mortgagor and the second was joined as a subsequent encumbrancer. The record does not have the journal sheet or sheets containing the entries made before the 4th October, 1949, except for a small portion of the first sheet. The parties to the appeal are agreed, however, that the following steps were taken. The court accepted the plaint on the 6th March, 1931, and ordered the issue of summonses on the defendants, returnable on the 17th April. On the 17th April the returnable date was extended to the 7th May. On the 7th May the court ordered that the case be laid by, and on the 30th September, 1932, it ordered the abatement of the action.

What appears on so much of the first journal sheet as is still to be found in the record is as follows :—

"*IN THE DISTRICT COURT OF N*

No. 5275 R. M. K.
Ambalam

Class : V
Amount : Rs. 5,825.
Nature : Bond Vs.
Procedure : Regular

C. P. Silv
another"

(overleaf)

"for Plff.
issued on Defts :
e now for 7/5
M. H. K.
D. J.
nam for Plff.
ain not Issued
Lay by
M. H. K.
D. J."

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The plaintiff had died in India on the 8th April, 1931, after the institution of the action and before it was laid by, leaving a last will by which he appointed two persons named Andiappen and Ramanathan Chettiar as executors and the respondent Sivasupramaniam Ambalam, who is his adopted son, his sole heir. The will was proved before the District Court of Colombo on the 7th July, 1932, and probate was granted on the 14th February, 1934, to Andiappen's Attorney Kowenna Sinniah Pulle (who had been the plaintiff's attorney) and Ramanathan Chettiar. The inventory and the final account filed in the testamentary case are verified by affidavits by Sinniah Pulle dated the 12th December, 1934, and the 24th October, 1935, respectively. He died in 1940, and the 1st defendant (the mortgagor) died on the 24th September, 1948.

It does not appear from the record of the mortgage action, or so much of it as is still in existence, that either of the executors took any steps in this action. On the 8th September, 1949, a petition was submitted to the district court by the respondent asking that he should be substituted in the place of the deceased plaintiff, and the appellants and certain other persons in the place of the deceased first defendant, and that the order for abatement be set aside. The appellants and two other parties objected that the respondent had no status to make the application. At an inquiry held on the 7th December, 1950, the respondent was granted time till the 25th January, 1951, to file an amended petition and affidavit. He did so, making the same application and stating among other things that Ramanathan Chettiar had applied to the District Court of Colombo for the recall of the probate that had been issued to him and that he himself had thereafter been appointed executor. It appears that actually he was granted letters of administration on the 18th April, 1951. After an inquiry into the amended petition the learned district judge made order on the 28th November, 1951, setting aside the order for abatement and substituting the respondent in the place of the deceased plaintiff and the 2nd appellant Juwan Silva (to whom letters of administration in respect of the estate of the 1st defendant had been granted on the 4th August, 1950) in the place of the deceased 1st defendant.

The ground of the learned judge's order was that the order for the abatement of the action was void for the reason that in the circumstances of this case the court had no power to make such an order under section 402 of the Civil Procedure Code. That section provides that "if a period exceeding twelve months . . . . elapses subsequently to the date of the last entry of an order or proceeding in the record without the plaintiff taking any step to prosecute the action where any such step is necessary, the court may pass an order that the action shall abate". There can be no doubt that this section can have no application in a case where the reason for the plaintiff's not prosecuting the action is that he is dead (*Sellamma v. Palavasam* [1]), but I can find no justification for the view that it was under this section that the court had purported to make the order for the abatement of the action. It

[1] *(1939) 41 N. L. R. 186.*

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is provided by section 395 that " in case of the death of a sole plaintiff . . . . the legal representative of the deceased may, where the right to sue survives, apply to the court to have his name entered on the record in place of the deceased plaintiff, and the court shall thereupon enter his name and proceed with the action " ; and by section 396 that " if no such application be made to the court by any person claiming to be the legal representative of the deceased plaintiff, the court may pass an order that the action shall abate ". In the present case, at the time of the order for abatement no application under section 395 had been made to the court by the plaintiff's legal representatives, although nearly eighteen months had elapsed since the death of the plaintiff. It was therefore open to the court, under section 396, to make an order for the abatement of the action. The actual terms of the order are not before us, but that circumstance cannot raise a presumption that the order which the court had power to make under one provision of law purported to be made under another which gave it no such power. Quite apart from the presumption in favour of regularity, it seems to be likely that the object of the order made on the 7th May, 1931, that the case should be laid by, was to give the plaintiff's executors an opportunity of making an application under section 395 to be substituted in his place. In my opinion the order for abatement was a valid order, and the learned district judge's view that it was void is erroneous.

In terms of section 403 of the Code the order could be set aside upon an application made by a person claiming to be the plaintiff's legal representative if the application was made within a reasonable time and it was proved that he was prevented by sufficient cause from continuing the action. The facts relied upon by the respondent to show that these conditions were satisfied are stated as follows in his petition of the 25th January, 1951 :

> " Owing to the deaths of Kowenna Sinniah Pulle and the 1st defendant and also due to the Petitioner's absence beyond the seas and the fact that the other executor took no interest in the administration proceedings, the Petitioner was prevented from continuing the action and recovering the moneys due."

It appears from the evidence given by the respondent at the inquiry that the absence beyond the seas to which he refers is an absence from 1935 to 1949, when he was in South India. He suggests that what prevented him from coming to Ceylon between 1940 (when Sinniah Pulle died) and 1949 was the war. He admitted that he took charge of the plaintiff's business in Ceylon in 1933 and that Sinniah Pulle managed it for him as his agent until 1940. On the 18th November, 1935, he signed a minute, which is filed in the testamentary case, accepting the correctness of the final account filed by the executors and consenting to the " estate being closed ", and stating further that he had " been in charge of the business from 4th December, 1933, and assisted the executors in filing the accounts in this case ". Nevertheless, according to him it was only in 1949, fourteen years after the filing of the final account in the testamentary case, that he learnt of this mortgage

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action ; although it is mentioned in the inventory filed in the testamentary case in December, 1934. The explanation, such as it is, that has been tendered by the respondent of the delay to make the application in question is in effect a plea that he and those whom he succeeded as the plaintiff's legal representative had been negligent. It cannot be said that the conditions upon which an order for abatement can be set aside have been satisfied.

The order appealed from must be set aside and the respondent's application must be dismissed. The respondent must pay the appellants their costs in this court and the court below.

GRATIAEN J.—I agree.

Appeal allowed.

1954 *Present* : **Gunasekara J. and Fernando A.J.**

PRINS GUNASEKERA, Appellant, *and* COMMISSIONER OF INCOME TAX, Respondent

S. C. 317—Case Stated under the Income Tax Ordinance

Income Tax Ordinance (Cap. 188)—Section 16 (1) (e)—Allowance thereunder—Conditions of (a) common residence and (b) maintenance.

An assessee who bears the expense of the maintenance of a relative is not entitled to claim allowance under section 16 (1) (e) of the Income Tax Ordinance unless he can also show that the relative resided or had his home with the assessee.

CASE stated under section 74 of the Income Tax Ordinance.

N. M. de Silva, with *M. Rafeek*, for the assessee appellant.

M. Tiruchelvam, Crown Counsel, for the Commissioner of Income Tax.

Cur. adv. vult.

July 27, 1954. FERNANDO A.J.—

The decision of the Board of Review for Income Tax, upon which a case has been stated for the opinion of this Court, was in the following terms :—

The appellant is employed by the *Times of Ceylon* and resides at No. 9, Asoka Gardens. His parents live outside Colombo. He has several sisters and brothers. One sister and two brothers attend

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school. The sister is a boarder at St. Bridget's Convent and the two brothers at Ananda Sastralaya, Kotte. The appellant pays the boarding fees, buys the school books and generally spends for three children, but even during the period the children are at school the parents sometimes send pocket money and buy clothes for them. When the vacation commences the children go home to their parents. These vacations last for about 2½ months. During that period the children are maintained by the parents. It was admitted here by the appellant's Counsel that the mother was a teacher employed in a Government School and the father owns some property. We regret that we are unable to hold that the sister and the two brothers "lived" with the appellant and was "maintained by" the appellant "throughout the year preceding the year of assessment". We therefore dismiss the appeal. We make no order as to costs.

The question of law presented in the case stated is whether "the Board of Review was wrong in holding that the sister and the two brothers of the appellant did not live with and were not maintained by the appellant throughout the year preceding the year of assessment".

The question involves the construction of S. 16 (1) (*e*) of the Income Tax Ordinance (Cap. 188) which entitles a person to claim a deduction from his assessable income of "an allowance of Rs. 250 in respect of each individual *who lived with him and was maintained by him throughout the year* . . . . , who was a relative (i.e., a parent, brother, sister or child) of his or his wife". If the expression "lived with him" which occurs in the section is to be understood in its ordinary connotation that the assessee's brothers and sisters should actually have *resided or had their homes* with the assessee throughout the year, then the assessee is clearly disentitled to claim the allowance: the admitted facts are that, even during such periods of the year as were not spent in boarding school, the brothers and sisters actually resided, not with the assessee but with their parents.

But it is contended that the object of the section is to grant the allowance to a person who completely or substantially undertakes the burden of paying for the education, subsistence and other needs of a relative, or who, in other words, acts "in loco parentis" in maintaining a brother or sister. In order, however, to support this contention, Counsel was compelled to submit that the words "lived with him" are redundant and do not impose any requirement or condition additional to that which refers to the maintenance of the relative by the assessee. If the fact that a relative is entirely or substantially maintained by an assessee is, in the intention of the Legislature, sufficient by itself to found a claim for the allowance, then the reference to *living with* the assessee is not merely redundant: it actually misleads the reader into an interpretation directly in conflict with the (alleged) intention. The words of the statute clearly and unambiguously impose two independent conditions of (*a*) common residence and (*b*) maintenance, and I feel quite unable, by ignoring the first of them, to construe the statute in a sense fundamentally different from that which the words bear on their

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face. It is perhaps necessary to add that on the facts of the present case we are not called upon to decide whether the section requires common residence and maintenance during the relevant year *without any interruption whatsoever*.

The requirement of common residence undoubtedly involves the denial of the benefit of the section in cases even more "meritorious" than the present one, for instance a case where an assessee bears the entire expense of the care and maintenance in some institution of an indigent and incurable relative. But the furthest extent to which a Court can be moved by such circumstances is to share with the Board of Review regret that the relief is not available, and to suggest that this matter merits consideration by the Legislature.

I would express the opinion, on the question stated, that the decision of the Board of Review was correct for the reason that the sister and brothers of the assessee did not "live" with him within the meaning of the relevant section. As this appears to be in the nature of a "test" case, I would make no order as to the costs of the proceedings in this Court.

GUNASEKARA J.—I agree.

Appeal dismissed.

1953 *Present :* **Nagalingam A.C.J.**

S. KANDIAH, Appellant, *and* THANGAMANY, Respondent

S. C. 819—M. C. Vavuniya, 25,250

Marriage—Presumption of marriage by habit and repute—Not applicable where cohabitation follows a marriage ceremony which is invalid.

The presumption of marriage by habit and repute cannot prevail where there is evidence that the parties had gone through a marriage ceremony and that the solemnization was invalid for the reason that one of the parties was, at the time of the ceremony, already lawfully married. Cohabitation of the parties and general recognition of them as husband and wife subsequent to the dissolution of the prior marriage are inadequate in law for the application of the doctrine of presumption of marriage.

APPEAL from a judgment of the Magistrate's Court, Vavuniya.

A., who was married to B., instituted divorce proceedings against her. Pending the action for divorce A. purported to marry C. according to Hindu rites and lived with her as husband and wife. There was

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no fresh ceremony, either according to custom or under the Marriage Registration Ordinance, subsequent to the dissolution of the marriage of A. with B. In the present case the question arose whether C. could claim maintenance as wife from A. It was contended that the co-habitation of A. and C. after the dissolution of the marriage between A. and B., coupled with the circumstance that A. and C. were recognized by friends and relatives as man and wife, entitled C. to gain the status of a lawful wife.

T. W. Rajaratnam, for the defendant appellant.

K. Sivasubramaniam, with *D. S. Nethsingha*, for the applicant respondent.

Cur. adv. vult.

September 17, 1953. NAGALINGAM A.C.J.—

This appeal involves a determination of the question as to what extent the presumption of marriage by habit and repute could be held to prevail where admittedly there is evidence that the marriage ceremony gone through by the parties is invalid, and further whether, after the factor rendering the marriage invalid has ceased to be operative and co-habitation continues, such co-habitation attended by recognition by members of the families of the parties as husband and wife is adequate in law for the application of the doctrine of the presumption of marriage.

The question arises on the application for maintenance made by the applicant on behalf of herself and her children on the ground that she is the lawful wife of the defendant and that the children were lawfully born in wedlock to him. The learned Magistrate has very carefully analysed the evidence and arrived at certain findings of fact with which I see no reason to disagree. Briefly stated, the facts are : The defendant was anterior to the dates material to these proceedings a widower. On the 28th February, 1948, he married one Ponnammah under the General Marriage Registration Ordinance, and the solemnization of the marriage is evidenced by the certificate of marriage D5. Though the marriage was solemnized between the defendant and Ponnammah, the parties never lived together, and the defendant shortly thereafter instituted divorce proceedings against her, and *decree nisi* dissolving the marriage with Ponnammah was entered on 6th May, 1949 ; the decree was made absolute only on 2nd February, 1953. After the defendant had instituted the action for divorce against Ponnammah, he would appear to have married the applicant according to Hindu rights. The marriage with the applicant took place in January, 1949, that is to say, subsequent to the institution of the divorce proceedings against Ponnammah but prior to even the *decree nisi* dissolving his marriage with the defendant being entered in the action.

It is conceded on behalf of the applicant that the marriage according to custom between her and the defendant having taken place at a time when the defendant was a married man having a lawful wife living,

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namely Ponnammah, the marriage according to custom cannot be vested with any legality; so that the marriage was void and of no effect. The appellant must, therefore, be regarded at the date she went through the marriage ceremonies with the defendant as having gone through proceedings which did not culminate in the normal legal consequences that flow from a lawful marriage. She would, therefore, be in the same position as a mistress and would have no legal rights against the defendant.

Counsel for the applicant, however, contends that the co-habitation of the applicant and defendant after the dissolution of the marriage between defendant and Ponnammah coupled with the circumstance that the applicant and defendant were recognized by friends and relatives as man and wife would at least from that day enable the applicant to gain the status of a lawful wife. I do not think that this contention is sound. Counsel relied upon the case of *Breadelbane Peerage Claim*[1], where it was held that living together of parties subsequent to the impediment which rendered the marriage solemnized between them invalid had been removed was sufficient to vest the union with legality. But that was a Scotch case and the judgment quite clearly indicates that under the Scotch Law no previous ceremonies are required for the validity of a marriage, and the mere consent of the two parties is all that is required for a valid marriage, and where the two parties continue to live together as a result of such mutual agreement, a valid marriage is deemed to subsist between them. See the case of *Weerapperuma v. Weerapperuma*[2]. The learned Magistrate himself has been persuaded to follow the principle laid down in the former case, and he has on that basis held the applicant to be a lawfully married wife.

Under our law, however, some antecedent public ceremony, public in the sense of a ceremony in the presence of relatives, friends or third parties, has to take place before the mere circumstance of the parties living together as man and wife followed by recognition of their living together as man and wife by friends and relations can form the basis of a deduction that there was a lawful marriage between the parties. It is not unimportant to stress that the fact of two parties living together as man and wife and their being recognized as such by friends and relations gives rise to a presumption—and a presumption only—of marriage. It does not prove the fact of marriage, and the presumption is not an irrebuttable presumption but one which may be disproved.

In this case, as observed earlier, the only evidence of any antecedent religious ceremony was of one which was invalid. There was no ceremony, either according to custom or under the Ordinance subsequent to the dissolution of the marriage of the defendant with Ponnammah. Therefore the living together of the defendant with the applicant as man and wife even if it is assumed that they lived together subsequent to the dissolution of the defendant's marriage with Ponnammah cannot lead to a presumption of marriage being drawn, for there is positive evidence that there was no valid marriage between the parties.

[1] *L. R. (1872) 2 H. L. S. C. 269.* [2] *(1938) 39 N. L. R. 433.*

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I need only observe further that the application of the applicant was made on 16th September, 1952, even at a date anterior to the order absolute dissolving the marriage of the defendant with Ponnammah was entered, clearly showing that there is no room even for the argument that the applicant and the defendant lived together as man and wife after the impediment which rendered their marriage void had been removed.

I, therefore, hold that the applicant is not the wife of the defendant and is not entitled to an order for maintenance, and set aside the order of the Magistrate to that extent.

The children are, however, entitled to an order in their favour though illegitimate. The defendant describes himself as an Ayurvedic physician, and the order of the learned Magistrate indicates that the defendant has a financial capacity of paying at least a sum of Rs. 37 a month towards the maintenance of his dependants. I think in all the circumstances of this case the amount fixed by the learned Magistrate for the maintenance of the two children is low. I would fix the maintenance for the elder child Thevamalar at Rs. 20 a month and for the younger child Ravendran at Rs. 15 a month. The order will take effect from the date of the judgment of the lower court.

In view of the fact that the defendant himself has on more than one occasion both in the course of these proceedings and in other proceedings described the applicant as his wife, I think the proper order to make with regard to costs is that the parties should bear their respective costs of appeal.

Appeal partly allowed.

1954 *Present :* **Gratiaen J.**

D. C. PANDITHA, Appellant, *and* D. J. N. DE ZOYSA, Respondent

S. C. 1,560—M. C. Galle, 8,558

Co-operative Societies Ordinance (Cap. 107), as amended by Act No. 21 of 1949—Section 50A—Money due to registered society—Mode of recovery.

Before the machinery of a Magistrate's Court is invoked for the purpose of recovering money alleged to be due by a person to a Co-operative Society, the requirements of section 50A of the Co-operative Societies Ordinance must be strictly proved.

APPEAL from an order of the Magistrate's Court, Galle.

C. G. Weeramantry, for the appellant.

E. R. S. R. Coomaraswamy, with *E. B. Vannitamby*, for the liquidator respondent.

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March 19, 1954. GRATIAEN J.—

This is an appeal against an order made under section 50A (2) of the Co-operative Societies (Amendment) Ordinance, No. 21 of 1949, whereby the Magistrate of Galle made an order for the recovery of a sum alleged to be due by the appellant to a Co-operative Society as if it were a fine imposed by a sentence of the Magistrate.

In my opinion, the order was prematurely made. Section 50A provides an extraordinary remedy and in all the circumstances it seems to me that before the machinery of the Magistrate's Court is invoked for the purpose of recovery, the requirements of the section must be strictly proved. For instance, there must be proof to the satisfaction of the Magistrate that in the course of an audit under section 17 of the Ordinance or of an inquiry or inspection under section 35 or in the course of the winding-up of a registered society it had appeared that a sum of money was due to the society from a person who had taken part in the organization or management of the society or from any past or present officer of the Society. It must be further proved that before making any order under the section the Registrar had given that person an opportunity of being heard and of showing cause why such an order should not be made. Finally it must be proved that the order sought to be enforced was in fact signed by the proper officer. None of these things can be presumed by a court.

I therefore quash the order and send the case back to enable the respondent to take such steps to enforce the alleged order as he may be advised. I make no order as to the costs of this appeal, but if the respondent should ultimately fail at the fresh trial he will pay to the appellant a sum of Rs. 52·50 as the costs of this appeal.

Order quashed.

1954 *Present :* **Gratiaen A.C.J. and Gunasekara J.**

ATTORNEY-GENERAL, Appellant, *and* V. RAMASWAMI IYENGAR *et al.* (Administrators of the Estate of R. A. A. R. Arunachalam Chettiar, Deceased), Respondents

S. C. 483 and 484—Applications for Conditional Leave to appeal under the Appeals (Privy Council) Ordinance in S. C. Nos. 235 and 236 of 1951

Privy Council—Conditional leave to appeal—Estate Duty Ordinance, ss. 40, 43—Assessee's appeal to Supreme Court—" Civil suit or action "—Appeals (Privy Council) Ordinance (Cap. 85), s. 3.

A final judgment pronounced by the Supreme Court in an assessee's appeal under section 43 of the Estate Duty Ordinance is a judgment in " a civil suit or action " within the meaning of section 3 of the Appeals (Privy Council) Ordinance. Appeal lies, therefore, as of right to the Privy Council if the matter in dispute on the appeal is of the required value.

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APPLICATIONS for conditional leave to appeal to the Privy Council.

Walter Jayawardena, Crown Counsel, with *G. F. Sethukavalar*, Crown Counsel, for the Attorney-General.

H. V. Perera, Q.C., with *S. J. V. Chelvanayakam, Q.C.*, and *S. Sharvananda*, for the respondents.

Cur. adv. vult.

February 18, 1954. GRATIAEN A.C.J.—

The Crown has applied for leave to appeal to Her Majesty in Council against two judgments of this Court pronounced on 12th October 1953. In one case, the judgment affirmed a decree of the District Court of Colombo (passed under section 40 of the Estate Duty Ordinance) directing the Crown to refund to the respondents a sum of Rs. 214,085·19 (together with interest) representing an amount wrongly levied by the revenue authorities upon an assessment of estate duty. In the other case, the judgment set aside a decree in favour of the Crown in connected proceedings and substituted a decree directing the Crown to refund to the respondents (together with interest) a sum of Rs. 700,402·65.

The applications were resisted on the ground that, in the respondents' submission, neither judgment had been pronounced in "a civil suit or action" within the meaning of section 3 of the Appeals (Privy Council) Ordinance (Cap. 85). In my opinion there is no substance in this objection.

We were referred to earlier rulings of this Court to the effect that a judgment in Insolvency proceedings could not be regarded, for the purposes of an application for leave to appeal to the Privy Council, as having been pronounced in "a civil suit or action"—*In re Ledward*[1], *In re Keppel Jones*[2], *In re De Vos*[3], and *Sockalingam Chetty v. Manikam*[4]. In the most recent of these authorities, Drieberg J. pointed out that *Ledward's case* (*supra*) was a binding decision of a Collective Court. I respectfully agree that, *as far as Insolvency proceedings are concerned*, it is not permissible to question the correctness of the ruling in *Ledward's case*. On the other hand, the very brief judgment of the Collective Court makes it impossible to ascertain precisely the grounds of that decision. It would therefore be unsafe to attribute to it a *ratio decidendi* capable of application or legitimate extension to judgments of the Courts exercising jurisdiction under other statutory enactments.

There is no right of appeal to the Privy Council from a judgment of this Court on a case stated under the Housing and Town Improvement Ordinance—*Soertsz v. Colombo Municipal Council*[5], *Sangarapillai v. Chairman, C. M. C.*[6] Similarly, with regard to a judgment on a case

[1] *(1859) 3 Lor. 234.*
[2] *(1877) Ram. 379.*
[3] *(1899) 4 Br. 331.*
[4] *(1930) 32 N. L. R. 65.*
[5] *(1930) 32 N. L. R. 62.*
[6] *(1930) 32 N. L. R. 92.*

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stated under the Income Tax Ordinance (i.e., before that Ordinance was recently amended to meet the difficulty). *R.M.A.R.A.R.R.M. v. The Commissioner of Income Tax*[1]. The principle is clear enough. When a Court exercises jurisdiction which is "merely consultative in character", or makes a determination in the nature of an "award" in proceedings "which from beginning to end were ostensibly and actually arbitration proceedings", its decision cannot be equated to a judgment pronounced in "a civil suit or action"—*Rangoon Botatoung Co. v. Collector, Rangoon*[2], *Secretary of State for India v. Chelikani Rama Rao*[3], *Tata Iron Steel Co. v. Chief Revenue Authority, Bombay*[4].

The functions exercised by the Court under the Estate Duty Ordinance must now be considered. An assessee "appeals" from the Commissioner's determination to the appropriate District Court, and his appeal "shall be deemed to be and may be proceeded with *as an action between the appellant as plaintiff and the Crown as defendant*" (section 40). The District Judge's decision is reached after trial on the issues which properly arise, and a decree is duly passed which may *inter alia* direct one party or the other to make a payment in accordance with the determination of the correct amount of duty payable under the Ordinance. A further appeal lies to this Court against "any decree or order" so made (section 43), and this Court is then empowered to enter a money decree in conformity with its decision on the appeal. At every stage, therefore, the characteristic features of a litigation in regular civil proceedings before a Court of record are prominently observed : the prayer for relief against an alleged wrong ; the *litis contestatio ;* the framing of issues in order to clarify the nature of the dispute ; the hearing of evidence ; and then the Court's determination followed by the passing of an effective decree granting or refusing, wholly or in part, the relief asked for ; eventually, the hearing of an appeal (if one is preferred by the party aggrieved) to a superior Court of record which may affirm, vary or modify the original decree. If the "final judgment" pronounced on such an appeal is not a judgment in "a civil suit or action" within the meaning of the Appeals (Privy Council) Ordinance, I really do not know what contrary description it can accurately be said to attract.

In the past, the statutory right of appeal to the Privy Council in estate duty cases (the other requirements being also satisfied) has never been questioned. I concede that "mere assumptions *sub silentio* are not to be taken as authoritative" and should not be followed if they are manifestly wrong; *Allen: Law in the Making* (5th Ed.) p. 312. But in this context the "assumption" is not based on error, and is justified by a ruling of the Judicial Committee of the Privy Council in *Commissioner of Stamps, Straits Settlements v. Oei Tjong Suang*[5] which is precisely in point. It was there held that a decision of the Court of Appeal of the Straits Settlements exercising jurisdiction in an estate duty case (under a colonial enactment based, like our local Ordinance, on the Finance Act,

[1] *(1935) 37 N. L. R. 447.*
[2] *(1912) L. R. 39 I. A. 197.*
[3] *(1916) L. R. 43 I. A. 192 at 198.*
[4] *(1923) L. R. 50 I. A. 212.*
[5] *(1933) A. C. 378 at 399.*

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1894 of England) was " *not a mere award of an administrative character but a judgment or determination made by the Court in a civil cause* " so that an appeal lay as of right to the Privy Council under the Colonial Charter.

I would therefore allow the applications of the Crown subject to the usual conditions which apply to cases in which the Crown is petitioner. The respondents must pay the costs of the argument in each application.

GUNASEKARA J.—I agree.

Applications allowed.

1954 *Present :* **Pulle J.**

G. H. D. WIJESEKERA, Appellant, *and* K. KANAPATHIPILLAI, Respondent

S. C. 108—C. R. Gampola, 10,228

Rent Restriction Ordinance, No. 60 of 1942—Section 9—Payments in excess of authorised rent—Recovery thereof—Computation of prescriptive period.

Action was instituted on June 17, 1952, against a tenant for ejectment on the ground that he was in arrears of rent. The tenant admitted that no payment of rent was made by him after October 31, 1949, but pleaded that he was not in arrears of rent if credit was given to him for payments made regularly in excess of the authorised rent from the commencement of the tenancy on January 1, 1944, up to October 31, 1949.

Held, that under section 9 of the Rent Restriction Ordinance, No. 60 of 1942, the tenant was entitled to credit for overpayments only for the prescriptive period of three years reckoned from October 31, 1949.

APPEAL from a judgment of the Court of Requests, Gampola.

Ivor Misso, with *A. G. B. Fernando*, for the defendant appellant.

H. W. Tambiah, with *K. Rajaratnam* and *T. Velupillai*, for the plaintiff respondent.

Cur. adv. vult.

July 19, 1954. PULLE J.—

The appellant in this case is the tenant of a house against whom the landlord filed an action for ejectment on the 17th June, 1952, on the ground that he was in arrears of rent from November, 1949. It was common ground that no payments on account of rent were made after 31st October, 1949, and that prior to that date, namely, from the commencement of the tenancy on the 1st January, 1944, up to 31st October, 1949, the tenant had regularly made payments in excess of the authorised rent. If at the date of the institution of the action the

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tenant was entitled to credit for the entirety of the overpayments the action was not maintainable. If, as was argued for the landlord, the tenant could take credit for overpayments only for the prescriptive period of three years reckoned from the 31st October, 1949, then these overpayments were not sufficient to meet the whole of the authorised rents due and payable from 1st November, 1949, to the date of action. The amount was about four months short of the rent due.

A large part of the excess payments was made during the operation of the Rent Restriction Ordinance, No. 60 of 1942, and the enforcement of any rights vested in the tenant by virtue of that Ordinance, which ceased to be in operation on 31st December, 1948—vide section 10 of the Amending Ordinance, No. 52 of 1947—was kept alive by the Rent Restriction (Special Provisions) Act, No. 4 of 1949.

The contention on behalf of the tenant was that the overpayment in any one month automatically extinguished a part of the rent due for the following month, even though the tenant, in respect of that following month, paid to the landlord a sum of money in excess of the authorised rent without making any deduction. The submission on behalf of the landlord was that if the tenant did not elect to deduct the excess in the exercise of the right conferred on him by section 9 of the Ordinance, then the only remedy he had was to sue for its recovery and that remedy was not available after a period of three years from the date of payment of each excess amount.

In my opinion the landlord's contention is right. There was no automatic extinguishment of debts because at the end of every month the tenant was the creditor and in each month there came unlawfully into the hands of the landlord a sum which represented the difference between the rent actually paid and the authorised rent. It was not till November, 1949, that the tenant by his letter D2 purported to exercise the right of deducting any excess amount paid by him. The tenant having failed to sue, the recovery of the amounts which accumulated prior to 1st November, 1946, was barred by the Prescription Ordinance.

The appeal fails and is dismissed with costs. If the arrears of rent up to and including August, 1954, and costs are paid on or before the 31st August, 1954, writ of ejectment will be stayed till 30th September, 1954.

Appeal dismissed.

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